

and absence of responsibility for assets and the servicing of liabilities during the period between the date on which the Constitution comes into force and the date on which the allocations are eventually made.

2.2 There is no clarity as to how differences will be resolved if the Commission's recommendations are not approved by Parliament.

2.3 The criteria for the "equitable, objectively based and transparent" allocation of assets and liabilities, are not indicated, save in the most general of terms.

3. For the sake of discussion we have drafted clauses 143-145 A to deal with the issues raised in the bilateral document. The practicability of these provisions depends on a formulation of section 119 which allows for a clear allocation of functions from the outset within the functional areas listed in Schedule 9.

#### **4. PROCUREMENT PROCEDURES**

The provisions in the bilateral document dealing with the procurement of goods and services are to some extent couched in the language of principles, rather than legislation. We have attempted to put these proposals into legislative form. In our view it will be sufficient for the Constitution to provide a framework for appropriate legislation, and there is no need for it to set out all the detail referred to in the bilateral document. The proposals we make are contained in section 150.

## 5. GUARANTEES BY NATIONAL GOVERNMENT

In our 18th report (page 16) it was suggested on the basis of previous bilaterals that the following provision should be inserted in Chapter 11:

*The national government may not guarantee any loans, unless -*

- (a) the guarantee is an explicit requirement demanded by an international financial institution; and*
- (b) the Financial and Fiscal Commission has verified the need for the guarantee and has recommended that it be given.*

This suggestion is not dealt with in the most recent bilateral document and requires further debate.

## 6. DISQUALIFICATION AS MEMBER OF PARLIAMENT

The bilateral document proposes an amendment to section 42 to disqualify persons who fail to register as taxpayers, and submit tax returns timeously, from being members of Parliament. This provision, if accepted by the Negotiating Council, should rather be inserted in section 43, which deals with vacation of seats by members of Parliament, who lose their qualifications after their election to parliament. The proposal is in the following terms:

43(1) A member of the National Assembly shall vacate his or her seat if he or she:

- (f) cannot within a period of two months after his or her election to Parliament, and on an annual basis thereafter, provide adequate proof to the Secretary of Parliament, that he or she -



- (i) is registered as a taxpayer for income tax purposes; and
- (ii) has, subject to any extension granted by the Commissioner for Inland Revenue, submitted all such returns of income as are required to be submitted by him or her in terms of the relevant Income Tax legislation.

A corresponding paragraph would have to be inserted in section 53(1) to deal with Senators, and possibly to section 104(1) to deal with members of the Provincial legislatures.

## **7. REMUNERATION OF MEMBERS OF PARLIAMENT**

A proposal that a Commission be appointed to make recommendations on salaries to be paid to political representatives at all levels of government, and that "the Receiver of Revenue shall be required to assess all income tax returns of elected representatives of all levels of government" are included in the bilateral document.

We require instructions as to whether such provisions are to be included in the Constitution.

## ADDENDUM TO 22ND REPORT (CONSTITUTIONAL ISSUES)

### CHAPTER 11

#### Finance

##### Vesting of property

143. (1) All property which immediately prior to the coming into operation of this Constitution vested in any administration as defined in subsection (5), and

(a) which was being used by such administration for the purpose of or relating to a function in respect of which a province has legislative competence in terms of section 118 of this Constitution shall, subject to the provision of subsection (2), vest in such Provincial government, and

(b) which was being used for any other purpose, shall, subject to the provisions of subsection (2) vest in the National government.

(2) When the rationalisation of administrations is carried out in accordance with section 119, or if a provincial government assumes responsibility for functions which were previously being carried out by the national government, the vesting of property under subsection (1) shall be reviewed by the governments concerned, on the basis that property which was being used for or in connection with a particular function shall vest in the government performing such function.

(3) If there should be any disagreement between the governments concerned in relation to the change in the vesting of property under subsection (2), the advice of the Commission on provincial government shall be obtained.

(4) If notwithstanding the provisions of subsection (3) the governments concerned are unable to reach agreement, the differences between them shall be *referred to arbitration*.



*alternatively<sup>1</sup>*

(4) If notwithstanding the provisions of subsection (3) the governments concerned are unable to reach agreement, the differences between them shall be *dealt with in accordance with an Act of Parliament*.

(5) For the purposes of this section -

"any administration" shall mean a provincial administration established in terms of the *Provincial Government Act*, 69 of 1986, administrations of the Self-governing Territories established in terms of the *Self-governing Territories Constitution Act*, 21 of 1971 and the Transkei, Bophuthatswana, Venda and Ciskei;

"property" shall mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein or in respect thereof.

### Transfer of property

144. (1) Immovable property transferred in terms of section 143 shall be transferred to the relevant government without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.

(2) The Registrar of Deeds concerned shall upon production to him or her of the title deed of any immovable property mentioned in section 143 endorse such title deed to the effect that the immovable property therein described is vested in the government concerned and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the said government to the said property.

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1. A political decision will have to be taken regarding these or other alternative procedures.

## Debts and liabilities

145. (1) All debts and liabilities which are directly linked to the property vesting in a province in terms of section 143 shall be assumed by such province.

(2) All liabilities other than those referred to in subsection (1) shall vest in the national government.

(3) The Financial and Fiscal Commission shall make recommendations to Parliament concerning the re-allocation of debts and liabilities referred to in section 143(1) and (2), taking into account all relevant factors.

(4) The re-allocation of debts and liabilities shall be made by Act of Parliament after taking into account the recommendations of the Financial and Fiscal Commission.

## Audit of property and liabilities

145A. The Auditor-General shall audit the re-allocation of property and liabilities made in terms of sections 143, 144 and 145.<sup>2</sup>

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2. In the bilateral document the following provision has been proposed:

*The national government shall not in any manner be bound by [the principles dealing with the re-allocation of liabilities] in terms of honouring liabilities which have been granted mala fide by any institution after this constitution has been enacted. Any liabilities incurred after this date which have not been subjected to proper appropriation procedures will be open for review and action by the new national Parliament.*

The grounds on which Parliament can repudiate liabilities incurred after the enactment of the Constitution are not clearly stated in this provision. We do not understand what is meant by "liabilities which have been granted mala fide", nor the reference to "proper appropriation procedures" in the context of the incurring of liabilities.



## National Revenue Fund

146. (1) There shall be established a National Revenue Fund into which shall be paid all moneys and revenues, as defined by Act of Parliament,<sup>3</sup> raised or received by the National Government, and from which appropriations shall be made by Parliament **[for the purpose of the National Government]**<sup>4</sup> in a manner prescribed by this Constitution and any other law, and subject to the charges imposed thereby.

(2) No money shall be withdrawn from the National Revenue Fund, except under appropriation made by law in accordance with the provisions of this Constitution **[and by any other law]**<sup>5</sup>: provided that revenue to which a province is entitled in terms of section 121(2) (a) and (b) shall form a direct charge against the National Revenue Fund to be credited to the relevant Provincial Revenue Fund.<sup>6</sup>

## Appropriation bills

147. Any bill which appropriates or authorises the appropriation of revenue or money for the services provided by the National Government shall deal only with such appropriation.

## Appropriation to be initiated by a Minister

148. The National Assembly shall not consider any bill for the appropriation of any part of the public revenue, or of any tax or impost, if such bill has not been initiated by a Minister.

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3. The inclusion of the underlined phrase, which was not in our original formulation, will have the effect of leaving it to Parliament to decide which moneys should be paid into the Revenue Fund and which moneys should be dealt with differently.
  4. This phrase, as proposed in the bilateral document, should be deleted, because it is superfluous.
  5. The phrase in brackets has been proposed in the bilateral document: we do not recommend its inclusion.
  6. The inserted proviso is based on a subclause (3) which was proposed in the bilateral document.

## **Annual Budget**

149. The Minister of Finance shall in respect of every financial year cause to be laid before the National Assembly an annual budget reflecting the estimated receipts and expenditure of the Government for that year.

## **Procurement administration**

150. (1) The procurement of goods and services for any level of government shall be regulated by Act of Parliament and provincial laws which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.

(2) The tendering system prescribed in terms of subsection (1) shall be fair, public and competitive, and tender boards shall be required to give reasons for their decisions to any interested parties.

(3) No member of the Cabinet or the legislature or of any organ of the state or any other person shall improperly interfere with the decisions and operations of the tender boards.

(4) All decisions of any tender board shall be recorded.

## ***Auditor-General***

## **Establishment and appointment**

161. (1) There shall be an office of Auditor-General for the Republic to which shall be appointed, in terms of subsection (2), an Auditor-General who shall have the functions, powers and duties prescribed by this Constitution and by any other law.

(2) A joint standing committee of Parliament, composed of one member of every political party represented in the National Assembly and the Senate, shall, at the request of the President nominate a person to be appointed by the President as Auditor-General and such nomination shall be approved by resolution adopted by two-thirds of the members present at a joint sitting of the National Assembly and the Senate: provided



that, in connection with such resolution, no debate shall be allowed; and provided further the post of Auditor-General shall not be vacant for more than 90 days.<sup>7</sup>

(3) The Auditor-General shall be a South African citizen who is a fit and proper person to hold such office and who shall be appointed with due regard to his or her specialised knowledge of or experience in auditing, state finances and public administration.

(4) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, the Auditor-General will hold office for a period of not less than 5 years and not more than 10 years and shall not thereafter be eligible for reappointment.

(5) The remuneration and other conditions of service of the Auditor-General shall be determined in accordance with the provisions of an Act of Parliament, and such remuneration and the other conditions of service shall not be altered to his or her detriment during his or her term of office.

(6)<sup>8</sup> The Auditor-General may be removed from office by the President, but only on the grounds of misconduct, incapacity or incompetence determined by the joint standing committee of Parliament referred to in subsection (2) and upon receipt of a request for such removal by Parliament adopted at a joint sitting of the National Assembly and the Senate.<sup>9</sup>

(7) An Auditor-General who is the subject of investigations by the joint standing committee of Parliament in terms of subsection (6) may be suspended by the President pending such investigation.

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7. The inclusion of the underlined requirement as proposed in the bilateral document raises the problem of the consequences of failure to comply therewith: what will happen if the committee fails to reach agreement within 90 days?

8. The following clause contained in our draft has not been included in the bilateral document:

(6) *The Auditor-General shall not perform remunerative work outside his or her official duties.*

9. The underlined phrase is a suggested amendment of both our original draft and that of the bilateral document.



- (8) The President may permit the Auditor-General to vacate his or her post.<sup>10</sup>

### **Independence and Impartiality**

162. (1) The Auditor-General shall be independent and impartial and carry out his or her functions, powers and duties subject only to this Constitution and the law.

(2) The Auditor-General and the persons appointed in terms of section 164(1) shall have such immunities and privileges as may be assigned to them by Act of Parliament for the purpose of ensuring the independent and impartial exercise of their powers and functions.

(3) No member of the Cabinet or the Legislature or of any organ of the state or any other person shall improperly interfere with the Auditor-General or a person appointed in terms of section 164(1) in the exercise of his or her powers, duties and functions.

(4) All organs of the state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the Auditor-General in the execution of his or her functions, powers and duties.

### **Powers, Functions and Duties**

163. (1) The Auditor-General shall audit and report on all the accounts and financial statements of all the accounting officers at national and provincial government level, other than that of the office of Auditor-General, and of all other persons in the national and provincial public services entrusted with public assets, trust property and other assets.

(2) The Auditor-General shall audit and report on all the accounts and financial statements of any local authority, board, fund, institution, company, corporation or other organization established or constituted by or under any law and of

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10. The following clause contained in our draft has been replaced in the bilateral document:

(8) *The Auditor-General may at any time resign by lodging his or her resignation in writing with the President.*



which the accounts and financial statements shall in terms of law be audited by the Auditor-General and of all persons in the employment of such body entrusted with own, trust or other assets.<sup>11</sup>

(3) The Auditor-General shall also, at the request of the President, conduct performance audits.<sup>12</sup>

(4) The Auditor-General may, whenever he or she considers it to be in the public interest, or upon receipt of a complaint, investigate, audit and report on the accounts and financial statements of any statutory body or any other institution in control of public funds.

(5) No further duty or function may be imposed upon or assigned to the Auditor-General other than by means of an Act of Parliament.

(6) Whenever the Auditor-General or a person appointed in terms of section 164 exercises his or her powers and functions in terms of this Constitution, he or she shall have access to all books, records and other documents and information relating to the accounts and financial statements referred to in this section.

(7) The Auditor-General shall report on the accounts examined by him or her and submit such reports to the authorities designated by Act of Parliament to receive them, and, unless otherwise provided by Act of Parliament, such reports or a report on any other matter shall be tabled in each house of Parliament within 7 days after receipt thereof by such authority; or if Parliament is not in session, within 7 days of the next ensuing session.

(8) The Auditor-General shall make public any report referred to in subsection (7) after the expiry of a period of 14 days from the date on which such report was submitted to the authorities concerned.

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11. This is a reformulation of clause 163(2) of our draft. We suggest that the meaning of the word "own" highlighted in the text is unclear.

12. This is a new provision.

### Staff and expenditure

164. (1) The Auditor-General may appoint, in a manner prescribed by law, such persons as may be necessary for the discharge of the work of the Office of the Auditor-General.

(2) The Auditor-General may delegate any of his or her functions to persons referred to in subsection (1) subject to such conditions as shall be prescribed by law.

(3) Expenditure incurred during the performance of the functions of the Auditor-General in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose and from fees raised or money obtained in a manner authorised by Act of Parliament.

### *South African Reserve Bank*

#### Central bank

165. The South African Reserve Bank, established and regulated by Act of Parliament, shall be the central bank of the Republic.

#### Primary objectives

166. (1) The primary objectives of the South African Reserve Bank shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic<sup>13</sup>

(2) The South African Reserve Bank shall, in the pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its duties

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13. This is a new formulation. The original formulation was as follows:

(1) *The primary objectives of the Reserve Bank shall be to achieve monetary stability in the interest of balanced and sustainable economic growth of the Republic and for that purpose to exercise control over the supply of money and the cost and availability of credit.*



independently: Provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.<sup>14</sup>

### **Powers and duties**

167. (1) The powers and duties of the South African Reserve Bank shall be those customarily performed by central banks, which shall be determined by Act of Parliament and shall be subject to such conditions as may be described by such Act.

(2) All decisions of the Board of Governors and the Board of Directors of the South African Reserve Bank shall be recorded.<sup>15</sup>

### *Financial and Fiscal Commission*

#### **Establishment**

170. A Financial and Fiscal Commission shall be appointed by the President in terms of this Constitution within 60 days of its coming into operation.

#### **Objects and functions**

171. (1) The objects and functions of the Commission shall be to apprise itself of all financial and fiscal information relevant to national, provincial and local<sup>16</sup> government, administration and development and, on the basis of such information, to render advice and make recommendations to the relevant legislative authorities in terms of this Constitution regarding the financial and fiscal requirements of the national, provincial and local governments, including -

- (a) financial and fiscal policies;
- (b) equitable fiscal and financial allocations to the national, provincial and local governments from revenue collected nationally;

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14. This proviso has been reformulated.

15. This is a new provision.

16. In the bilateral document the inclusion of local government in this section was suggested.

- (c) taxes, levies, imposts and surcharges that a provincial government intends to levy;
- (d) the raising of loans by a provincial or local government and the financial norms applying thereto;
- (e) criteria for the allocation of financial and fiscal resources; **[to provinces]**<sup>17</sup> and
- (f) any other matter allocated to the Commission by law.

(2) In carrying out its functions the Commission shall, *inter alia*, take into consideration the provisions of this Constitution, the national interest, economic disparities between and within the provinces, the population and developmental needs of the provinces, the administrative responsibilities<sup>18</sup> and other legitimate interests of each province.

#### Constitution, expertise and impartiality

172. (1) The Commission shall consist of -

- (a) a chairperson and deputy chairperson, who shall also be the chief executive officer and deputy chief executive officer of the Commission's staff,<sup>19</sup> appointed by the President on the advice of the Cabinet; and
- (b) 9 members each of whom shall be nominated by a different provincial executive and who shall be appointed by the President; and
- (c) 7 members appointed by the President on the advice of the Cabinet.<sup>20</sup>

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17. It is proposed that the highlighted words be deleted.

18. The bilateral document suggests the deletion of the underlined words: we however suggest that they be retained.

19. The underlined phrase is taken from the bilateral document.

20. Subparagraph (c) is a new provision taken from the bilateral document.



(2) No person shall be qualified to be appointed to the Commission unless he or she -

(a) is a South African citizen; and

(b) is a person who, by reason of his or her training and experience, has expertise in the field of economics or public finance or public administration.

(3) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, a member of the Commission may only be removed from office by the President on account of misconduct, incapacity or incompetence: provided that removal of a member of the Commission from office and the reasons therefor shall be communicated by the President by message to Parliament and to the provincial legislatures within 14 days after such removal or, if Parliament or a provincial legislature is not then in session, within 14 days after the commencement of its next ensuing session.

(4) Vacancies in the Commission shall be filled in accordance with the provisions of this section.

(5) A member of the Commission shall be eligible for re-appointment.

(6) A member of the Commission shall perform his or her duties fairly, impartially and independently.

(7) The chairperson and deputy chairperson<sup>21</sup> shall not perform or commit himself or herself to perform remunerative work outside their official duties.

(8) A member of the Commission shall not hold office in any political party or political organisation.

(9) It shall be an offence to influence or attempt to influence a member to act otherwise than in accordance with the provisions of subsection (6).

21. The underlined words replace the words "a member of the Commission" and are based on the bilateral document.

(10) The chairperson and deputy chairperson shall be the only full-time members of the Commission.<sup>22</sup>

(11) The chairperson and deputy chairperson shall be appointed for a period of 5 years and the other members of the Commission for a period of 2 years.<sup>23</sup>

### **Meetings of the Commission**

173. (1) The first meeting of the Commission shall be held within 30 days of its appointment at a time and place to be determined by the Chairperson, and subsequent meetings will be held at a time and place determined by the Commission or, if authorised thereto by the Commission, by the Chairperson. If both the Chairperson and Deputy Chairperson are absent from a meeting, the members present shall elect one from amongst their members to act as Chairperson.

(2) A quorum for a meeting of the Commission shall not be less than one half of all its members.

(3) A decision of two-thirds of all the members of the Commission shall constitute a decision of the Commission.

(4) All the decisions of the Commission shall be recorded.

### **Committees**

174. (1) The Commission may establish committees from among its number.

(2) Any such committee shall consist of such number of members as the Commission may determine.

(3) The Commission shall designate one of the members of the committee as chairperson thereof, and if any such chairperson is absent from a meeting of the

22. This is a new provision taken from the bilateral document.

23. This is a new provision based on the bilateral document.



committee the members present shall elect one from among their number to act as chairperson.

- (4) (a) The Commission may, subject to such directions as it may issue from time to time -
- (i) delegate any function entrusted to it by or under section 171 to such a committee; and
  - (ii) grant authority that a duty assigned to it by or in terms of section 171 may be performed by such a committee.
- (b) The Commission shall not be divested of a function so delegated and the performance of a duty so authorised, and may amend or set aside any decision of a committee.

#### **Co-option of persons to serve on or advise committees**

175. (1) A committee may co-opt any person to serve on such committee or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

(2) Such a person may take part in the proceedings of the committee in connection with the matter or at the meeting in respect of which he or she has been co-opted, but shall not be entitled to vote.

#### **Remuneration and allowances of members of the Commission and other persons**

176. Members of the Commission and persons referred in section 175 who are not in the employment of the State, shall be paid, from moneys appropriated by Parliament for that purpose, such remuneration and allowances as the Minister of Finance may determine.

### Appointment of Staff

177. (1) The Commission may appoint and accept secondment of staff as it may deem necessary in consultation with the Commission for Administration.<sup>24</sup>

(2) Expenditure incidental to the performance of the functions of the Commission in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose.

### Regulations

178. The President may make regulations regarding -

- (a) procedures in connection with any function of the Commission; and
- (b) any other matter in connection with the achievement of the objects of the Commission.

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24. This is a reformulation of the original provision.



# EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

## TWENTY THIRD REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 12 NOVEMBER 1993

*The parts of the draft Constitution reflected in this report are presented to the Negotiating Council for final approval.*

### ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

### PREAMBLE

In humble submission to Almighty God,

We the people of South Africa declare that -

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races;

AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

AND WHEREAS it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution;

NOW THEREFORE the following provisions are adopted as the Constitution of the Republic of South Africa:

NOTE: After the last provision of the Constitution the following words are to be inserted:

Nkosi sikelel' iAfrika. God seën Suid-Afrika.

Morena boloka sechaba sa heso. May God bless our country.

Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.

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## CHAPTER 8

### The Public Protector and Human Rights Commission

#### *The Public Protector*

#### Establishment and appointment

1. (1) There shall be an Office of the Public Protector for the Republic to which shall be appointed a Public Protector who shall have the functions, powers and duties prescribed by this Constitution and by any other law.

(2) A joint standing committee of Parliament, composed of one member of every political party represented in the National Assembly and the Senate shall within 60 days of the first sitting of the Senate nominate a person to be appointed as the Public Protector and if such nomination is approved by resolution adopted by 75% of the members present at a joint sitting of the National Assembly and the Senate, the nominee shall be appointed by the President as Public Protector.



(3) If the nomination is not approved at the joint sitting as contemplated in subsection (2), the matter shall be referred back to the joint standing committee for reconsideration.

(4) A vacancy in the office of Public Protector shall be filled in accordance with the procedure prescribed in this section.

(5) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who -

(a) is a Judge of the Supreme Court of South Africa; or

(b) is qualified to be admitted as an advocate and has, for a cumulative period of at least 10 years after having so qualified:

(i) practised as an advocate or an attorney, or

(ii) lectured in law at a university; or

(c) has specialised knowledge of or experience of a period of at least 10 years in the administration of justice, public administration or public finance.

(6) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, the Public Protector will hold office for a period of 7 years.

(7) The remuneration and other conditions of employment of the Public Protector shall be prescribed by an Act of Parliament and such remuneration shall not be reduced, nor shall such conditions be adversely altered, during his or her term of office.

(8) The Public Protector shall not perform remunerative work outside his or her official duties.

(9) The Public Protector may be removed from office by the President, but only on the grounds of misbehaviour, incapacity or incompetence determined by the joint standing committee of Parliament referred to in subsection (2) and upon receipt of an address from both the National Assembly and the Senate requesting such removal.

(10) A Public Protector who is the subject of investigations by the joint standing committee of Parliament in terms of subsection (9) may be suspended by the President pending such investigation.

### **Independence and Impartiality**

2. (1) The Public Protector shall be independent and impartial and carry out his or her functions, powers and duties subject only to this Constitution and the law.

(2) The Public Protector and the persons appointed in terms of section 4(1) shall have such immunities and privileges as may be assigned to them by Act of Parliament for the purpose of ensuring the independent and impartial exercise of their powers and functions.

(3) No member of the Cabinet or the Legislature or of any organ of the state or any other person shall improperly interfere with the Public Protector in the exercise of his or her powers, duties and functions.

(4) All organs of the state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the Public Protector in the execution of his or her functions, powers and duties.

### **Powers, Functions and Duties**

3. (1) The Public Protector shall be entitled -

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged -

(i) maladministration in connection with the affairs of the government at any level; or

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function; or



- (iii) improper or dishonest act, omission or corruption with respect to public money; or
  - (iv) improper or unlawful enrichment or the receipt of any improper advantage or promise of such enrichment or advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
  - (v) any other alleged act or omission by an employee of government at any level or a person performing a public function which results in unlawful or improper prejudice to any other person.
- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by -
- (i) mediation, conciliation or negotiation; or
  - (ii) advising, where necessary, any complainant regarding appropriate remedies; or
  - (iii) any other means as may be expedient in the circumstances.
- (c) at any time prior to, during or after an investigation -
- (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or
  - (ii) if he or she deems it advisable, to refer any matter which has a bearing on the investigation contemplated in subparagraph (a) to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other recommendation he or she deems expedient to the affected public body or authority.

(d) Nothing in this subsection shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law.

(2) The Public Protector shall conduct an investigation under subsection (1) with due regard to the circumstances of each case, and shall for the purposes of such investigation, in addition to such powers as may be prescribed by law, but subject to the provisions of this Constitution and the law of privilege, have the power to -

(a) direct any person to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which in the opinion of the Public Protector, has a bearing on the matter being inquired into, and may examine such person for that purpose; and

(b) enter or authorise another person to enter any building or premises and there to make such investigation or inquiry as he or she may deem necessary and seize anything on those premises which in his or her opinion has a bearing on the purpose of the investigation.

(3) The Public Protector or any member of his or her staff shall be competent but not compellable to answer questions in any proceedings in a court of law or before any body or institution established by or under any law in connection with any information which in the course of his or her investigation has come to his or her knowledge.

(4) Recourse to or exercise of any powers, functions and duties of the Public Protector, shall not oust the jurisdiction of the Court to hear any matter or cause whatsoever.

(5) Notwithstanding any other provision the Public Protector shall report in writing on his or her activities to Parliament at least once every year.

#### Staff and expenditure

4. (1) The Public Protector may appoint, in a manner prescribed by law, such persons as may be necessary for the discharge of the work of the Office of the Public Protector.



(2) The Public Protector may delegate any of his or her functions to persons referred to in subsection (1) subject to such conditions as shall be prescribed by law.

(3) Expenditure incidental to the performance of the functions of the Public Protector in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose.

### **Provincial Public Protector offices**

5. (1) A provincial legislature may by law establish and regulate an Office of Provincial Public Protector.

(2) A provincial law referred to in subsection (1) shall not in any way derogate from the powers of the Office of the Public Protector established in terms of section 1.

(3) The Provincial Public Protector shall be appointed by the Premier in consultation with the Public Protector, provided that the appointment shall be confirmed by resolution of a two thirds majority of the provincial legislature.

### ***Human Rights Commission***

#### **Establishment and appointment**

6. (1) There shall be a Human Rights Commission which shall consist of 11 fit and proper persons who are South African citizens and broadly representative of the South African community.

(2) A joint standing committee of Parliament, composed of one member of every political party represented in the National Assembly and the Senate shall within 60 days of the first sitting of the Senate nominate persons to be appointed to the Commission and if such nominations are approved by resolution adopted by 75% of the members present at a joint sitting of the National Assembly and the Senate, the nominees shall be appointed to the Commission by the President.

(3) If the nominations are not approved at the joint sitting as contemplated in subsection (2), the matter shall be referred back to the joint standing committee for reconsideration.

(4) A vacancy on the Commission shall be filled in accordance with the procedure prescribed in this section.

(5) The Human Rights Commission shall have powers, duties and functions vested in it by an Act of Parliament which shall include the duty to -

- (a) promote the observance of, the respect for and the defence of fundamental rights;
- (b) develop an awareness of fundamental rights amongst all people of the Republic;
- (c) make recommendations to the government and all organs of the state at all levels when it considers such action advisable for the adoption of progressive measures in favour of fundamental rights within the framework of the law and this Constitution as well as appropriate measures for the further observance of those rights;
- (d) prepare such studies for report on or relating to fundamental rights as it considers advisable in the performance of its duties; and
- (e) request any organ of government to supply it with information on any legislative or executive measures adopted by it in or relating to matters of fundamental rights.

(6) If the Commission is of the opinion that any provisions of any proposed legislation might be contrary to the provisions of Chapter 3 of this Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature.

(7) The Commission shall be entitled to investigate on its own initiative or on receipt of a complaint any alleged violation of fundamental rights, and if, after due



investigation, the Commission is of the opinion that there is substance in any complaint made to it, it shall, insofar as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief.

### Staff and expenditure

7. (1) The Commission shall appoint a director who shall be the chief executive officer of the Commission, who shall be empowered to appoint staff subject to the approval of the Commission and such conditions of service as may be prescribed by Act of Parliament.

(2) The expenditure incidental to the performance of the functions of the Commission in terms of this Constitution or any other law shall be defrayed from money appropriated by Parliament specifically for that purpose.

### Reports

8. The Commission shall be required to report to the President at least once in every year on the performance of its mandate, and the President shall cause such report to be tabled promptly in the National Assembly and the Senate.

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## CHAPTER 11

## Finance

## Vesting of property

143. (1) All property which immediately prior to the coming into operation of this Constitution vested in any administration as defined in subsection (5), and

- (a) which was being used by such administration for the purpose of or relating to a function in respect of which a province has legislative competence in terms of section 118 of this Constitution shall, subject to the provision of subsection (2), vest in such provincial government, and
- (b) which was being used for any other purpose, shall, subject to the provisions of subsection (2) vest in the national government.

(2) When the rationalisation of administrations is carried out in accordance with section 119, or if a provincial government assumes responsibility for functions which were previously being carried out by the national government, the vesting of property under subsection (1) shall be reviewed by the governments concerned, on the basis that property which was being used for or in connection with a particular function shall vest in the government performing such function.

(3) If there should be any disagreement between the governments concerned in relation to the change in the vesting of property under subsection (2), the advice of the Commission on provincial government shall be obtained.

(4) If notwithstanding the provisions of subsection (3) the governments concerned are unable to reach agreement, the differences between them shall be dealt with in accordance with parameters prescribed by Act of Parliament.

(5) For the purposes of this section -

"any administration" shall mean a provincial administration established in terms of the *Provincial Government Act*, 69 of 1986, administrations of the Self-governing Territories established in terms of the *Self-governing Territories*



*Constitution Act, 21 of 1971 and the Transkei, Bophuthatswana, Venda and Ciskei;*

"property" shall mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein or in respect thereof.

### **Transfer of property**

144. (1) Immovable property transferred in terms of section 143 shall be transferred to the relevant government without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.

(2) The Registrar of Deeds concerned shall upon production to him or her of the title deed of any immovable property mentioned in section 143 endorse such title deed to the effect that the immovable property therein described is vested in the government concerned and shall make the necessary entries in the deeds register, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the said government to the said property.

### **Debts and liabilities**

145. (1) All debts and liabilities which are directly linked to the property vesting in a province in terms of section 143 shall be assumed by such province.

(2) All debts and liabilities other than those referred to in subsection (1) shall vest in the national government.

(3) The Financial and Fiscal Commission shall make recommendations to Parliament concerning the re-allocation of debts and liabilities referred to in section 143(1) and (2), taking into account all relevant factors.

(4) The re-allocation of debts and liabilities shall be made by Act of Parliament after taking into account the recommendations of the Financial and Fiscal Commission.

### Audit of property, debts and liabilities

145A. The Auditor-General shall audit the re-allocation of property, debts and liabilities made in terms of sections 143, 144 and 145.

### National Revenue Fund

146. (1) There shall be established a National Revenue Fund into which shall be paid all revenues, as defined by Act of Parliament, raised or received by the National Government, and from which appropriations shall be made by Parliament in a manner prescribed by this Constitution and any other law, and subject to the charges imposed thereby.

(2) No money shall be withdrawn from the National Revenue Fund, except under appropriation made by law in accordance with the provisions of this Constitution: provided that revenue to which a province is entitled in terms of section 121(2) (a) and (b) shall form a direct charge against the National Revenue Fund to be credited to the relevant Provincial Revenue Fund.

### Appropriation bills

147. Any bill which appropriates or authorises the appropriation of revenue or money for the services provided by the National Government shall deal only with such appropriation.

### Appropriation to be initiated by a Minister

148. The National Assembly shall not consider any bill for the appropriation of any part of the public revenue, or of any tax or impost, if such bill has not been initiated by a Minister, with the approval of the Minister responsible for national financial matters.

### Annual Budget

149. The Minister responsible for national financial matters shall in respect of every financial year cause to be laid before the National Assembly an annual budget reflecting the estimates of receipts and expenditure, which shall *inter alia*, reflect capital and current expenditure, of the Government for that year.



### Procurement administration

150. (1) The procurement of goods and services for any level of government shall be regulated by Act of Parliament and provincial laws which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.

(2) The tendering system prescribed in terms of subsection (1) shall be fair, public and competitive, and tender boards shall be required to give reasons for their decisions to interested parties.

(3) No member of the Cabinet or the legislature or of any organ of the state or any other person shall improperly interfere with the decisions and operations of the tender boards.

(4) All decisions of any tender board shall be recorded.

### Guarantees by the national government

151. The national government may not guarantee any provincial or local government loans, unless -

- (a) this guarantee complies with the framework and norms as set out in an Act of Parliament; and
- (b) the Financial and Fiscal Commission has made recommendations concerning compliance with the framework and norms referred to in subparagraph (a).

### Special pensions

152. (1) Provision shall be made by Act of Parliament for payment by the national government to -

- (a) persons who have made sacrifices or who have served the public interest in the establishment of a democratic constitutional order; or

(b) dependents of such persons.

(2) The Act of Parliament referred to in subsection (1) shall prescribe the qualifications of a beneficiary of a pension referred to in subsection (1), the conditions for the granting thereof and the manner of the determination of the amount of such pensions, taking into account all relevant factors, including *inter alia* any other pension received by such beneficiary.

### *Auditor-General*

#### **Establishment and appointment**

161. (1) There shall be an office of Auditor-General for the Republic to which shall be appointed, in terms of subsection (2), an Auditor-General who shall have the functions, powers and duties prescribed by this Constitution and by any other law.

(2) A joint standing committee of Parliament, composed of one member of every political party represented in the National Assembly and the Senate, shall, at the request of the President nominate a person to be appointed by the President as Auditor-General and such nomination shall be approved by resolution adopted by two-thirds of the members present at a joint sitting of the National Assembly and the Senate: provided that, in connection with such resolution, no debate shall be allowed.

(3) If the post of Auditor-General becomes vacant, the highest ranking member of the Auditor-General's office shall act as Auditor-General until the vacancy is filled, and for that purpose, shall have the functions, powers and duties of the Auditor-General.

(4) The Auditor-General shall be a South African citizen who is a fit and proper person to hold such office and who shall be appointed with due regard to his or her specialised knowledge of or experience in auditing, state finances and public administration.

(5) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, the Auditor-General shall be appointed for a specific period of not less than 5 years and not more than 10 years and shall not thereafter be eligible for reappointment.



(6) The remuneration and other conditions of service of the Auditor-General shall be determined in accordance with the provisions of an Act of Parliament, and such remuneration and the other conditions of service shall not be altered to his or her detriment during his or her term of office.

(7) The Auditor-General shall not perform remunerative work outside his or her official duties.

(8) The Auditor-General may be removed from office by the President, but only on the grounds of misconduct, incapacity or incompetence determined by the joint standing committee of Parliament referred to in subsection (2) and upon receipt of a request for such removal by Parliament adopted at a joint sitting of the National Assembly and the Senate.

(9) An Auditor-General who is the subject of investigations by the joint standing committee of Parliament in terms of subsection (8) may be suspended by the President pending such investigation.

(10) The Auditor-General may at any time, subject to his or her conditions of service, resign by lodging his or her resignation in writing with the President.

### **Independence and Impartiality**

162. (1) The Auditor-General shall be independent and impartial and carry out his or her functions, powers and duties subject only to this Constitution and the law.

(2) The Auditor-General and the persons appointed in terms of section 164(1) shall have such immunities and privileges as may be assigned to them by Act of Parliament for the purpose of ensuring the independent and impartial exercise of their powers and functions.

(3) No member of the Cabinet or the Legislature or of any organ of the state or any other person shall improperly interfere with the Auditor-General or a person appointed in terms of section 164(1) in the exercise of his or her powers, duties and functions.

(4) All organs of the state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the Auditor-General in the execution of his or her functions, powers and duties.

### **Powers, Functions and Duties**

163. (1) The Auditor-General shall audit and report on all the accounts and financial statements of all the accounting officers at national and provincial government level, other than that of the office of Auditor-General, and of all other persons in the national and provincial public services entrusted with public assets, trust property and other assets.

(2) The Auditor-General shall audit and report on all the accounts and financial statements of any local government, board, fund, institution, company, corporation or other organization established or constituted by or under any law and of which the accounts and financial statements shall in terms of law be audited by the Auditor-General and the accounts and financial statements of all persons in the employment of such a body, who have been entrusted by it with its assets, or any other assets.

(3) The Auditor-General shall also, at the request of the President or Parliament, conduct performance audits.

(4) The Auditor-General may, whenever he or she considers it to be in the public interest, or upon receipt of a complaint, investigate, audit and report on the accounts and financial statements of any statutory body or any other institution in control of public funds.

(5) No further duty or function may be imposed upon or assigned to the Auditor-General other than by means of an Act of Parliament.

(6) Whenever the Auditor-General or a person appointed in terms of section 164 exercises his or her powers and functions in terms of this Constitution, he or she shall have access to all books, records and other documents and information relating to the accounts and financial statements referred to in this section.



(7) The Auditor-General shall report on the accounts examined by him or her and submit such reports to the authorities designated by Act of Parliament to receive them, and, unless otherwise provided by Act of Parliament, such reports or a report on any other matter shall be tabled in each house of Parliament within 7 days after receipt thereof by such authority; or if Parliament is not in session, within 7 days of the next ensuing session.

(8) The Auditor-General shall make public any report referred to in subsection (7) after the expiry of a period of 14 days from the date on which such report was submitted to the authorities concerned.

### **Staff and expenditure**

164. (1) The Auditor-General may appoint, in a manner prescribed by law, such persons as may be necessary for the discharge of the work of the office of the Auditor-General.

(2) The Auditor-General may delegate any of his or her functions to persons referred to in subsection (1) subject to such conditions as shall be prescribed by law.

(3) Expenditure incurred during the performance of the functions of the Auditor-General in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose and from fees raised or money obtained in a manner authorised by Act of Parliament.

### ***South African Reserve Bank***

#### **Central bank**

165. The South African Reserve Bank, established and regulated by Act of Parliament, shall be the central bank of the Republic.

#### **Primary objectives**

166. (1) The primary objectives of the South African Reserve Bank shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank shall, in the pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its duties independently, subject only to the powers of Parliament as set out in section 167(1): provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.

### **Powers and duties**

167. (1) The powers and duties of the South African Reserve Bank shall be those customarily performed by central banks, which shall be determined by Act of Parliament and shall be subject to such conditions as may be described by such Act.

(2) All decisions of the Board of Governors and the Board of Directors of the South African Reserve Bank shall be recorded.

### *Financial and Fiscal Commission*

#### **Establishment**

170. A Financial and Fiscal Commission shall be appointed by the President in terms of this Constitution within 60 days of its coming into operation.

#### **Objects and functions**

171. (1) The objects and functions of the Commission shall be to apprise itself of all financial and fiscal information relevant to national, provincial and local government, administration and development and, on the basis of such information, to render advice and make recommendations to the relevant legislative authorities in terms of this Constitution regarding the financial and fiscal requirements of the national, provincial and local governments, including -

- (a) financial and fiscal policies;
- (b) equitable fiscal and financial allocations to the national, provincial and local governments from revenue collected nationally;



- (c) taxes, levies, imposts and surcharges that a provincial government intends to levy;
- (d) the raising of loans by a provincial or local government and the financial norms applying thereto;
- (e) criteria for the allocation of financial and fiscal resources; and
- (f) any other matter allocated to the Commission by law.

(2) In carrying out its functions the Commission shall, *inter alia*, take into consideration the provisions of this Constitution and the matters mentioned in section 121(4)(b).

### **Constitution, expertise and impartiality**

172. (1) The Commission shall consist of -
- (a) a chairperson and deputy chairperson, who shall also be the chief executive officer and deputy chief executive officer of the Commission's staff, appointed by the President on the advice of the Cabinet; and
  - (b) nominees of the provincial executives, each nominating one person, who shall be appointed by the President; and
  - (c) 7 members appointed by the President on the advice of the Cabinet, at least one of whom shall have experience in local government finance.
- (2) No person shall be qualified to be appointed to the Commission unless he or she -
- (a) is a South African citizen; and
  - (b) is a person who, by reason of his or her training and experience, has expertise in economics, public finance, public administration, taxation, management or accountancy.

(3) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, a member of the Commission may only be removed from office by the President on account of misconduct, incapacity or incompetence: provided that removal of a member of the Commission from office and the reasons therefor shall be communicated by the President by message to Parliament and to the provincial legislatures within 14 days after such removal or, if Parliament or a provincial legislature is not then in session, within 14 days after the commencement of its next ensuing session.

(4) Vacancies in the Commission shall be filled in accordance with the provisions of this section.

(5) A member of the Commission shall be eligible for re-appointment.

(6) A member of the Commission shall perform his or her duties fairly, impartially and independently.

(7) The chairperson and deputy chairperson shall not perform or commit himself or herself to perform remunerative work outside their official duties.

(8) A member of the Commission shall not hold office in any political party or political organisation.

(9) It shall be an offence to influence or attempt to influence a member to act otherwise than in accordance with the provisions of subsection (6).

(10) The chairperson and deputy chairperson shall be the only full-time members of the Commission.

(11) The chairperson and deputy chairperson shall be appointed for a period of 5 years and the other members of the Commission for a period of 2 years.

### **Meetings of the Commission**

173. (1) The first meeting of the Commission shall be held within 30 days of its appointment at a time and place to be determined by the Chairperson, and subsequent meetings will be held at a time and place determined by the Commission or, if authorised thereto by the Commission, by the Chairperson. If both the Chairperson and Deputy



Chairperson are absent from a meeting, the members present shall elect one from amongst their members to act as Chairperson.

(2) A quorum for a meeting of the Commission shall not be less than one half of all its members.

(3) A decision of two-thirds of the members present shall constitute a decision of the Commission.

(4) All the decisions of the Commission shall be recorded.

### Committees

174. (1) The Commission may establish committees from among its number.

(2) Any such committee shall consist of such number of members as the Commission may determine.

(3) The Commission shall designate one of the members of the committee as chairperson thereof, and if any such chairperson is absent from a meeting of the committee the members present shall elect one from among their number to act as chairperson.

(4) (a) The Commission may, subject to such directions as it may issue from time to time -

(i) delegate any function entrusted to it by or under section 171 to such a committee; and

(ii) grant authority that a duty assigned to it by or in terms of section 171 may be performed by such a committee.

(b) The Commission shall not be divested of a function so delegated and the performance of a duty so authorised, and may amend or set aside any decision of a committee.

### **Co-option of persons to serve on or advise committees**

175. (1) A committee may co-opt any person to serve on such committee or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

(2) Such a person may take part in the proceedings of the committee in connection with the matter or at the meeting in respect of which he or she has been co-opted, but shall not be entitled to vote.

### **Remuneration and allowances of members of the Commission and other persons**

176. Members of the Commission and persons referred in section 175 who are not in the employment of the State, shall be paid, from moneys appropriated by Parliament for that purpose, such remuneration and allowances as the Minister of Finance may determine.

### **Appointment of Staff**

177. (1) The Commission may appoint and accept secondment of staff as it may deem necessary in consultation with the Public Service Commission.

(2) Expenditure incidental to the performance of the functions of the Commission in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose.

### **Regulations**

178. The President may make regulations regarding -

- (a) procedures in connection with any function of the Commission; and
- (b) any other matter in connection with the achievement of the objects of the Commission.

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