

Free Market Foundation SPECIAL REPORT



November 1996

In the Constitutional Court

During the week beginning **July 8**, the Free Market Foundation, through Gary Moore, FMF member and attorney, led evidence in the Constitutional Court on three occasions. Our invitation to appear in the court followed our objection to and written submission on the **draft constitution** regarding the following issues:

- the horizontal application of the bill of rights
- property rights
- socio-economic rights
- the independence of the Reserve Bank
- collective bargaining
- the appointment of lay people to courts.

The Constitutional Court's jurisdiction regarding the ratification of the draft constitution was confined to two issues:

- did the draft constitution comply with the **constitutional principles** detailed in the **interim constitution** which was drafted at the World Trade Centre in 1993?
- had the draft constitution been passed by the Constitutional Assembly in accordance with the interim constitution?

The Foundation was invited to lead evidence on two of the issues to which it had objected: property and socio-economic rights -- both of which had to be argued on the basis of whether or not the specific clauses complied with the constitutional principles.

The constitutional principles

The constitutional principles were agreed upon and adopted by the Negotiating Council of the Multi-Party Negotiating Process to provide definitive guidelines for the drafting of the final constitution. The constitutional principles have a higher status than the rest of the constitution in that they cannot be amended. This particular status stems from their special function in the matrix of the two-stage constitution-making process agreed to during the multi-party negotiation process and reflected in the text of the constitution. The language of the constitution itself provides a strong indication of the applicability and overriding purpose of the constitutional principles. The interim constitution proclaims itself as a "historic bridge"; it

was never intended to be the final destination. It prescribes and regulates the process leading towards the achievement of the final constitution. Various provisions of the interim constitution prescribe how the new constitution should come about and the constitutional principles form part of the future-directed framework.

The Kempton Park negotiators left the framing of the final constitution to an elected assembly "in accordance" with a solemn pact recorded as the constitutional principles.

Property rights

Gary Moore, on behalf of the FMF, emphasised two aspects of our argument in respect of property rights and compensation. The first related to the absence in the draft constitution of a clause entrenching the fundamental right to *acquire* and *hold* property. The second to the provision that the amount, timing and manner of payment of compensation should reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors including "the purpose of the expropriation".

Discrimination

against blacks and have-nots

The interim constitution contains a

clause which states that every person shall have the right to acquire and hold rights in property. In contrast, the property clause in the draft constitution consists entirely of provisions laying down the manner in which deprivation and expropriation of property is permitted.

The Foundation based its argument on the fact that the absence of a clause protecting the right to acquire and hold property, coupled with the presence of a clause laying out a procedure in terms of which deprivation or expropriation of property is permitted, discriminates against black persons, who may be acquiring property for the first time, in favour of white persons, who are the main property holders at present.

Gary Moore argued that the absence of a right-to-property clause did not comply with the constitutional principles which state that the constitution shall provide for a system of government committed to achieving equality between people of all races and shall promote racial equality.

A universally accepted right

Furthermore, the absence of a right-to-property clause does not comply with the principles, which state in addition that a) everyone shall enjoy all universally accepted fundamental rights and freedoms, which shall be provided for and protected in the constitution; and b) that the constitution shall be drafted after having given due consideration to the fundamental rights contained in Chapter 3 of the interim constitution.

Gary pointed out that "universally accepted" means "accepted by most people everywhere" and that it is universally accepted that everyone would like to acquire their own possessions. And that the exclusion of a right-to-property clause from the draft constitution, after having been given due consideration by the Constitutional Assembly, is deliberate. The onus, he said, was on Constitutional Assembly to say

what justified the removal of the property rights clause -- which, he said, can be justified only if it is universally accepted that people should *not* have the right to acquire and hold property.

Expropriation and compensation

The draft constitution states that the amount, timing and manner of payment, of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including *inter alia* "the purpose of the expropriation".

The Foundation argued that the courts have no yardstick for deciding what weight to give different purposes for which property is expropriated and that, therefore, the clause is not justiciable. For example, there are no criteria or standards to enable the courts to determine whether it is more desirable or worthy to expropriate property for the purpose of settling squatters, building a sewerage treatment works, establishing an aerodrome, or erecting a children's creche. The constitutional principles state that all universally acceptable fundamental rights, freedoms and liberties shall be provided for and protected by *justiciable* provisions in the constitution.

Socio-economic rights

The FMF emphasised four aspects in respect of its objection to the inclusion of socio-economic rights in the draft constitution.

The first related to whether matters that are not contemplated in the **constitutional principles** should be included in the draft constitution. The second to whether questions regarding the **availability of resources** for the state to take measures to realise rights of access to housing and health care are justiciable or are instead political questions. The third to whether the right to have access to housing and

health care will be interpreted in a narrow sense only, or if they would be interpreted as conferring an **entitlement** to housing and health care and, if so, whether these entitlements will be enforceable in practice. And the fourth to the **undermining** of enforceable rights by the inclusion of non-justiciable and unenforceable rights in the Bill of Rights chapter of the draft constitution.

Available resources

Mr Moore argued that the inclusion of new socio-economic rights clauses did not comply with the constitutional principles because they were not covered by the principles in the interim constitution.

The draft constitution says that the state must take reasonable legislative and other measures, "within its available resources", to achieve the progressive realisation of the right to have access to housing, health care, food, water and social security. This imposes a positive obligation on the state to take certain measures.

The question of whether the state has available resources is essentially a political question. The court is not in a position to contradict the government on whether the purpose for which its funds have been reserved are more worthy than housing, health care, food, water and social security. The availability of resources depends on the political priorities of the government. To seek to give this function to the courts is to attempt to confer on it a power which it is not competent to exercise and which should be exercised instead by the legislative or executive branches.

The right to a house?

Clause 26(1) states that everyone has "the right to have access to" adequate housing. Clause 27(1) states that everyone has "the right to have access to" health care services, sufficient food and water, and social security. These clauses are am-

biguous. They could be interpreted to mean merely that everyone has the right not to be *denied* access to housing, health care, and so forth. But these clauses could also be interpreted as conferring the *right* to housing and health care, etc.

An indication that these clauses may have this wider meaning of creating an entitlement to housing and health care are the provisions of clauses 26(2) and 27(2), which say that the state must take measures to achieve the realisation of these rights. If the right meant that the state must refrain from restricting access to housing and health care, it would have been more appropriate to say that the state must take no legislative or other measures which will obstruct the realisation of those rights.

If these clauses are to be given this wider meaning of conferring a right to housing and health care, they will in practice prove to be un-enforceable against the state.

Undermining real rights

Furthermore, if the court decides, in a particular case involving a claim for housing or health care, that judgement should not be given against the state, a precedent may be set that leads to the undermining of fundamental rights. These include:

- security of the person
- freedom of expression
- freedom of association
- freedom of movement
- property rights
- access to courts
- and so on.

The inclusion in the draft constitution of non-justiciable un-enforceable rights will compromise the enforcement of other rights contained in the constitution. This would be, the Foundation argued, a gross injustice against all those who have worked toward a free and democratic South Africa.

Evidence to Parliamentary Committees

The Free Market Foundation was invited on two occasions in recent months to lead evidence to portfolio committees. On both occasions the Foundation was represented by **Leon Louw**, Executive Director, and **Temba Nolutshungu**, Cape Regional Director.

Achieving global competitiveness

They argued at both sessions for a sound economic framework and showed how economic freedom achieves economic growth. They said that to become globally competitive, South Africans must be given greater economic freedom and pointed out the following elements as being essential components in such an economy:

- protection of property
- competitively low tax rates
- a low and stable inflation rate to strengthen the Rand and encourage long term private planning and investment
- an absence of legislative barriers to entry into business, trades and professions
- a sound, efficient and affordable legal system
- a stable and flexible market
- consistent and impartial government policies
- relatively low level of government consumption expenditure
- minimal tariff protection and other barriers to international trade.

Trade & Industry budget

On June 5 Louw and Nolutshungu led evidence to the **Trade and Industry Portfolio Committee** on the Department's budget report which was to be tabled in parliament that month. During the hour they spent with the committee, they emphasised that government should concentrate on creating a positive environment for investment in South Africa. They suggested that the government was likely to be aiming at achieving the following outcomes:

- sustained high economic growth rates
- redressing of inequalities
- vastly improved employment and self-employment opportunities
- rapid escalation in per capita incomes
- visibly improved quality of life — especially for the poor
- a peaceful and secure society.

The Foundation suggested that the way to achieve these outcomes was through the liberalisation of the economy, the creation of numerous Export Processing Zones (EPZs) as in Mauritius, substantial privatisation of state industries, the immediate scrapping of exchange controls and the streamlining of administrative procedures.

On the expenditure contained in the Trade and Industry budget, they recommended that the Department only spend money on the promotion of exports if the measurable benefits exceeded the cost and stated that in general, export promotion should be totally self-funding.

Joint Portfolio Committees

On July 25, evidence was led to the **joint Housing, Finance, and Trade and Industry Portfolio Committee** on the alleged **collusion** between banks

over interest rates. The evidence given by the Foundation was based on the premise that the primary objective of government is to create an enabling environment in which South African citizens have the opportunity to improve the quality of their lives by increasing their standard of living.

The FMF showed how it was the monetary authorities who were ultimately responsible for the high interest rates and the harm done to consumers, and not the private banks. In a competitive environment, any attempts by banks to collude on setting excessively high interest rates would fail. It showed that monopolies are created and sustained by government and that without government protection or funding no deleterious monopoly or collusive activity could survive. Anti-trust or competition laws, it said, tended to reduce rather than increase competition. Instead of promoting the interests of consumers, competition laws were inclined to protect competitors from each other.

Competition in the financial markets could be achieved by:

- minimising the barriers to entry into banking
- abolishing exchange controls to open up the South African financial markets
- removing all impediments that deter foreign banks from operating in South Africa
- repealing all laws that involve government intervention in interest rates
- reducing inflation and inflationary expectations
- decriminalising non-banking financial markets and operators.

Economic freedom and its consequences

The Foundation based much of its evidence on the findings detailed in *Economic Freedom of the World 1975-1995*. This book, co-published by the FMF, is the result of a series of six conferences with a total of 62 conference participants including

three Nobel Prize winners, Milton Friedman, Gary Becker and Douglass North. The study took 10 years to complete and uses 17 measurable components to determine freedom, growth and incomes in 102 countries.

Louw and Nolutshungu outlined how South Africa rates in terms of economic freedom and showed the correlation between economic freedom and per capita incomes and the relationship between economic freedom and the growth in per capita incomes. The findings show clearly which path South Africa needs to follow to bring about spectacular economic growth.

BOOK ORDER

If you have not yet ordered your copy of *Economic Freedom of the World 1975-1995*, call **Lyn Stidworthy** on **(011) 884 0270** and place your order with her today.

The cost of the book is **R99** including VAT and postage.

FMF NEWSLETTER

The FMF would like to produce a regular four-page newsletter along similar lines to this report in order to keep members and allies informed about its work. If you would like to fund one or more copies @ R3 500 per copy, or one or more pages @ R1 000 per page, please complete the form below and post or fax it to the FMF as soon as possible.

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