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M.A. McLOUGHLIN

Attorney, Notary & Conveyancer

Michael Arthur McLoughlin

15 Seymour Ave
Parktown 2193
Johannesburg
Telephone: (011) 726-8152/3
Fax: (011) 726-2923

P.O. Box 72299
Parkview 2122

Docex: DX66
Johannesburg

Our Ref: M A McLOUGHLIN/W11 MAM-M66
Your Ref: MR M PHILLIPS

The Chairman
Management Committee
Multi-Party Forum
P O BOX 307
ISANDO
1600

26 March 1993

Dear Sir,

re : CONSTITUTION AND BILL OF RIGHTS

With further reference to the above matter I enclose herewith my letters of the 30th March 1992 and 16th October 1992 for ease of reference, copies of which should, however, be in your file.

My letter of the 30th March 1992 was written in response to an invitation for the members of the public to address Codesa on issues relating to the Constitution and Bill and Rights. Unfortunately, whilst I asked that copies of my letter be circulated to all the delegations, I never received confirmation that this was, in fact, done. If it was done, then I was studiously ignored by all the delegations. I trust that this will not be the case when "Codesa 3" commences and that we can expect that the Constitution and Bill of Rights be negotiated from the bottom up rather than from the top down. Unless this is done, and seen to be done, it is unlikely that a democracy, other than in name, will be the result.

Other than control of the security forces, my main concern is with control of finances in the new South Africa. It would seem that control of expenditure to prevent corruption needs a complete overall. In this regard, Ministers of State must be made personally accountable for the performance of their departments. This, however, will be insufficient on its own. Internal and external auditors should be appointed to continuously monitor the financial performance of each department on a continuous basis and productivity incentives and bonuses should be given to civil servants where performance audits show that they have, not only performed within their budget but, in fact, have reduced the department's expenditure or, alternatively, have achieved more than was required of them within the budget. If goals are not

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set and productivity incentives are not given, we can expect the same, if not worse, inefficiencies and corruption in a new government as exists in the present one. The Ministers for the Budget and of Finance should be made more accountable for their respective portfolios and, in particular, the expenditure side of the budget should be carefully monitored throughout the year. Deficits should not be allowed to reach anything above 3% of Gross Domestic Product and these matters should be covered in the Constitution (cf. the Gramm Bill in the USA). The money supply should similarly be controlled within certain parameters and the Reserve Bank should totally independent of State control. These measures should prevent inflation ever occurring again. Inflation is, after all, a fraud on the public.

Insofar as corruption, fraud and gross negligence within any state department is concerned, state officials should be treated harshly. Ministers of State should be made to resign immediately, whether or not they were personally aware of any corruption, fraud or gross negligence within their own departments. The principle of delegation of authority but not of responsibility must be made to apply. The sanction for allowing such matters to occur should be, not only the loss of office, but the loss of, at least, the state's contribution towards such party's pension and, where the Minister and/or State Official is personally involved in any act or omission which causes loss to the State, such person should be prosecuted and made to make recompense, where possible.

The above measures are necessarily harsh, as they must be, in order to cope with the rampant corruption which is a bedevilling our society.

The whole tax system must be reviewed to encourage universally accepted moral and ethical values and geared to discourage the baser instincts of man. In this regard, I need only mention as an example, the high taxes and strict laws on the distribution of alcohol in countries like Norway and Sweden. There are, obviously, many areas in which the tax laws can be used to uplift society and not pander to man's greed and fear and other countries tax laws should be studied and, if possible, improved on to nurture more civilised values.

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I trust that the man in the street is not going to be ignored when deliberations on these matters recommence and would be happy to address any of the relevant committees further on the various matters raised.

In the circumstances, I look forward to hearing from you.

Yours faithfully



M A McLOUGHLIN

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M A McLOUGHLIN/W11 MAM-M66
MR M PHILLIPS

The Chairman
Management Committee
CODESA
P O BOX 307
ISANDO
1600

16 October 1992

Dear Sir,

re : CONSTITUTION AND BILL OF RIGHTS

I am in receipt of your letter of the 21st September 1992. I have still not received any confirmation that the points raised in previous correspondence will be specifically addressed point for point. If and when Codesa or its successor reconvene and I would like to have an assurance that all the issues raised will be submitted to its delegations and that I will receive, as an ordinary citizen, the same courtesy as those afforded to the invited participants with regard to the issues raised. Insofar as these issues are concerned, I would also add that the right to privacy in its widest form be afforded to all citizens as this is a very important issue in a world in which the State intrudes more and more into the private lives of its citizens. The right to privacy must be incorporated both in the Constitution and the Bill of rights.

I look forward to hearing from you.

Yours faithfully



M A McLOUGHLIN

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M.A. McLOUGHLIN

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Our Ref:

Your Ref: M A McLOUGHLIN/W11 MAM-M66

30 March 1992

The Chairman
Group 3 (Constitutional Affairs)
CODESA
P O Box 307
ISANDO
1600

Dear Sir,

re : CONSTITUTION AND BILL OF RIGHTS

Members of the public were requested and invited to make representations to CODESA over the deliberations for a new constitution and bill of rights. In accordance with the said invitation and in an effort to make a possible contribution to the debate over a truly democratic dispensation whereby the new constitution will truly be of the people, for the people and by the people and, in terms of which, the rulers are truly the servants of the people and not the reverse, I have the following points to make which I feel need to be addressed, namely :-

1. CONTROL OF THE ARMED FORCES

It has been suggested, that elements within either the SADF or the police are, with or without the connivance of their superiors, actively attempting to destabilize the negotiating process towards a just dispensation for all. Alternatively, that different factions amongst the blacks are jockeying for position and that a "third force" is assisting one or other element in this regard. These are not idle allegations and one has only to look at recent press reports with regard to TV producer, John Drury, of the BBC's "Assignment" programme and, the continued local perception of such a third force, to realise that certain people are definitely trying to destabilize the democratic, negotiating process. Whoever is responsible, and it could, into alia, be the elements in the security forces referred to, power needs to be controlled in a new South Africa. No Constitution, or Bill of Rights, whether justiciable or not, will be of any force or effect, if the Armed Forces are controlled, effectively, by one man or, a small clique of Generals. One shudders when a whole band of ex-Generals, publicly advocated a No vote to the deliberations at CODESA. As Groucho Marx once said "Military intelligence is a contradiction in terms!"

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I suggest that one way of insuring that a new government is not overthrown by the military, would be to decentralise security on a regional basis, so that no military council can take over the government by way of a Coup d'etat unless such regional military power has the support of the generals from all the other decentralised regions. This may lead to a more expensive military establishment but, will be well worth the cost if democracy is to be ensured. I have, to date, not heard any of the leaders of the various political parties at CODESA comment on control of the military in a new South Africa and, as Africa has a poor record of democracy and a good record for military takeovers, whatever constitution is in place, I feel that this important issue needs to be addressed publicly as well as being debated at CODESA. After all, if the Armed Forces are to be the guardians of the constitution and the bill of rights who, in turn, is to control the Armed Forces? They should be subject to even more stringent checks and balances than Parliament, to avoid any abuse of power.

2. "THE NATIONAL INTEREST"

This concept, which is used by governments world wide, including the great democracies, to cover up embarrassing actions and misdemeanors on their part, needs to be subject to scrutiny within a true democracy. Accordingly, will provision be made in the constitution or the Bill of Rights, for all information under the government's control, to be subject to scrutiny by the courts, (in camera, if necessary), to ensure that "the national interest" is not subject to the perverted subjective whim of the state or its officials. I believe that it is necessary that all state information and documents be freely accessible to the people, unless the government or its officials, themselves, apply to a constitutional court for such information or documents to be held secret, in the national interest. The inconvenience, to the government and its officials, of having to take positive action, will be far less than the damage caused to democracy if "the national interest" is to be left to the discretion of some politician, who may have something to hide. The US Freedom of Information Act, is a precedent which should be looked at by CODESA as a starting point and could be adapted, in its scope to suit local conditions.

3. ADVISORY COMMITTEES

I understand that in Germany the Ministers of
State/....

State are advised by Committees in their respective areas of responsibility. These committees are made up of the best brains in the country, whatever the political persuasion of the individuals on committees are. The Minister may reject the committees' advice on any particular matter, but does not do so lightly. This is just another check against the taking of arbitrary decisions by politicians.

4 THE AUDITOR GENERAL

Although the Auditor-General is only responsible to Parliament, his position would be greatly strengthened and, as a civil servant, he would be free from political manipulation, if his report to parliament was given jointly, with a report from an independent team of auditors, made up of respected firms within the auditing profession. This would cost extra but, would be more than adequately compensated, by the prevention of corruption within the Government and Civil Service. I was recently shocked to read that in one of the provinces, less than 50% of the municipalities had balanced their books for the year or submitted their balance sheets to the Province. Some apparently were more than one year in arrears. This should not be allowed. If a Municipality is more than 6 months in arrear, a team of auditors, should immediately be sent in and the management committee suspended until the results of the audit is known.

5 RESERVE BANK

As in the case of the Bundesbank, the Reserve Bank should be completely free from political manipulation and the constitution should incorporate provisions similar to those in the German Constitution on this point.

DEFICIT FINANCING AND MONEY SUPPLY

I believe that deficit financing is wrong in principle and, if resorted to, should be limited to a maximum of 3% of the gross domestic product and then only for short periods when an economy is in a recession/depression. An Act similar to the Gramm Act in the United States, forcing the government to reduce the deficit, if this is not done voluntarily, should be included in the Legislative armoury. This type of Legislation would not be necessary, if deficit financing is covered by the Constitution/Bill of Rights. Similarly, money supply should be controlled, and put within limits, insofar as increases are concerned. In this regard, the money supply should be covered by the Gold and Foreign Exchange Reserves to a certain percentage, say, 25%. This discipline is necessary, to avoid inflation, which impoverishes the Nation, and is a fraud on its citizens.

EXCHANGE CONTROL

This is an iniquitous control brought in by the Finance Minister of the Nazi Regime in Germany in 1930's. It is undemocratic, and should be outlawed in a new Constitution. All arguments for retention of exchange control should be seen for what they are - spurious! A citizen who has paid his taxes, should be allowed to invest his money, wherever he wishes, particularly, as the world is now becoming a global village. The country's currency will initially depreciate but, if exchange control is banned in the Constitution, this would be short term and investment will pour into the country, when investors realise that their investments are safe, and may be repatriated, without any intervention by whatever government of the day is in power. Similarly, citizens of the country will not be inclined to remove their capital as they will be secure, in the knowledge that their money can be moved, without let or hindrance from the government. If we call ourselves a free enterprise economy, we must not only pay lip service to the concept, but show this clearly by protecting it within the Constitution/Bill of Rights.

6. THE CALLING OF REFERENDA

In any truly democratic country, where the will of the people is to be given expression to, the right to call referenda on various issues, local, regional or national, should be encouraged, provided, of course, any person or group, wishing to call a referendum, has sufficient support for the issue to be aired. None of the delegates at CODESA who truly believe in a full democracy, should object to the constitution and bill of rights encompassing this matter.

7. POSTULATES OF JUSTICE : AND RETRO-ACTIVE LEGISLATION

Enclosed is an extract from Wille's Principles of South Africa Law, 8th edition, pages 14, 15 and 16 which clearly set out the qualities required by the rule of positive Law namely, that, all Laws should be :-

- (1) Reasonable
- (2) Impartial
- (3) Certain
- (4) Comprehensive
- (5) Publicly promulgated
- (6) In accordance with public opinion.

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I believe these qualities should be the cornerstone of all legislation in the new South Africa and, in this regard, I particularly refer to the last two sentences of the paragraph headed "Promulgated", to wit, legislation which is made to apply to actions that were committed in the past, and which changes the law, is called retrospective or ex post facto legislation. It is, obviously, unfair and is almost universally condemned. Is the question of retro active legislation on the agenda at CODESA? If not, I suggest that it should be placed thereon and, hopefully, condemned, in line with a democratic constitution.

8. APPOINTMENT OF JUDGES

If the powers of the Executive, Legislative and the Judicial arms of Government are, hopefully, to have equal powers of veto against each other in a new constitution then the appointment of Judges is an important issue and should not be controlled, directly or indirectly, by the Executive and/or Legislative arms alone. At best, I believe that these other arms of government should be given a maximum of a 50% right to the appointment of judges and that the balance should rest with the legal profession as a whole or, possibly, it and other relevant constituencies. In the event of an impasse, the Appellate Division or the Constitutional Court should act as the final arbiter.

CARTELS AND MONOPOLIES

The proliferation of cartels and monopolies in the South African economy exist despite Legislation under the Monopolies Act and the existence of the Competitions Board. These seem to be ineffective, essentially, against the continuance of these cartels and monopolies. They are essentially undemocratic, if not immoral, and have been allowed to develop by virtue of the historical, undemocratic nature of our society. The argument that they need to exist to fund multi-million or multi-billion Rand contracts is not acceptable. If a need for such financial muscle is necessary, this can always be achieved by various big companies forming consortia to part-take in joint ventures. The cartels and monopolies should be broken up in an ordered manner over a period of, say, 10 years. Only in this way will free enterprise be seen to be working, in practice, as well as theory.

CONTROL BOARDS

These bloated bureaucracies have outlived any usefulness they may have had, which is doubtful. They should be disbanded as soon as possible to allow the market to regulate itself. They tend to act as another cost burden to the economy which is unnecessary. If the farmer wants, or needs a marketing arm and a mechanism for smoothing out fluctuations in price, he can formulate his own strategies through co-operatives and the like.

POLICE

A democratic society needs a dedicated, professional and impartial Police Force which is seen to be such by all its people, in order to be respected. To achieve this, high standards and high pay are necessary.

HEALTH, EDUCATION AND HOUSING

In principle, the Government should act merely as a facilitator and catalyst setting down the principles and standards to be met and applied in each of these areas. It is not, or should not be, the function of Government to act as the bonus paterfamilias providing all the peoples needs. The people need to be taught how to catch fish not merely be given th fish. If one is merely given hand outs one never learns and a Nation should have enough pride in itself for each of its citizens to learn to stand on his or her own two feet. Provided this principle is accepted, it may be necessary for the State to assist in providing the initial impetus, for instance, by bearing the bulk of primary education. Parents should, however, be asked to contribute a reasonable amount out of their own pockets in accordance with their means. This would not relieve a citizen of his own self-respect and pride as well as his obligation for his own family. It builds character and can only improve the work and responsibility ethic in a Nation. To say that it is the States responsibility to provide housing, education, health and social welfare for its people is nonsense. The state should merely stand as a back stop to help the really needy and those who cannot, under any circumstances, help themselves. As stated previously, a conditional period may be necessary before this principle of self-help can be fully implemented, because of historical imbalances, but the principle should still be accepted and implemented, in a phased manner.

I have the following additional comments to make on various portfolios.

HOUSING

This should be financed over a number of generations and bonds granted at the finest rate of interest possible, excluding subsidies, and over a period of 50 years through banks, building societies and insurance companies. This finance should be seen as some form of retribution to our fellow citizens, who have been legally deprived from entering the housing market for so many years. By the same token, these communities must bear their responsibility for payment of bond instalments, lights, water and other services.

EDUCATION/....

EDUCATION

In a free enterprise society, the State should merely set the minimum standards and principles to meet overall objectives and leave it, thereafter, to private enterprise to provide, in whatever form, the needs of various communities. This is well illustrated in Nobel Prize winning economist MILTON FRIEDMAN'S BOOK "FREE TO CHOOSE" where he suggests that a voucher system be implemented in American schools, in terms of which, each student is subsidised by the State up to a certain amount, depending on the level of education being sought. These vouchers can be cashed in at any institution, which may charge, either more or less, than the amount of the voucher. The institution then obtains payment for the amount of the vouchers received by it from the State and the parent then pays the difference, if any. The better institutions will then sell education at a premium, and in accordance with their results and facilities, will receive more vouchers than a school which does not meet the standards required by the community. Such a competitive base for an institution, can only be of benefit to the community as a whole. It will also give freedom of choice for different types of education as may be required by parents for their children. In a democracy, it should not be the prerogative of the State, to tell parents how their children should be educated other than by way of setting minimum standards!

AGRICULTURE

It must be accepted that a redistribution of land will have to occur, to correct the imbalances created by an apartheid society. The 1913 and 1936 Land Acts protected the interests of the white man alone and, obviously, these imbalances must be redressed. Some expropriation will be necessary, but farmers should be adequately compensated by the State. Such compensation should, however, take into account the tax breaks received by the farmer in terms of Schedule 1 of the Income Tax Act in setting the level of compensation to be paid. Thereafter, the farmer should be treated as any other businessman whose success or failure depends on his own ability and ingenuity. Farmers have in the past been too protected by the State, at the expense of the other citizens of the country who do not receive the same tax breaks. As a result, farmers have been allowed to build up substantial capital assets which other citizens have not and, although, their income may be relatively small, the capital value of their assets have increased substantially through the years. Any farmer who has not set aside sufficient reserves from good years, to cover bad years, has only himself to blame in most cases, for the dire straits in which he may now find himself. The market place must be the final arbiter of who should be a farmer or who should not.

HEALTH/...

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HEALTH

The emphasis here should be on preventative medicine and not curative medicine. The State should provide basic clinics throughout the country, together with the necessary education on preventative medicine, to change the whole culture of health care. Thought should be given to creating incentives for people to encourage them to lead healthy life styles. A National Health Scheme for curative medicine should be based on no claim bonuses being granted to those who do not utilise or abuse the system.

REGIONAL AND LOCAL GOVERNMENT

These tiers of Government should be obliged to run their levels of Government, incorporating the same principles, as outlined above for National Government within the framework of the Constitution/Bill of Rights.

LANGUAGE

I believe that the best way of ensuring National identity, cohesion and communication within a Nation is through a National language. The only language which would seem to fit the bill from a practical point of view would be English. If all the people speak one language, they can identify with each other more easily. The United States of America is an example of peoples of diverse Nations coming together and being unified through the use of one language. This in no way means that a particular ethnic or cultural group should not be proud of and continue to speak their own language within their own communities but it is impractical to expect the Nation as a whole to speak a number of languages.

Naturally, I would expect that in a democracy, a justiciable Bill of Rights would be a sine qua non, together with the division of powers as outlined above in national, regional and local politics. I would be pleased to hear that the above matters, if not specifically on the agenda for the debate within working group three, should be placed thereon. If, however, you do not feel that the issues raised are of sufficient importance to warrant discussion, would you kindly let me know. I would be happy to appear before your working group, if required, to expand on the themes outlined above.

I truly believe that a Constitution and a justiciable Bill of Rights, incorporating all the checks and balances set out above, would be something of which all South Africans

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could be truly proud and, would insure that the politicians and servants of the state can truly say "I serve". Regrettably, human nature still seems to be guided by greed, fear and power, and as long as this is the case, the checks and balances, set out herein, will be necessary to insure evenhandedness down to the weakest member of society. If such a constitution can be agreed to at CODESA, I, for one, would be happy to accept my new destiny with pride and to serve under any President, no matter what his race, colour or creed. I would then push for elections to be held as soon as possible.

I do not think that it would be in the interest of the people as a whole for a transitional government to be installed before agreement, in principle, has been reached on what kind of democracy every one is talking about.

I shall be glad if you would confirm that my letter will be brought to the attention of all the interested parties within working group three and look forward to hearing from you.

Yours faithfully



M. A. McLOUGHLIN

encl:

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M.A. McLOUGHLIN

Attorney, Notary & Conveyancer

Michael Arthur McLoughlin

14

15 Seymour Ave
Parktown 2193
Johannesburg
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17 May 1992

The Chairman
Group 1 (Constitutional Affairs)
CODESA
P O BOX 307
ISANDO
1600

Dear Sir,

re : CONSTITUTION AND BILL OF RIGHTS

Further to my letters of 30th March 1992 and 15th April 1992, I enclose herewith an extracts from the Star of the 3rd May 1992 regarding Anti-Trust Laws which, I feel, should be addressed by the appropriate working group dealing with Economic Affairs and Finance. If we are to preserve capitalism in the new South Africa then it is essential that Anti-Trust Laws similar to those in the United States of America are introduced as soon as possible. Failure to do so will most certainly strengthen the arguments of those who wished to have a controlled economy which will be equally disastrous for South Africa. Kindly confirm that my letter will be distributed amongst all the relevant constituencies dealing with Economic Affairs and Finance. When replying, would you also let me have your reply to my letter of the 15th April 1992 receipt of which was acknowledged by you on the 23rd April 1992.

I look forward to hearing from you.

Yours faithfully



M A McLOUGHLIN

Date Rec'd : 21/5/92.....
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ROBIN MCGREGOR ... blames lack of competition.

Anti-trust laws will help fight inflation

THE introduction of simple, effective anti-trust legislation is vital to halt the snowball of increasing prices, says Robin McGregor, managing director of McGregor's Online.

He targets the lack of competition as one of the basic causes of the country's high inflation.

Mr McGregor says South Africa, effectively, has no competition control. He points to the recent ho-siery debacle where the Competitions Board ruled against a takeover of Arwa by FSI which already controlled Burhose — the merger of which gave FSI 99 percent of the market — and was subsequently overruled by Government.

"The Reserve Bank can keep in-

terest rates high, but until objective anti-trust laws are introduced with no political interference, inflation will not be significantly reduced."

Mr McGregor says anti-trust laws are not necessarily the ogre they are believed to be, and are the only State intervention needed in a free market economy. "By selling off their down-the-line subsidiaries to entrepreneurs, conglomerates will actually be able to buy their supplies in a more competitive market than from their present bureaucratic and inefficient subsidiaries."

He calls upon SA Mutual and Sanlam to finance entrepreneurial buyouts: "Not only will this encour-

age growth and employment, it will also give them better investments for their policy holders."

McGregor's Online has proposed the introduction of the Herfindahl-Hirschman Index (HHI) to increase competition and decrease inflation.

"The HHI measures the degree of concentration in an industry in an easy and inexpensive way; the sum of the squares of the market shares of all participants in an industry. Should a merger result in that sum exceeding 2 500, the merger is disallowed — should the sum not be greater than 1 000, the merger is allowed.

"Should it fall between 1 000 and 1 800, the Competition Board would have the option to conduct an in-

vestigation and should it be between 1 800 and 2 500, consent from the board is mandatory."

Mr McGregor says with the Rainbow takeover of Premier's broiler operation, the HHI in the broiler industry would be approximately 3 600. "It simply would not be allowed, with Rainbow's market share now up to 55 percent, it can unquestionably influence prices."

Mr McGregor says adding to the dangers of this particular merger is the fact that Rainbow now also owns 50 percent of Premier's feed division and has management control. "This, together with their own feed requirements previously supplied by Tiger Oats, will give them an even higher share."

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The Star¹⁶

Established 1887

South Africa's largest daily newspaper

Food price 'sabotage'

FOOD prices are rising at an alarming rate, having increased by 29 percent, or nearly double the average inflation rate, over the past year. The steep rise occurs in the midst of deepening poverty, widespread hunger and prolonged recession. Taking account of these factors, Nick Barnardt, of Amalgamated Banks, has said the sharp increase in food prices "borders on national economic sabotage".

It may be worse than that. The spectre of food riots, once a phenomenon confined to "corrupt dictatorships", cannot be dismissed as unlikely in the present volatile climate. If food prices continue to rise at their present rate, South Africa could reap a bitter harvest.

Mr Barnardt has called on producers and retailers of food to co-operate, in the national interest, to drastically lower food price inflation in the next six months. Pleas for co-operation, however eloquently voiced, will not help. The causes have got to be identified, attacked and, where possible, eliminated.

Various explanations have been offered. One theory is that the basket of food items on which price movements are calculated contains too much red meat, an expensive and fast-rising item. Another is that a statistical error may have crept into official calculations, a not unknown occurrence.

A third has been identified by Robin McGregor of McGregor's Online: lack of competition and the existence of public-sector "boards of control" and private-sector oligopolies. Mr McGregor has found that where four suppliers or fewer produce more than 75 percent of a commodity, its price increases at more than the average inflation rate.

That situation pertains to the production of most staple foods, including mealie meal, bread and meat. The Competition Board seems unable or unwilling to act against boards of control, near-monopolies and suspected cartels. The time has come to consider seriously the introduction of anti-trust laws, the existence of which is not antithetical to competitive capitalism but a necessary condition for it.

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M.A. McLOUGHLIN

Attorney, Notary & Conveyancer

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15 April 1992

The Chairman
Group 3 (Constitutional Affairs)
CODESA
P O Box 307
ISANDO
1600

Dear Sir,

re : CONSTITUTION AND BILL OF RIGHTS

With further reference to the above matter and my letter of the 30th March 1992, would you please inform me why the deliberations at CODESA seem to be shrouded in secrecy, and why the Media and the public are not allowed to report on, or observe, respectively, the deliberations. It would seem that, in an open democracy, the people should be informed of the deliberations towards achieving a democratic government at each step of the proceedings. I do not believe that any of the parties at CODESA have been given carte blanche to decide for their respective constituencies on the final format of any proposed constitution. Accordingly, unless the deliberations are aired publicly all along the way, the people will be merely presented with a fait accompli on which they will be expected to vote without having had the opportunity of providing input into those deliberations at each stage.

I look forward to hearing from you in this regard.

Yours faithfully


M A McLOUGHLIN

Date Rec'd : 23/4/92.....
Date Ackn : 24/4/92.....
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