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MESSAGE:

ANNEXURE A TO FOLLOW ON
13 OCTOBER 1993

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1993-10-12

The Chairman
Technical Committee on Constitutional Issues
Multiparty Negotiating Forum
World Trade Centre
P O Box 307
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Dear Sir

MEMORANDUM BY THE OMBUDSMAN OF THE REPUBLIC OF SOUTH AFRICA ON THE FOURTEENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL

---Annexed please find my memorandum on the Fourteenth Report of 29 September 1993 for your consideration. I have taken the liberty of preparing the memorandum to point out certain practical implications the draft text would have.

I would gladly discuss my comments with messrs Moseneke and Ngoepe, should you feel it appropriate. Aspects raised in paragraphs 2 and 6 of the memorandum might well need further discussion.

With kind regards

MR JUSTICE P J VAN DER WALT
OMBUDSMAN

14/mvdm/ms

MEMORANDUM BY THE OMBUDSMAN OF THE REPUBLIC OF SOUTH AFRICA ON THE FOURTEENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

1. To assist the Committee I have prepared this memorandum, containing comments on the practical implications of the draft text for Chapter 8 of the Constitution attached as an addendum to the Fourteenth Report.

2. Clause 1(3)

2.1 Clause 1(3) makes it possible to appoint as Ombudsman someone who has no legal background. I have serious reservations whether such an Ombudsman would be able to do justice to the office, since legal knowledge and experience have proved to be indispensable in my Office. The ideal person would be someone with both legal and public administration background. Public administration would include public finance, but a person with knowledge only of public finance would do better in the Treasury. Paragraph (b) of clause 1(3) seems to be somewhat strict. One might thereby inhibit the candidature of someone with both legal and public administration experience. I would suggest that subparagraphs (iii) and (iv) be added to read something like:

"(iii) been concerned in the application of the law; or

(iv) been concerned in the application of the law and with public administration."

Clause (3)(c) could then be deleted.

3. Clause 1(4)

3.1 An Ombudsman holding office for a fixed period is not commensurate with security of tenure. It opens the door for lobbying when a term in office runs out, and for popular instead of correct decisions to be taken, which will affect the independence and compromise the stature of the Office. It would also not be the answer to limit an Ombudsman to one term in office only, since, if this proves to be a concern, he would then have no motivation to keep up the good work, so to speak. One would also, by limiting re-appointment, have to forbear the experience of an incumbent who has shown him- or herself to be a particularly successful Ombudsman.

4. Clause 2(3)

4.1 The present formulation allows for the argument that the Constitution, by prohibiting improper interference, by implication allows other interference by Cabinet or other organs of the State. The Constitution would thus compromise the independence of the Office. The Ombudsman is there to investigate members of the Cabinet, as has happened in one instance, and the organs of State. Under no circumstances should the Cabinet or any organ of State be put in a position to interfere with the Ombudsman, or to debate whether interference was improper or not.

4.2 The subclause could merely read:

"2.(3) No person shall interfere with the Ombudsman in the exercise of his or her powers, duties and functions."

4.3 This formulation would not curtail the position of Parliament at all, since clause 2(1) makes the Ombudsman subject to the law, which will include the Ombudsman Act in which Parliament sets out the Ombudsman's role towards Parliament.

4.4 Another possibility would be to substitute the words "shall endeavour to influence" for the present words "shall improperly interfere" in clause 2(3).

5. Clause 2(4)

5.1 It might be advisable to formulate clause 2(4) as follows:

"2.(4) All organs of the State shall accord such assistance as may be required by the Ombudsman for the protection of the independence, impartiality and dignity, and for the effectiveness of the Ombudsman in the execution of his or her functions, powers and duties".

5.2 By changing the words "impartiality, dignity and effectiveness" to the words "impartiality and dignity, and for the effectiveness", it is made quite clear that organs of the State must not only assist in the protection of the Ombudsman, but also to get

the work done. The Ombudsman presently has the authority under section 5(7) of the Ombudsman Act to request any person from an institution over which he or she has jurisdiction to assist him or her, under his or her supervision and control, in the performance of his or her functions. This authority is extensively used, works very well, and is quite indispensable, since doing away with it will necessitate the appointment of many more personnel in my Office. The formulation suggested above slots in, I submit, with the said section 5(7).

5.3 It should be considered whether the terminology "organ of the state" is wide enough to include all institutions falling within the Ombudsman's jurisdiction - see paragraph 6.1 below for more detail.

5.4 By stipulating in clause 2(4) that the Ombudsman is the one who would require the assistance, as suggested in the formulation given above, it becomes unnecessary to refer to "reasonably", since the Ombudsman would always be a reasonable man. By leaving the qualification "reasonably" out, one will not create the situation where an organ of State goes into debate with the Ombudsman on whether his request is reasonable or not. Such a debate will compromise the stature of the Office and could effectively delay or even interfere with an investigation.

6. <u>Clause 3(1)</u>

6.1 The jurisdiction of the Ombudsman should include within its

ambit all institutions receiving public funds. Consideration should be given as to whether the present terminology of clause 3(1) is sufficiently wide to achieve this. To facilitate this, I attach a list of the present area of my jurisdiction, marked "annexure A".

6.2 It will be noted from this list that the corporations like Telkom, Transnet and its affiliates, South African Post Office, South African Airways, Abakor, Aventura (previously Overvaal), to name a few, no longer fall within the Ombudsman's jurisdiction, though the State remains a major shareholder and public monies a major component. Many complaints are received by this Office from the public regarding some of these corporations. Thought should be given to the position of these corporations.

6.3 I note from clause 3(1)(a) that an act or omission leading to improper prejudice are not included in the draft. This is a pity, since the concept of "improper prejudice" has proven to be invaluable in practice. My assistant prepared a draft submission at request of the Republic of South Africa Government negotiators for the latter's use in preparing a submission on clause 3 to your Committee. I attach a copy of the draft submission hereto, marked "annexure B". I go along with the suggested formulation of clause 3(1)(a)(ii) and the reasoning behind the formulation set out in annexure B.

6.4 I furthermore note that clause 3(1)(c)(ii) follows the wording

of the Ombudsman Act, but for obvious reasons left out the reference to section 4(1)(d) of that Act. However, this inadvertently leads to all powers given in clause 3(1)(c)(ii) referring back to maladministration only, and not to the other functions set out in clause 3(1). This aspect is also dealt with in annexure B. I once again go along with the formulation and reasoning given there.

7. Clause 3(2)

7.1 Making the powers of the Ombudsman subject to the "law of privilege" puts it too widely and can in fact paralyse the Office. "Law of privilege" seems to be wide enough and vague enough to include what is referred to as public privilege or state privilege (see Schmidt Bewysreg 3 rd ed p537 et seqq). Public privilege is aimed at protecting public interests, but so does the Ombudsman. To allow organs of the State to hide behind such privilege in the name of public interest would keep the Ombudsman from investigating possible corruption and maladministration at its very source and indeed in this way harm the public interest. No area of State administration should be excluded from investigation by the Ombudsman.

7.2 At present the Ombudsman often investigates in areas classified as secret by the State. The interpretation of the present Act militates against public privilege being raised, and the State has never tried to do so.

7.3 The privilege which does play a role here, is the one protecting witnesses against self-incrimination. Thought should be given to whether even this privilege should be retained in view of the fact that clause 3(3) does not make the Ombudsman or his staff competent or compellable to answer questions in court. Obviously the privilege should be retained, were the Ombudsman to be a competent but not compellable witness.

7.4 If it is decided to retain the privilege against self-incrimination I suggest that the formulation of clause 3(2) be changed to read:

> "subject only to the provisions of this Constitution, and the privilege against self-incrimination,".

8. <u>Clause 3(3)</u>

The formulation of clause 3(3) (and of section 7B of the Ombudsman Act, for that matter) raises concern whether a member of the staff shall be competent and compellable where he or she had access to information, but not in the course of an investigation. Take for example the clerk filing files of completed investigations in the Ombudsman's archives.

8.2 I submit that the following formulation would circumvent this problem:

"3.(3) ... in connection with any information which in the

course of his or her investigation, or as a result of an investigation or in the course of his or her employment in the Office of the Ombudsman, has come to his or her knowledge."

8.3 If it were to happen that clause 3(3) be amended to allow the Ombudsman and his staff to be competent, though not compellable witnesses, care should be taken that the formulation does not lead to the situation where a member of the Ombudsman's staff could decide to testify against the wishes of the Ombudsman.

9. Clause 3(4)

9.1 There seems to be a popular, but incorrect, notion that recourse to the Ombudsman suspends court proceedings. It may be advisable to clarify the position. I suggest that the insertion of "suspend" in clause 3(4) would do this. The clause would then read:

"3(4) ... shall not oust or suspend the jurisdiction of the Court to hear any matter or cause whatsoever."

10. Clause 5(1)

10.1 I prefer the first model set out in the report. However, should the second model be chosen, I submit it to be advisable to add to clause 5(1) the words:

" , which Ombudsman shall perform his powers, functions and duties in consultation with the Ombudsman for the Republic".

10.2 My views on the need for consultation are known to adv Moseneke and adv Ngoepe.

10.3 I believe that the argument has been raised that Ombudsmen tend to flock together, and that one will find that informal consultation takes place without the need for formalising such consultation. May I respectfully point out that consultation taking place at gatherings of Ombudsmen never goes further than liaison regarding philosophies and maybe procedure. What is needed here, is consultation on policy directions in the different offices, which informal consultation will not attain and which is highly desirable, for instance, in a uniform interpretation of clauses in a Bill of Rights.

MR JUSTICE P J VAN DER WALT
OMBUDSMAN

14/mvdm/ms

ANNEXURE B

SUBMISSION OF THE RSA GOVERNMENT ON CLAUSE 3 OF THE DRAFT TEXT: FOURTEENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL

1. It is submitted that subparagraph (ii) of clause 3(1)(a) be amended to read as follows:

> "(ii) act or omission by a person performing a public function prejudicing any person in an improper manner, which shall include, but not be limited to, prejudice resulting from -
>
> (aa) abuse or unjustifiable exercise of power; or
>
> (bb) unfair, capricious or discourteous conduct; or
>
> (cc) undue delay;
>
> by the person performing the public function; or"

2. <u>Motivation for 1</u>

2.1 The concept of "improper prejudice" has evolved over the past 14 years from experience gained in practice. It became clear from certain complaints to the Advocate-General's Office (which could not deal with these complaints) that there was a need for an ombudsman who could deal with conduct leading to improper prejudice.

2.2 The concept "improper prejudice" covers all matters an ombudsman in the classical sense of the word usually deals with. This is verified by the experience of the past two years in the Ombudsman's Office.

2.3 Since the inception of the Ombudsman's Office two years ago, the concept "improper prejudice" has consistently shown itself to be a versatile concept within which all complaints to the Ombudsman can be dealt with, including complaints in the field of human rights.

2.4 Subparagraph (ii) is extremely important since it is the only one dealing with the classical Ombudsman's functions. Of all cases presently dealt with in the Ombudsman's Office, an estimated 99% fall within the ambit of the classical Ombudsman's functions. By making use of the tried, all-encompassing concept of "improper prejudice" one will not inadvertently curtail the Ombudsman's powers to the detriment of the public, which is quite possible when listing more specific concepts as the draft text presently does. The generic concept "improper prejudice" will also allow the Office's jurisdiction to evolve and grow as the need arises and new constitutional developments take place, without necessitating legislative amendments.

2.5 By combining the concept "improper prejudice" with the present wording of the draft text, it makes the subparagraph more readily understandable to the layperson, even though "an act or omission prejudicing any person in an improper manner" will include "abuse or unjustifiable exercise of power or unfair, capricious, discourteous conduct or undue delay" even without spelling it out.

2.6 It is not unknown that an act of State may lead to unfairness towards the individual in the interest of the community at large Expropriation of property, with sentimental value to the individual, for necessary development could serve as an example. In such circumstances the objective concept "improper" has proved to be more useful than the somewhat subjective "unfair" to enable the Ombudsman to reach the correct conclusion in any case. Combining "unfair" with "improper" as suggested in the amendment above, solves the problem. Furthermore laypersons tend to accept the explanation for the decision against them when it is based on the argument that the State did not act improperly, even though they still regard it as unfair. It will be impossible in these cases to explain the Ombudsman's decision to such laypersons on the basis that the State did not act unfairly in the circumstances.

2.7 A concept like "discourteous conduct" should not be left open-ended. For example, a heated word brought on by wilful unacceptable behaviour on a complainant's part will thus also have to be investigated by the Ombudsman. Such cases are more appropriately dealt with by the chief of the public official concerned

which will prevent the Ombudsman's Office getting bogged down by irrelevant squabbles. However, were discourteous conduct to lead to "improper prejudice" it would be a matter the Ombudsman should look into. It should be pointed out that "improper prejudice" can be found in relatively minor circumstance, for example where discourteous conduct hurts the complainant's feelings or is indicative of a racial slur, or where a complainant is detrimentally affected by a delay in answering his correspondence.

3. It is further submitted that paragraph (ii) of clause 3(i)(c) should be amended to read as follows:

> "(ii) if he or she deems it advisable, to refer any matter to an appropriate public body or authority or to make an appropriate recommendation regarding the redress of the prejudice resulting from any matter or make any other recommendation he or she deems expedient."

4. Motivation for 2

4.1 The Ombudsman should have the power to refer any matter within his or her jurisdiction to an appropriate authority, as well as the power to make recommendations on any matter he or she has jurisdiction to deal with.

4.2 Experience in the Ombudsman's Office has shown that it is through making recommendations that the Ombudsman is able to rectify most, if not all, situations detrimental to the public at

large or to a particular individual. The making of interim recommendations prior to finally reporting to Parlement, as well as recommendations contained in the report to Parlement itself, are in fact the main tools of the classical Ombudsman's trade.

4.3 Such recommendations are made in practice not only in cases of maladministration, but also in cases dealt with by subparagraph (ii), and even subparagraphs (iii) and (iv), of clause 3(1)(a).

4.4 The present subparagraph 3(1)(c)(ii) is too restrictive where it allows recommendations to be made to the affected body or authority only. Experience in the Ombudsman's Office has taught that recommendations to another body or authority than the one affected, or to Parlement, are sometimes needed to rectify a situation. An example would be where Department A is the transgressor, but legislation administered by Department B provides the only way to redress resulting prejudice.

4.5 Similarly it is sometimes necessary to refer a matter to a different authority than the one affected, for example where a matter is referred to the Auditor-General.

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