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OMBUDSMAN

REPUBLIEK VAN SUID-AFRIKA



REPUBLIC OF SOUTH AFRICA

Tel. (012) 322 2916
Fax (012) 322 5093

Verwysing
Reference

Privaatsak • Private Bag X677
Pretoria 0001

228 Visagie Str. 228
Pretoria

1993-11-15

The Chairman
Technical Committee on Constitutional Issues
Multiparty Negotiating Forum
World Trade Centre
P O Box 307
ISANDO
1600

Dear Sir

MEMORANDUM BY THE OMBUDSMAN OF THE REPUBLIC OF SOUTH AFRICA ON CHAPTER 8 OF THE DRAFT INTERIM CONSTITUTION FOLLOWING UPON THE 23RD REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES DATED 12 NOVEMBER 1993

Annexed please find my memorandum on Chapter 8 for your consideration. In the memorandum certain issues as yet not finally or adequately resolved, are addressed.

May I express my appreciation for the manner in which previous aspects raised by this office have been addressed and accommodated in your various interim reports and in the deliberations of the Negotiating Council up to the present.

With kind regards

A handwritten signature in black ink, appearing to read 'P. J. van der Walt'.

MR JUSTICE P J VAN DER WALT
OMBUDSMAN

mb/memo2

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1. CLAUSE 1

1.1 The name of the office remains an issue. It has varied from the former Advocate-General to Ombudsman to Ombud to Public Protector.

The office is the buffer between bureaucracy and citizen, favouring neither and protecting both from bureaucratic excesses or unjust criticism.

"Public Protector" places a subjective emphasis on one of the sides to the exclusion of the other. Public Protector is not readily capable of meaningful translation.

May I suggest that clause 1(1) be substituted by the following:

"1(1) There shall be an office of the National Ombudsman for the Republic to which shall be appointed a National Ombudsman who shall have the functions, powers and duties prescribed by this constitution and by any other law. By choice and preference of a particular incumbent of the office he or she may be known as 'Ombudsman', 'Ombudswoman' or 'Ombud'."

1.2 In this manner the various preferences can be accommodated but the name of the constitutional office conforms to that which is internationally known and accepted. A name and function which has, moreover, been widely publicised and utilized by some 7 000 or more complainants in 1992 only at the various Ombudsman Offices in the Southern African region. In my office alone over the past two years there have been some 3 000 written complaints and probably as many telephonic inquiries.

1.3 By using 'National Ombudsman' the office is distinguished from the Provincial Ombudsman and both from the plethora of other similar functions.

1.4 The name 'Ombudsman' either 'National' or 'Provincial' where applicable, is recommended for use throughout Chapter 8.

2. CLAUSE 2

2.1 In Clause 2.3 the word 'improperly' should be deleted. Retained, it would imply 'proper' interference as being permissible. 'Interfere' as term by itself connotes impropriety. There should be no interference at all in the exercise of the functions, powers and duties of the Ombudsman.

3. CLAUSE 3

3.1 In Sub-Clause 3(1)(a)(v) I would suggest that the word "other" be deleted. Such deletion would retain "unlawful or improper prejudice" as a useful catch-all phrase while in no way derogating from the specific instances set out in the other sub-clauses.

3.2 In Sub-Clause 3(1)(c)(ii) I would suggest that the wording after the word 'prejudice' in the pen-ultimate line of the sub-clause should read:

"..... resulting therefrom or make any other appropriate recommendations he or she deems expedient to the affected or any other public body or authority."

By this amendment the powers of recommendation are not limited to the affected institution only. For example a recommendation that remedial action be taken by the Human Rights Commission would be possible.

3.3 In Sub-Clause 3(2) the vague 'Law of privilege' is used. May I suggest that the words be deleted. If openness is to be achieved nothing should be permitted to frustrate an investigation of the Ombudsman.

4. CLAUSE 5

4.1 in respect of Sub-Clause 5.1 I repeat my recommendation that 'Provincial Ombudsman' be the name of the office and that the incumbent should have a preferential choice of appellation.

4.2 I would suggest that further Sub-Clauses 5(4) and 5(5) be added with the following wording:

"5(4) The functions, powers and duties of the Provincial Ombudsman shall be those set out in Clause 3 above in respect of the National Ombudsman, save that they shall be exercised only in respect of those institutions and persons falling under the sole jurisdiction of the provincial legislature.

5(5) Such functions, powers and duties are to be exercised in consultation and in conjunction with the National Ombudsman who will have concurrent jurisdiction in the region concerned."

P. J. van der Walt 15-11-93

MR JUSTICE P J VAN DER WALT
OMBUDSMAN

mb/memo