

[2/1/6/14]



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee
FROM: Executive Director
Date: 3 May 1996
RE: Prosecuting authority

We enclose for your consideration a document from the Office of the Attorney-General.

**H. EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

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KANTOOR VAN DIE
PROKUREUR-GENERAAL



OFFICE OF THE
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Verwysing
Reference

1/4/3/1

Mr Hassan Ebrahim
Director-General : Constitutional
Assembly
P O Box 15
CAPE TOWN
8000

Private Bag X300
PRETORIA 0001
2 May 1996

Dear Mr Ebrahim

DELIBERATIONS : PROSECUTING AUTHORITY

1. I have been referred to you by Mr Justice **ARTHUR CHASKALSON**, President of the Constitutional Court.
2. As a result of a conversation with Mr **C RAMAPHOSA** in which he indicated the desirability of consulting the Attorneys-General on the above subject, we have been waiting to be consulted. In a further telephonic conversation, he intimated that he would remind the relevant committee of the need to consult us.
3. It is appreciated that your Assembly has been extremely busy. Yet the subject-matter concerns absolutely vital principles.
4. It must be understood that we as Attorneys-General desire no more than to assist your body in drafting a workable dispensation. We firmly believe that our considerable practical experience will be valuable, just as the experience of the judiciary led to it being consulted in its field.

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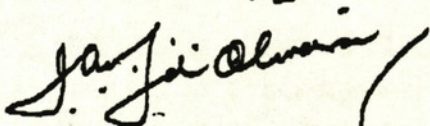
5. My colleague, adv **A P DE VRIES S C** (Witwatersrand), and I took the initiative and discussed the subject with Mr **DULLAH OMAR**, Minister of Justice on Monday 29 April 1996. We believe that he has seen the merits of our proposal.

--- 6. Enclosed, is a copy of the ensuing correspondence with the Minister.

7. You are very earnestly requested, even at thus late stage, please to bring the matter to the attention of all the parties to the deliberations as a matter of urgency.

8. It will be noted from the accompanying correspondence that we believe that the democratic desire for overarching co-ordination and policy control can successfully be reconciled with the legal principle of professional independence. The latter principle was affirmed as essential in the Namibian Supreme Court (in a judgment to which **MAHOMED D P** was a party).

Yours faithfully _



J A van S d'Oliveira | S C
ATTORNEY-GENERAL:
TRANSVAAL

/tp

KANTOOR VAN DIE
PROKUREUR-GENERAAL



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Reference

1/4/3/1

The Honourable D Omar
Minister of Justice
Private Bag X276
PRETORIA
0001

Private Bag X300
PRETORIA 0001
29 April 1996

Dear Minister Omar

CONSTITUTIONAL ASSEMBLY : DELIBERATIONS ON THE PROSECUTING AUTHORITY

1. With reference to your meeting of Monday morning 29 April 1996 with the undersigned, we hereby submit written proposals for urgent consideration.
2. It is confirmed that you desire a succinct formulation of the core relationship between the National Director of Public Prosecutions and the Attorneys-General for purposes of inclusion in the new constitution, whilst the details concerning the prosecuting authority can and will be more fully fleshed out in national legislation at a later stage.
3. As stated to you, we have endeavoured to assess (albeit indirectly) the desires of the majority party in the GNU. We believe that our proposal will accommodate the objectives without derogating from the essential principle of independence (cf the Namibia Attorney-General case and the several modern constitutions which uphold independence).
 - 3.1 We are ad idem that the prosecution be structured nationally in such a way as to achieve co-ordination, control and accountability.

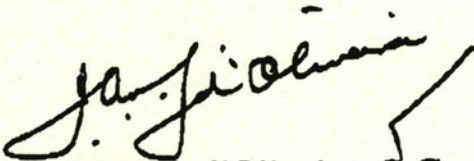
- 2 -

- 3.2 The objective to allocate policy matters to a central point, causes no problem. There is, however, a need to ensure that the "central point" is well advised of the situation in each physical area. Hence the need for consultation with the Attorneys-General in the determination of policy.
- 3.3 The objective to enable some form of "review" of decisions not to prosecute, can be achieved as follows:
- 3.3.1 The National entity assumes the present powers of the Minister to call for information or report on a matter and the reasons for any decision.
- 3.3.2 The National entity, whilst in itself having no original authority to institute prosecutions, may - in cases of a refusal to prosecute - call for a certificate to that effect and itself then institute a prosecution. (This does not need to derogate from the traditional private prosecutions in terms of a certificate of nolle prosequi).
- 3.4 It is confirmed that the principle of the original authority or independence of an Attorney-General is essential to maintain the workability and full confidence of the public and the legal system, in the independence and impartiality of the prosecution system. (Adv DE VRIES S C did illustrate the great difficulties of his office not having had a person with full authority in charge). It also supplies the necessary checks and balances to the National entity who will be in a powerful, unelected position. (Cf the attached copy of a letter by Adv DE VRIES S C to Mr C RAMAPHOSA M P).
4. As stated to you, the National entity should also be the co-ordinating instance for all constitutional matters/litigation.
5. Enclosed, please find our considered proposal for a succinct formulation for purposes of the new constitution.

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We believe that it will reconcile the objectives of the GNU with the sound traditional and international principle of independence of the judicial process. We believe further that it will find acceptance by the various role-players, allay anxieties and, very important, enjoy the confidence of the Division : Attorneys-General.

Yours faithfully



J A van S d'Oliveira S C
ATTORNEY-GENERAL:
TRANSVAAL



A P de Vries S C
ATTORNEY-GENERAL:
WITWATERSRAND

/tp

**KANTOOR VAN DIE
PROKUREUR-GENERAAL
Witwatersrandse Plaaslike Afdeling**

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24 April 1996

Mr C Ramaphosa MP
Chairperson : Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Privatek XB/Private Bag XB
JOHANNESBURG
2000

Verwysing/Reference
3/2/3
Mr Twoco
332 8389

BY URGENT FAX : 021-461 9461

Dear Sir

NATIONAL ATTORNEY-GENERAL

While I fully support the concept of a single national prosecuting authority, I have now received a copy of section 169 of the Fifth Refined Working Draft of the final Constitution and respectfully draw your attention to the following :

- 1 On 29 May 1995, I submitted a Memorandum in my personal capacity to Theme Committee 5 in Cape Town, regarding the position of the prosecution. During the same hearing, chaired by Mr Willie Hofmeyr MP, NADEL also made submissions largely overlapping with mine.
- 2 In my submission I took the view that the single authority should be named the Director of Public Prosecutions. The reasons therefore are threefold :
 - 2.1 The term "National Attorney-General" would be a misnomer in view of our common law as this official's task would differ markedly from that of an Attorney-General.
 - 2.2 The term "National Attorney-General" has an emotive connotation with the general public.
 - 2.3 The official would in effect be the Director of the

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prosecuting authority, but should not himself have any prosecuting authority.

NADEL had no objections to this.

- 3 Section 169(5)(d) is in direct contrast with my submission at the hearing that the Director of Public Prosecutions should not have the authority to interfere with a decision by an Attorney-General to prosecute or not to prosecute. This view was in fact fully supported by NADEL. Any power to interfere carries the inherent risk of the manipulation of criminal prosecutions for purposes other than meeting the ends of justice.

Section 169, as it now stands, gives a delegated power to the Attorneys-General to institute prosecutions. The original power is vested in the National Attorney-General. This situation is, in my respectful view, unworkable. Attorneys-General should have a strong measure of independence in making decisions, as it is this independence that ensures the exercise of their functions without fear, favour or prejudice. This can only be attained if the Attorneys-General are vested with original powers.

Attached hereto please find some sections from my memorandum, as well as an organogram which may be of assistance in the ongoing negotiations.

I fully support the request of my colleague Dr d'Oliveira in his fax dated 18 April 1996 for a meeting between yourself and the corps of Attorneys-General.

Yours faithfully

A P DE VRIES SC
ATTORNEY-GENERAL
WITWATERSRAND LOCAL DIVISION

C:\BRIEF\BRIEF.003 \MDEL

PROSECUTING AUTHORITY

1. The national prosecuting authority in the Republic, structured in terms of national legislation, consists of:
 - (a) a national Director of Public Prosecutions¹ appointed by the President on the advice of the responsible Minister²; ,
 - (b) An Attorney-General³ appointed by the State President, for each area of jurisdiction as determined by national legislation, and
 - (c) such other professional and support staff to enable the prosecuting authority to fulfil its function(s).

2. The national Director of Public Prosecutions shall be responsible for the prosecuting authority and for
 - (a) co-ordinating the activities of the Attorneys-General, calling for and receiving such reports as provided for by national legislation⁴;
 - (b) determining prosecuting policy in consultation with the Attorneys-General⁵;
 - (c) all matters referred to the Constitutional Court⁶; and
 - (d) such matters as determined by national legislation or by the responsible Minister in consultation with the Attorneys-General.

- 3(a) The authority to institute criminal prosecutions for and on behalf of the State and to perform all functions incidental thereto, shall vest in the Attorney-General of each area of jurisdiction⁷.

- (b) The Attorney-General shall exercise his/her powers and functions without fear, favour or prejudice, independently of the government and in accordance with prosecuting policy as determined⁸.

4. Whenever an Attorney-General has declined to prosecute in a matter the Director of Public Prosecutions may require from such Attorney-General an certificate to that effect and may then himself institute a prosecution at the public instance⁹.

EXPLANATORY NOTES

GENERAL

On an issue as serious as this where so much authority is vested in one appointed functionary not subject to the electorate, accountability plays a largely increased role and various checks and balances have to be built in; power does tend to corrupt. This has to be balanced, but yet ensuring the independence of the prosecution and the credibility of the judicial system.

1. Except as mentioned in Section 4, the national entity has no power to institute a prosecution on behalf of the State. It may tend to lead to confusion to name him an Attorney-General as his role is largely controlling, directing and supporting of the prosecution (See also note 3).
2. The national entity should assist the Minister and ensure some degree of accountability by the Attorneys-General. He would principally deal with circumstances different to prosecutions *simpliciter* such as extraditions, legal opinions and representivity of staff. As such he should be appointed for a limited period on behalf of the Minister to carry out the intentions of the Government of the day. Conversely, the Attorney-General's independence is enshrined by his appointment by the President in order to even prosecute members of Parliament.
3. In this country the appellation of the person responsible for instituting a prosecution has traditionally been Attorney-General and follows an even longer British tradition. There is no need to change this merely for the sake of change. If the distinction between Attorney-General (who prosecutes) and Director of Public Prosecutions (who directs) is clearly drawn it becomes even more obvious that a difference in nomenclature is necessary.
4. This function is at present fulfilled by the Minister of Justice but should be in the hands of the Director of Public Prosecutions.
5. In this manner some measure of accountability to the executive authority is exercised over the Attorneys-General.

- 2 -

6. This ensures that the Government of the day can establish a policy regarding prosecutions and arguing matters before the Constitutional Court as the sole representative of the Government. At present the various Attorneys-General do not have the same argument and Government counsel frequently appear in opposition to the Attorney-General's argument. See in this regard the remarks of **CHASKELSON P** in the case of The State versus T Makwaynane and M Mchunu : "The Attorney-General of the Witwatersrand, whose office is independent of the Government..."
(underlining supplied)
7. This is of the utmost importance. If the national entity has the authority to institute prosecutions, he then has to delegate this authority to all other prosecutors, including the various Attorneys-General. From a practical point of view this is a massive task, unfeasible, and will lead to a drop in standards. The Attorney-General will lose his power to delegate according to the principle that delegated power cannot be delegated. The power to delegate is what makes an Attorney-General independent and responsible, ensuring high standards of professionalism, and is the single most important feature in controlling his own staff. Without this feature an Attorney-General's instruction has no degree of finality except that of rank, and can be countermanded by another official of higher rank. The Attorney-General should have the final say over legal matters. The Johannesburg office over the last year is a shining example of an office falling apart as even an acting appointment has no degree of finality. Without the authority of delegation powers and thus finality in rank what occurred in Johannesburg will undoubtedly occur nationwide.
8. The Director of Public Prosecutions follows the policy of the Government of the day. The Attorney-General in each area of jurisdiction also prosecutes contraventions of local Acts and even municipal legislation. This is one reason why prosecuting policy should be determined in conjunction with the Attorneys-General, and also why he should be independent of any Government, local or national.

- 3 -

In this regard the judgement (to which MOHAMMED D P was a party) in Ex parte Attorney-General, Namibia; In re The Constitutional Relationship between the Attorney-General and the Prosecutor-General, 1995(8) BCLR 1070 (Nms) should be studied, political control over the prosecuting authority was ruled to be unconstitutional in a rechtsstaat. Nevertheless the Attorney-General is bound by the prosecuting policy as any prosecution he institutes contrary thereto is an illegal prosecution and he may be personally liable for damages.

9. This affords the only measure of review necessary over a recalcitrant Attorney-General and will be quite effective. This will greatly benefit the general public as certain "*private prosecutions*" can now be done at the expense of the State. A general right of review is unsatisfactory as the only authority the national entity has, is to direct the Attorney-General to institute a prosecution in a case he has already expressed he has no faith in. Practical experience has shown that this leads to a lacklustre prosecution in which the prosecutors' only aim is to prove his own point of view. A different entity must handle the prosecution.

