

2/4/2/1/4/3

MEMORANDUM

TO: Theme Committee 2
Theme Committee 3

FROM: Hassen Ebrahim
Executive Director

DATE: 9 November 1994

INTERACTION BETWEEN COMMISSION ON PROVINCIAL GOVERNMENT AND THE CONSTITUTIONAL ASSEMBLY

A meeting took place recently between the Constitutional Assembly and the Chairpersons of the Commission on Provincial Government. It was agreed on this meeting that further regular meetings between the two Chairpersons would take place.

For purposes of your Theme Committee's work, I attach on the cover hereof copies of the following documents:

1. Telefax from Commission on Provincial Government dated 4 November 1994.
2. Response by the Executive Director.
3. Draft legal opinion by the Constitutional Assembly's Legal Advisors.
4. Document from Commission on Provincial Government entitled "Preliminary Identification on Key Issues".
5. Commission on Provincial Government's process document.
6. Contents of subject of Commission on Provincial Government.
7. Commission on Provincial Government document entitled "Status Report".
8. Invitation issued by Commission on Provincial Government.

We hope that the above meets with your approval.

COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 162 of Act 300, 1992

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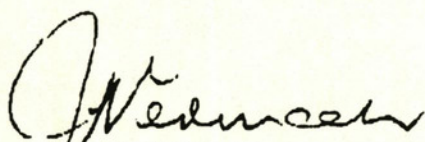
TELEFAX COVERING SHEET/DEKBLAD

04 NOV 1994

TO/AAN: Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
FAXNUMBER/FAKSNUMMER: 021 461 4339
FROM/VAN: J P Vermaak
CPG
SUBJECT/ONDERWERP: Draft: Interaction between the Commission on Provincial Government and the Constitutional Assembly
NUMBER OF PAGES/AANTAL BLADSYE: 1 + 3
If you have not received all the pages please phone: Indien u nie al die bladsye ontvang het nie skakel asseblief: (012) 442297

Have tried to reach you telephonically without success. I enclose a draft document relating to interaction between the CA and the CPG for your consideration. Perhaps you could contact me by telephone if you propose changes to the document or fax your proposals to me - Fax (012) 343 8043.

I will be away from my office from Monday afternoon, 7/11/94 to Wednesday 9/11/94 inclusive.


J.P. VERMAAK
4/11/94

DRAFT

INTERACTION BETWEEN THE COMMISSION ON PROVINCIAL GOVERNMENT AND THE CONSTITUTIONAL ASSEMBLY

1. In terms of the Constitution the Constitutional Assembly (CA) (and its Theme Committees) and the Commission on Provincial Government (CPG) have overlapping but distinctly different roles to play in the constitution-making process relating to provincial government. The Commission must advise the CA and submit draft constitutional proposals from a technical and non-partisan position. It is an independent body which must come to its decisions independently. The CA and its substructures on the other hand, are ultimately responsible for the consideration of both the political and technical aspects relating to the new constitution, including the independent advice and draft constitutional proposals presented by the CPG, as well as the political negotiations and debates preceding adoption of the new constitution.
2. It is, however, recognized by both Institutions that a formal structured interaction between them would facilitate their various processes. The purpose of this document is to propose such a structure.
3. It is obvious that both institutions should solicit as wide a spectrum of views and information as possible in order to formulate constitutional proposals relating to provincial and local government systems, including traditional authorities, and ancillary matters. The CPG, with its more limited resources, will concentrate on collecting such information by means of written submissions, workshops, discussions with stakeholders, and academic research. The CA (Theme Committees) with larger resources, will be able to collect views and information also from political parties, civil society and the broader public as set out in CA resolutions of 5 September 1994.

4. No restrictions can be placed on the methods or processes that either institution may employ to obtain the information each considers necessary for the performance of its functions. However, in order not to incur unnecessary expenditure or confuse the public, an overlap of methods and processes should be avoided where possible. This objective could to a large extent be reached by sharing information and through regular interaction, particularly at the technical level, between the two institutions.

5. It is therefore proposed as follows -
 - (a) The Chairperson and Deputy Chairperson of the CPG should be able to attend meetings of the Constitutional Committee in order to keep abreast of the developments taking place in that committee. If this is not possible, regular meetings should take place between the Chairpersons and Deputy Chairpersons of the CA and the CPG to review progress and work plans with a view to reaching agreed targets. Agendas for such meetings would be prepared jointly by the Executive Director of the CA and the Technical Co-ordinator of the CPG.

 - (b) Regular meetings between the two officials named in paragraph (a) should take place regarding work programmes, time tables, etc In order that the CPG can prepare its submissions to fit in with the process in the CA. The format and procedure to be followed in presenting the CPG's submissions must also be determined.

 - (c) The CPG will provide the CA with copies of all submissions received by it, reports on workshops held by it and other documentation which may assist the CA committees in their work. Delegations from the Theme Committees will be invited to attend all workshops arranged by the CPG.

 - (d) The relevant CA committees will provide the CPG with copies of all submissions received relating to provincial and local government systems (including traditional authorities) and other relevant material including,

reports on meetings held with civil society, political parties and the broader public, relevant documentation prepared for consideration by the Theme Committees, minutes of meetings of relevant Theme Committees and the Constitutional Committee, and any other relevant documents. Observers from the CPG will be invited to attend public meetings and hearings arranged by the relevant Theme Committees, and also the relevant Theme Committees' own meetings.

- (e) Technical committees appointed by the CPG and the CA should meet as the need arises to discuss issues arising during the parallel processes of the two bodies and to share views and information relevant to their tasks, in order to facilitate the work of both.
- (f) The CPG will submit its proposals in regard to any aspect of provincial and local government systems to the CA as soon as its own deliberations regarding any such aspect have been completed and the comments of provincial governments have been obtained, in order to facilitate the work of the CA and its committees. The CPG will endeavour to submit its full final proposals and draft constitutional provisions, together with the comments thereon of the provincial governments, to co-incide with the work programme of the CA.

CONSTITUTIONAL ASSEMBLY

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PO Box 15
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REPUBLIC OF SOUTH AFRICA

REF No:

9 November 1994

Commission on Provincial Government
Private Bag X887
PRETORIA
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ATTENTION: MR J P VERMAAK

INTERACTION BETWEEN THE COMMISSION ON PROVINCIAL GOVERNMENT AND THE CONSTITUTIONAL ASSEMBLY

Thank you for your telefax dated 4 November 1994. I wish to confirm that I have now had the opportunity of studying your draft and, in general, am satisfied that it serves as a useful basis on which to proceed.

I further wish to confirm the following:

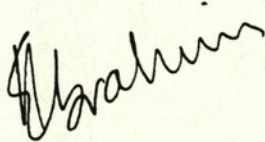
1. The Chairpersons and Deputy-chairpersons of the Commission on Provincial Government are most welcome to attend any meeting of the Constitutional Assembly or its Sub-Structures. In fact, this would be very highly recommended. In the absence of either of the Chairpersons, it is suggested that a representative of the Commission on Provincial Government attend our meetings. In this regard, all documentation in respect of these meetings will be made available to those attending.
2. We would have little difficulty with the proposal that the Chairpersons of both Structures meet on a regular basis. However, discussions with regard to the Work Programmes and Time Tables with regard to the Structures of the Constitutional Assembly, it would be more profitable to raise these in meetings or discussions with the Executive Director. In this regard, the Constitutional Committee is due to meet during the first week of December 1994 for purposes of finalising the Work

Programme of Theme Committees for 1995. A copy of the approved document will be made available.

3. With regard to the format and procedure to be followed in presenting the Commission on Provincial Government's submissions to the Constitutional Assembly, the advise of the relevant Theme Committees will be sorted and conveyed to you in due course.
4. We would most welcome copies of all submissions received by the Commission on Provincial Government as this would prove most useful in our work. In this regard, instructions will be given to our staff to ensure that you receive all documentation from the relevant Theme Committees. Of course, observers from the Commission on Provincial Government would be free to attend all public meetings and hearings arranged by the relevant Theme Committees, and also the Theme Committee's own meetings.
5. It would be appreciated if your request that the Technical Committees of both Structures meet is elaborated. This matter is raised since our Technical Committee have as yet not been appointed.

We hope that the above meets with your approval and hope to hear from you in due course.

Yours faithfully



H EBRAHIM
EXECUTIVE DIRECTOR

CONSTITUTIONAL RELATIONSHIP BETWEEN THE CONSTITUTIONAL ASSEMBLY AND THE COMMISSION ON PROVINCIAL GOVERNMENT, THE VOLKSTAAT COUNCIL AND THE COUNCIL OF TRADITIONAL LEADERS

1.

We have been requested to give an outline of the legal relationship between the Constitutional Assembly and the Commission on Provincial Government, the Volkstaat Council and the Council of Traditional Leaders, and the manner in which these institutions are required to interact with the Constitutional Assembly in terms of the Interim Constitution.

2.

We will deal with the Commission on Provincial Government provided for in sections 163 to 173 of the Interim Constitution first. The Commission on Provincial Government (CPG) is a consultative and advisory body which was established by the Interim Constitution to facilitate the establishment of provincial government. It consists of a body of persons who may not hold office in any political party or political organisation. At least one member of the Commission must be appointed from each province with the concurrence of the Premier of the particular province.

3.

The CPG has three primary functions in terms of section 164(1), namely -

- (a) to advise the Constitutional Assembly on the development of a constitutional dispensation with regard to provincial systems of government;
- (b) to advise the national and provincial governments on the establishment and consolidation of administrative institutions and structures in a province and on any matter arising out of the application of section 124 (provincial boundaries); and
- (c) to make recommendations to the national government or a provincial government on the rationalisation of statutory enactments or public resources directed at the introduction and maintenance of an effective system of provincial government.

4.

The CPG's first function concerns the Constitutional Assembly directly whilst the second impacts on the task of the Constitutional Assembly to draft the final Constitution.

5.

Section 164(2) provides that advice given by the CPG to the Constitutional Assembly may include recommendations in the form of draft constitutional provisions regarding -

- (a) the finalisation of the number and the boundaries of the provinces;
- (b) the constitutional dispensation of such provinces, including the constitutional structures within such provinces as well as the method of their election and their authority, functions and procedures;
- (c) measures that provide for the phasing in of the new provincial constitutional dispensation;
- (d) the final delimitation of powers and functions between national and provincial institutions, with due regard to the criteria set out in section 164(3);
- (e) fiscal arrangements between the institutions of national government and those of the provincial governments; and
- (f) the powers and functions of local governments.

6.

The provisions setting out the CPG's powers and functions must be read with the Constitutional Principles relating to the provision for provincial and local government in the final Constitution. Constitutional Principles XVI up to XXVII are of particular importance here. These principles are guidelines also for the CPG when it makes its proposals to the Constitutional Assembly (see section 164(3)(b)).

7.

Section 161 of the Interim Constitution contains certain specific provisions which bind the Constitutional Assembly in its entertainment of proposals emanating from the CPG. Subsection (1) provides that the development of a system of provincial government shall receive the priority attention of the Constitutional Assembly and that the Constitutional Assembly shall in this

regard take into consideration any recommendations of the CPG and any comments thereon by the respective provincial governments. We understand this to mean that the Constitutional Assembly is obliged to consider the CPG's proposals but only in context of any comment submitted by the respective provincial governments in respect of such proposals. In order to facilitate consideration by the Constitutional Assembly of the CPG's proposals, it would be wise for the CPG not to submit proposals to the Constitutional Assembly unless it has obtained the comment of the provinces.

8.

Section 161 further provides that the CPG must include in its recommendations to the Constitutional Assembly "draft provisions" for inclusion in the new constitutional text. Subsection (3) requires the Constitutional Assembly to deal with such draft proposals "in the same manner as it is required in terms of this Constitution to deal with other constitutional proposals". We have scrutinised Chapter 5 and other parts of the Interim Constitution dealing with the new constitutional text, but were unable to find any definite provision prescribing to the Constitutional Assembly how to deal with constitutional proposals. However, in view of the further provisions of section 161 it seems that all proposals of the CPG which are in the form of draft provisions must be formally laid before the Constitutional Assembly for debate. In terms of subsection (4) of section 161 it is clear that such draft provisions can only lapse and be dispensed with if the Constitutional Assembly formally decides not to adopt them in the new text. The Constitutional Assembly may, however, refer the draft provisions back to the CPG for reconsideration, whereupon the whole process has to be repeated if the CPG amends its proposals in a substantial respect.

9.

Because of the particular role the Interim Constitution envisages for the CPG in the constitution-making process, special attention should be given to accommodating the CPG in the most practical way. Perhaps a special liaison committee consisting of representatives of the Constitutional Committee and of the CPG should be considered. The CPG's proposals will substantially impact on the work of the Theme Committees Nos. 2 and 3 and a close working relationship between the CPG and these committees should be mapped out.

10.

Secondly the Volkstaat Council. Sections 184A and 184B of the Interim Constitution authorise the establishment of a Volkstaat Council to serve as a constitutional mechanism to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat. The

Volkstaat Council is to consist of 20 members elected by members of Parliament who support the establishment of a Volkstaat for those people who want it. The establishment of the Volkstaat Council is being attended to in the Volkstaat Council Bill presently before Parliament.

11.

The Volkstaat Council is in terms of the Constitution competent to gather, process and make available information with regard to matters pertaining to a possible Volkstaat, such as boundaries, legislative and executive structures, powers and functions, intergovernmental relationships etc., and to make feasibility and other studies with regard to these matters. Section 184B(1)(c) empowers the Council to submit representations and recommendations to the Constitutional Assembly "with regard to the possible establishment of a Volkstaat and any other matter in connection therewith".

12.

Sections 184A and 184B must, however, be read with Constitutional Principle XXXIV dealing with the right of the South African people as a whole to self-determination and, within the framework of this right, possible provision in the final Constitution for a notion of a right to self-determination by a community sharing a common cultural and language heritage, whether within a territorial entity within the Republic or in any other recognised way.

13.

The idea then is that proponents of a Volkstaat or of other possible expressions of Afrikaner self-determination should, within the framework of the Interim Constitution and the right of the South African people to self-determination, develop their proposals and submit these to the Constitutional Assembly through the mechanism established for this purpose, viz the Volkstaat Council.

14.

The way in which the Volkstaat Council and the Constitutional Assembly should interact is not spelt out in the Interim Constitution. Although Parliament is authorised in terms of section 184B(2) to prescribe the procedures to be followed by the Volkstaat Council in the performance of its functions, we do not understand this to mean that the Constitutional Assembly is bound by what Parliament may enact, as the Constitutional Assembly has full sovereignty in respect of matters pertaining to the constitution-making process. See section 70.

15.

Apart from the fact that the Volkstaat Council has a constitutional right to submit its proposals to the Constitutional Assembly (section 184B(1)(c)), it is thus up to the Constitutional Assembly to determine practical ways and means for interaction between itself, its structures and the Volkstaat Council.

16.

In our view interaction at the level of especially the Theme Committees seems to be both practical and meaningful. An advisory body in terms of section 72(1) of the Interim Constitution, consisting of representatives of say the Constitutional Committee and of the Volkstaat Council to facilitate proper liaison can also be considered. It has already been decided, as we understand, that the Chairperson of the Constitutional Assembly and the Chairperson of the Volkstaat Council will meet regularly.

17.

The constitutional role of the Council of Traditional Leaders must be considered against the background of provincial competences in relation to traditional authorities and indigenous law in terms of Schedule 6 to the Interim Constitution.

18.

Section 182 requires that the legislature of each province must establish a House of Traditional Leaders for the province. The members of such a House must be elected or nominated by the traditional authorities in the province. The functions of such a House are to advise and make proposals to the provincial legislature and government in respect of matters relating to traditional authorities, indigenous law and the traditions and customs of traditional communities within the province. Such a House is also in terms of the said section entitled to play a role in the provincial legislative process with regard to draft legislation pertaining to traditional authorities, indigenous law and such traditions and customs.

19.

Section 184 establishes a Council of Traditional Leaders to be composed of members elected by an electoral college constituted by the members of all the provincial Houses of Traditional Leaders. The Council of Traditional Leaders has functions similar to that of a provincial House but at national level of government. It also has a constitutional right to comment on parliamentary Bills pertaining to traditional authorities, indigenous law and

the traditions and customs of traditional communities.

20.

As far as the constitution-making process is concerned, no specific role was given to the Council of Traditional Leaders in the Interim Constitution. However, we do not see this as a legal obstacle to the Council's participation in the constitution-making process. Section 184(4) provides for additional functions to be allocated to the Council "by any other law". It would therefore in our view be constitutionally appropriate for Parliament, in the Act contemplated in section 184(3)(a), to empower the Council to make recommendations to the Constitutional Assembly with regard to traditional authorities and indigenous law, including traditions and customs of traditional communities. Such legal provision will clear the way for the Constitutional Assembly to accommodate liaison with the Council within its structures. The Council of Traditional Leaders Bill is presently under consideration by Parliament. As it presently reads no role in the constitutional-making process is allocated to the Council of Traditional Leaders. Perhaps this matter should receive the attention of the portfolio committees of Parliament dealing with this Bill.

21.

Traditional authorities and indigenous law are areas of provincial competence subject only to the overrides of Parliament in terms of section 126(3). This is the position in the Interim Constitution. This must, however, be read with Constitutional Principle XVIII 2 which stipulates that the powers and functions of the provinces as defined in the final Constitution shall not be substantially less than or substantially inferior to those provided for in the Interim Constitution. The implication is that the functional areas "traditional authorities" and "indigenous law" will remain, at least substantially, where they presently are, i.e. within the provincial domain of legislative and executive competence. This fact may influence the relationship between the Constitutional Assembly and the Council, and it may perhaps be wise for the Constitutional Assembly to consider input from the Council only after the provinces have commented thereon.

22.

Also in this case we are of the opinion that interaction with the Council should primarily take place at the level of the Theme Committees.

**G H Grové SC
M Ndziba**

**Law Advisers Division: Constitutional Assembly
7 November 1994**

PRELIMINARY IDENTIFICATION OF KEY ISSUES

PROVINCIAL GOVERNMENT

- (a) Relationship between the powers of national government and provincial government.
- (b) Representation of provinces, metropolises, rural areas and traditional leaders in the Senate or other chamber of Parliament.
- (c) Functional areas of legislative competence and the basis for allocation to three levels of government.
- (d) Composition of provincial legislatures.
- (e) Elections and the representation of constituencies.
- (f) Majorities required for Bills.
- (g) Composition of provincial executive authority - numbers, party representation, national unity.
- (h) Financing of provincial services - taxation/loans.
- (i) Position of provincial staff vis a vis public service, and staff of provincial legislature.
- (j) Establishment of sub-regions and their functions and powers.
- (k) Formalising of intergovernmental relations.
- (l) Self-determination (including the Volkstaat issue).

LOCAL GOVERNMENT

- (a) Establishment and Status

Levels/Structures

- metropolitan
- urban
- rural

- (b) Powers and functions

Qualified Autonomy;
Encroachment by national and provincial government

- (c) Elections and Representation

Procedures;
Legitimacy

- (d) Financing of local government services

Sources of revenue

- (e) Traditional Authorities and representation

COMMISSION ON PROVINCIAL GOVERNMENT

PROCESS TO BE FOLLOWED IN THE FORMULATION OF ADVICE TO THE CONSTITUTIONAL ASSEMBLY ON THE DEVELOPMENT OF A CONSTITUTIONAL DISPENSATION WITH REGARD TO PROVINCIAL SYSTEMS OF GOVERNMENT, INCLUDING LOCAL GOVERNMENT AND TRADITIONAL AUTHORITIES

PROCESS	COMPLETION DATE
1. Description of the present constitutional dispensation for provincial and local government in South Africa as provided for in the Constitution Act, 1993, collection of prescribed data on provinces and ancillary matters.	31/10/94
2. Collection, analysing and tabulation of information on provincial and local government systems in selected other countries.	31/10/94
3. Holding of discussions with interested parties in regard to affected areas in terms of the Constitution and obtaining of comments on redefinition of provincial boundaries.	9/12/94
4. Holding of discussions, meetings and workshops in which academics, practitioners and interested parties will participate to provide information and broaden insights in regard to provincial and local government systems.	9/12/94
5. Formulation of first draft constitutional proposals for new provincial government systems and final provincial boundaries to serve as a document for discussion with and comment by all affected parties, including central and provincial government institutions, local authorities, political parties, etc.	31/1/95
6. Obtaining of comments by affected parties	28/2/95
7. Compilation of areas of concern identified in comments received and holding of further discussions and workshops to deal with such matters.	30/3/95
8. Preparing of second and, if necessary, further draft constitutional proposals for discussion and comment as contemplated in paragraph 5 above, followed by a repetition of steps 6 and 7 as required.	*
9. Obtaining of comments by affected parties	30/4/95
10. Preparation of final draft constitutional proposals for comment by the respective provincial governments as contemplated by section 161(1) of the Constitution.	31/5/95

PROCESS	COMPLETION DATE
11. Obtaining of comments by provincial governments.	30/6/95
12. Consideration of comments by provincial governments and submission of final draft constitutional proposals, comments of provincial governments and any further comments by the Commission on Provincial Government to the Constitutional Assembly.	31/7/95
13. Further consideration and submission of draft provisions that may be referred back to the Commission in terms of section 161(4)	
14. During the process information and progress will be reported to the Constitutional Assembly and the Intergovernmental Forum.	

* Note: The process will probably be extended by approximately one month for each further draft of the constitutional proposals under item 8 above.

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CONTENTS OF SUBJECTS FOR CONSIDERATION BY THE COMMISSION ON PROVINCIAL GOVERNMENT RELATING TO PROVINCIAL GOVERNMENT SYSTEMS, INCLUDING LOCAL GOVERNMENT AND TRIBAL AUTHORITIES

1. PRINCIPLES

- 1.1 Form of state/government - See Constitutional Principle (CP) i - xxxiv
- 1.2 Centralisation or decentralisation - See CP xxi(1)
- 1.3 Extent of devolution of powers -
- * Principle of subsidiarity - See CP xxi
 - * Exclusive powers - See CP xix - xxiii
 - * Concurrent powers - See CP xix - xxiii and section 126(2A)
 - * Residual powers - See CP xxi(8)
 - * Self-determination for ethnic communities - See CP xxxiv
 - * Asymmetry
 - * Encroachment by national government - See CP xxii
 - * Precedence of national government legislation - See CP xxiii
 - * Safeguarding powers of provincial governments - See section 61, 62 and 73(2) and (11)
- 1.4 Override -
- * Should central government override provinces in their areas of competence?
 - * Should provinces override central government in their areas of competence? - See CP xxi, xxii and xxiii
- 1.5 Continuity between interim constitution and final constitution - See section 164(3)(a) and (b)
- 1.6 Cohesiveness - build one country or one nation without undermining diversity of culture, language, etc - See CP iii, xi, xii, xxxiv
- 1.7 Ensuring effectiveness and efficiency of delivery of services (clean and cost-effective government) - See CP xxi and section 164(3)(d) to (g)
- 1.8 Bringing government closer to people and enhancement of accountability - See CP xxi(1)

1.9 Building a single economy - See CP xxi(5) and section 126(3)(d) and (e)

1.10 Establishing peace and reconciliation - See final paragraph of Constitution

2. CENTRAL GOVERNMENT STRUCTURES - THE SENATE

2.1 Form of provincial representation at national level (whom do senators represent?) - See section 48

2.2 Representation of traditional leaders in Senate

2.3 Metropolitan representation in Senate

3. NUMBER AND BOUNDARIES OF THE PROVINCES - section 124

* Finalisation in regard to the affected areas, namely:

- (a) Bosbokrand - Consisting of the Mala district of Gazankulu and the Mapumaleng district of Lebowa
- (b) District of Namaqualand
- (c) District of Groblersdal
- (d) Northern Transkei/Pondoland - Consisting of the Bizana, Flagstaff, Lusikisiki, Mt Ayliff, Mt Frere, Mt Fletcher, Matatiele and Tabankulu districts of Transkei, as they were defined on 26 October 1976.
- (e) District of Umzimkulu of Transkei, as it was defined on 26 October 1976
- (f) The area consisting of the districts of block "B" envisaged in Part 1 in respect of the province of Pretoria-Witwatersrand-Vereeniging
- (g) The areas consisting of the districts of the two blocks envisaged in Part 1 in respect of the province of Eastern Cape
- (h) Province of Northern Cape
- (i) The area for which the KwaNdebele Legislative Assembly has been instituted in terms of section 1 of the Self-governing Territories Constitution Act, 1971 (Act No 21 of 1971), including the districts of Moutse 1, 2 and 3 and the district of Mathanjana as described in Part 2 of the Schedule to the Bophuthatswana Border Extension Act, 1978 (Act No. 8 of 1978)
- (j) District of Sasolburg
- (k) The area consisting of the districts of Clanwilliam, Vredendal and Van Rhynsdorp
- (l) District of Mount Currie, including land mentioned in Proclamations R.141 of 30 September 1983 and 43 of 26 April 1985 and the farms Drumleary 130 and Stanford 127
- (m) The area consisting of the districts of Kuruman, including the area defined in Proclamation 103 of 31 October 1991, Postmasburg and Hartswater
- (n) The area consisting of -
 - (i) the district of Brits, excluding the areas as described in Part 1 of the Schedule to the Bophuthatswana Border Extension Act, 1978 (Act No. 8 of 1978), and Proclamations R.222 of 28 November 1986 and R.98 of 30 June 1989;

- (ii) the districts of Moretele and Odi of Bophuthatswana, as they were defined on 6 December 1977

4. CONSTITUTIONAL DISPENSATION OF PROVINCES

4.1 Provincial constitutions

- 4.1.1 Power of provincial legislature to adopt - sec 160(1)
- 4.1.2 Drafting and consideration - sec 160(2)
- 4.1.3 Consistency with present Constitution and Constitutional Principles - sec 160(3)
- 4.1.4 Provision for legislative and executive structures and procedures different from those provided in the Constitution - sec 160(3)(a)
- 4.1.5 Provision for the institution, role, authority and status of a traditional monarch, and specifically the Zulu Monarch - sec 160(3)(b)
- 4.1.6 Diversity of language and culture to be protected and encouraged - CP xi and sec 3(5)
- 4.1.7 Certification by Constitutional Court - sec 160(4)
- 4.1.8 Holding of provincial election after adoption of a new constitution - sec 162

4.2 Legislative competence - section 126

4.2.1 Functional areas of legislative competence - Schedule 6

Agriculture
 Abattoirs
 Airports, other than international and national airports
 Animal control and diseases
 Casinos, racing, gambling and wagering
 Consumer protection
 Cultural affairs
 Education at all levels, excluding university and technikon education
 Environment
 Health services
 Housing
 Indigenous law and customary law
 Language policy and the regulation of the use of official languages within a province, subject to section 3
 Local government, subject to the provisions of Chapter 10
 Markets and pounds
 Nature conservation, excluding national parks, national botanical gardens and marine resources

Police, subject to the provisions of Chapter 14
 Provincial public media
 Provincial sport and recreation
 Public transport
 Regional planning and development
 Road traffic regulation
 Roads
 Soil conservation
 Tourism
 Trade and industrial promotion
 Traditional authorities
 Urban and rural development
 Welfare services

- Tender Board** - section 187
- 4.2.2 Agency or delegated functions - CP xix
- 4.2.3 Appropriate and adequate powers - CP xx
- 4.2.4 Basis for allocation - CP xx
- * Financial viability
 - * Effective public administration
 - * Promotion of national unity and legitimate provincial autonomy and acknowledgement of cultural diversity
- 4.2.5 Criteria for allocation of powers - CP xxi
- 4.3 Provincial legislature - section 125 but see also 160(3)(a)
- 4.3.1 Composition - section 127
- 4.3.2 Participation of minority political parties - CP xiv
- 4.3.3 Duration and dissolution - section 128/9
- 4.3.4 Elections - section 128 and schedule 2 par 10 - 14
- * To be held regularly - CP viii
 - * Universal adult suffrage on common voters' roll - CP viii and section 6
 - * May not be inconsistent with national Constitution - section 160(3)

- * Democratic representation - CP xvii
 - * Constituency representation
 - * Party representation
 - * Proportional representation - CP viii
 - * Winner take all
 - * Combinations
 - * Resignation from party list and joining another party
 - * Domicile of voters and representatives
- 4.3.5 Qualifications for membership - section 132
- 4.3.6 Vacation of seats and filling of vacancies - section 133
- 4.3.7 Oath and affirmation by members - section 134
- 4.3.8 Sittings - section 130
- 4.3.9 Speaker and Deputy Speaker - section 131
- 4.3.10 Powers, privileges and immunities - section 135
- 4.3.11 Benefits of members - section 135(4)
- * Commission on remuneration - section 207(2)
- 4.3.12 Penalties for sitting or voting when disqualified - section 136
- 4.3.13 Rules and orders - section 137
- * Formal legislative procedures - CP x
- 4.3.14 Quorum - section 138
- 4.3.15 Requisite majorities - section 139
- 4.3.16 Assent to Bills - section 140
- 4.3.17 Signature and enrolment of provincial laws - section 141

- 4.3.18 Public access - section 142
- 4.3.19 Administration and staff - section 143
- 4.4 Provincial executive authority - section 144 but see also 160(3)(a)
 - 4.4.1 Size of government
 - 4.4.2 Executive authority vests in Premier - section 144
 - 4.4.3 Election of Premiers - section 145
 - 4.4.4 Tenure and removal from office of Premier - section 146
 - 4.4.5 Responsibilities, powers and functions of Premiers - section 147
 - 4.4.6 Acting Premiers - section 148
 - 4.4.7 Executive Councils - section 149
 - * Number of members [149(1)]
 - * Party representation [149(2) and (3)]
 - * Allocation of portfolios [149(4)]
 - * Concept of national unity [149(5)]
 - * Oath of office [149(7)]
 - * Other rules [149(8) - (10)]
 - 4.4.8 Executive Council procedure - section 150
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 - 4.4.9 Temporary assignment of powers and functions - section 151
 - 4.4.10 Transfer of powers and functions - section 152
 - 4.4.11 Accountability of members - section 153
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 - * Resignation of Premier [154(3)(a)]
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- * Dissolution of provincial legislature [154(4)]
- 4.4.13 Freedom of information, open and accountable administration
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- 4.5 Provincial finance and fiscal affairs - section 155 - 159
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- 4.5.1 Province's share of revenue collected nationally
- section 155
 - * Equitable share [155(1) and CP xxvi]
 - * Formulae [155(2)]
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 - * Guidelines [155(4)]
- 4.5.2 Levying of taxes by the provinces - see section 156
 - * Competency to raise taxes, levies and duties, other than income tax or VAT and to impose surcharges on taxes and limitations [156(1)]
 - * Exclusive competence to tax gambling and wagering excluding income tax and VAT [156(1B)]
 - * Taxes not to affect national economic policies detrimentally [156(2)]
 - * Imposition of user charges and limitations [156(3)]
- 4.5.3 Raising of loans - section 157
 - * Not for current expenditure [157(1)(a)]
 - * Subject to norms and conditions in case of capital expenditure [157(1)(b)]
 - * Bridging finance during a fiscal year [157(2)]
 - * Guarantee of loans [157(3)]
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- 4.5.4 Revenue allocations by national government
 - section 158
 - * In terms of an Appropriation Act [158(a)]
 - * To local government through provincial government [158(b)]
- 4.5.5 Provincial revenue funds
 - section 159
 - * All monies to be paid into [159(1)]
 - * Withdrawal only in accordance with an appropriation law [159(2)]
- 4.5.6 Auditor-general's powers
 - section 193
- 4.5.7 Financial and Fiscal Commission
 - section 199
- 4.6 Provincial staff matters
 - Chapter 13
 - 4.6.1 Powers of Public Service Commission
 - section 210 and CP xxix
 - 4.6.2 One efficient, non partisan, career-orientated, broadly representative public service for the Republic
 - section 212 and CP xxx
 - 4.6.3 Provincial Service Commissions
 - section 213
 - * Powers subject to national laws and standards [213(1)]
 - * Powers in respect of -
 - establishment and organisation of provincial departments
 - appointments, promotions transfers and other career incidents in respect of public servants employed by the province
 - promotion of efficiency and effectiveness in provincial departments [213(1)]
 - * Relationships of provincial civil servants and national civil servants
- 4.7 Sub-regions
 - 4.7.1 Establishment
 - 4.7.2 Powers and functions

4.7.3 Metropolitan structures as sub-regions

5. LOCAL GOVERNMENT

- 5.1 Framework of powers, functions and structures to be set out in Constitution - CP xxiv
- 5.2 Appropriate fiscal powers and functions for different categories of local government - CP xxv
- 5.3 Constitutional right to receive equitable share of revenue collected nationally to ensure provision of basic services and execution of allocated functions - CP xxvi
- 5.4 Financial and Fiscal Commission to recommend equitable fiscal and financial allocations from national revenue - CP xxvii
- 5.5 Provisions of present Constitution - section 174 - 180
- 5.5.1 Establishment and status - section 174
- * Establishment by law [174(1)]
 - * Metropolitan, urban and rural local government [174(2)]
 - * Differentiated powers, functions and structures [174(2)]
 - * Autonomy within limits of law [174(3)]
 - * No encroachment by Parliament or provincial legislature which will compromise status, purpose and character of local government [174(4)]
 - * Proposed legislations materially effecting status, powers and functions of local government to be published for comments and representations [174(5)]
- 5.5.2 Powers and functions - section 175
- * To be determined by law [175(1)]
 - * To be assigned powers and functions necessary to provide services for the maintenance and promotion of the well-being of all persons in its areas of jurisdiction [175(2)]
 - * Local government to provide for access to water, sanitation, transportation, electricity, primary health services, education, housing and security within a safe and healthy environment to extent determined in law [175(3)]

- * By-laws not to be inconsistent with the Constitution, Acts of Parliament or provincial laws [175(4)]

- * Power to assign functions [175(6)]

5.5.3 Council resolutions - section 176

5.5.4 Executive Committee - section 177

5.5.5 Administration and Finance - section 178

- * Guarantee of loans by National Government
- section 188

5.5.6 Elections - section 179

- * To be democratic and to take place every three to five years [179(1)]

- * Electoral system to include both ward and proportional representation [179(2)]

- * Qualification of voters [179(4) and (5)]

5.5.7 Code of conduct - section 180

6. INTERGOVERNMENTAL RELATIONS

6.1 Need for formal structures for communication between:

- * National and provincial governments

- * Provincial and local governments

- * National, provincial and local governments

7. ESTABLISHMENT OF A VOLKSTAAT

7.1 Procedures for finalisation of provincial boundaries does not preclude the establishment of a Volkstaat - section 184B(3)

7.2 Constitutional provision for self-determination by any community sharing a common culture and language heritage within the framework of the Constitution is not precluded - CP xxxiv(1)

7.3 Any particular form of self-determination may be included in Constitution provided there is substantial proven support for it with the relative community - CP xxxiv(2)

- 7.4 Any territorial entity established in terms of the present Constitution shall be entrenched in the new Constitution, including its structure, powers and functions - CP xxiv(3)
- 7.5 Representations and recommendations of Volkstaat Council to be submitted to the Constitutional Assembly and the Commission on Provincial Government - section 184B(1)(c)

8. TRADITIONAL AUTHORITIES

- 8.1 Recognition of traditional authorities and indigenous laws - section 181 and CP xiii
- 8.2 Traditional leader of a community ex officio entitled to be a member of the relevant local authority - section 182
- 8.3 Establishment of House of Traditional Leaders by provincial legislature within six months of elections of first Premier - section 183
- 8.4 Consultation with traditional authorities on legislation in 8.3 - section 183(1)(c)
- 8.5 House of Traditional Leaders to advise and make proposals to provincial legislature or government on traditional authorities, indigenous laws or traditions and customs of traditional communities. - section 183(2)(a)
- 8.6 Provincial bills relating to traditional matters to be referred to House for comment - section 183(2)(b)
- 8.7 Council of Traditional Leaders - section 184
- 8.7.1 Instituted by Constitution - section 184(1)
- 8.7.2 Competent to advise and make recommendations to national government and President - section 184(4)
- 8.7.3 Parliamentary Bill pertaining to traditional authorities, indigenous laws or the traditions and customs of traditional communities to be referred to Council for comment - section 184(5)

9. PHASING IN OF A NEW PROVINCIAL DISPENSATION

- section 164(2) and 232

- * Need for a Commission of Provincial Government

- section 164

10. RATIONALISATION OF STATUTORY ENACTMENTS OR PUBLIC SECTOR RESOURCES UPON IMPLEMENTATION OF NEW PROVINCIAL DISPENSATION

10.1 Rationalisation of statutory enactments - section 164(1)(c)

10.2 Transitional arrangements for

10.2.1 Executive authorities - section 235

10.2.2 Public administration - section 236

10.2.3 Rationalisation of public administration
- section 237

10.2.4 Assets and liabilities - section 239

10.2.5 Revenue funds - section 240

10.2.6 Local Government - section 245

10.2.7 Definitions - section 233

10.2.8 Legislative authorities - section 234

STATUS REPORT ON THE AMENDMENT OF PROVINCIAL BOUNDARIES

1. The Constitution provides for several methods to amend the boundaries of the provinces as established by section 124. An opinion from the State Legal Adviser confirmed the following:

1.1 Section 37 empowers Parliament to make laws for the Republic in general. However, section 62(1) prescribes procedures for the amendment of the Constitution. Section 62(2) specifically provides that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature. Such an amendment would also require a two-thirds majority of the total number of members of both Houses at a joint sitting. Parliament is therefore competent to affect any amendments, including amendments which do not relate to the affected areas described in Schedule 1, during the existence of the present Constitution. Parliament would, however, have to take into account any amendments to boundaries which may have been passed in terms of section 124(14) and (15) following a referendum or a successful petition by a majority party as described hereunder. Parliament could, however, amend or even repeal section 124 itself.

1.2 Section 124(3) provides that a referendum may be held in each of the "affected areas" described in Part 2 of Schedule 1 to determine the views of the voters ordinarily resident in such area regarding an issue referred to in subsection (5) or (6). These issues relate to the inclusion or exclusion of the affected areas in specific provinces, the continued existence of the Northern Cape as a separate province, and the establishment of a possible additional province in the area of the Eastern Cape. At least 20 percent of the voters in any affected area can petition Parliament to hold such a referendum. A petition must be lodged within a period of six months of the commencement of the Constitution (i.e. not later than 26-10-1994). According to an official of Parliament, only one such petition in respect of Sasolburg has been received to date.

1.3 Section 124(8) provides that a party or parties representing the majority of voters in an affected area may within one month of the date of the first election under the Constitution petition the Independent Electoral Commission requesting that an affected area be altered as contemplated in sub-section (5) or (6). The procedures in this regard is dealt with in subsections (8) to (12). According to the IEC only one such petition was received and published under GN 692 of 25-6-1994 but subsequently withdrawn by GN 829 of 18-7-1994. The period allowed for this method has lapsed and unless the Constitution is amended to extend this period, it is no longer available to parties.

Section 124(14) compels the President to amend section 124(1) and Schedule 1 to give effect to the outcome of the petitions or referendums in paragraphs 1.2 and 1.3 above. Section 124(15) permits Parliament to effect consequential amendments to the Constitution by an ordinary majority of each House.

- 1.4 The Constitutional Assembly must in terms of section 68(2) of the Constitution draft and adopt a new constitutional text, which shall in terms of section 71(1)(a) and Constitutional Principle XVIII inter alia define the boundaries of the provinces. According to paragraph 3 of Constitutional Principle XVIII the boundaries of the provinces shall be the same as those established in terms of the present Constitution. The State Legal Adviser is of the opinion that this means that the boundaries of the provinces shall be the same as they existed immediately before the commencement of the new Constitution. The provincial boundaries as "established in terms of the Constitution" can only be its descriptions in the present Constitution as amended (if such is the case) by -

- (a) any Act of Parliament passed in accordance with section 62;
- (b) any proclamations made in terms of section 124(14); or
- (c) any Act of Parliament made under section 125(15).

Thus, the Constitutional Assembly does not even have the power to redefine the boundaries of affected areas in the new constitutional text. It must define the boundaries as they existed immediately before the commencement of the new Constitution. Therefore, any recommendations of the Commission on Provincial Government given to the Constitutional Assembly in terms of section 164(2)(c) regarding the finalisation of the number and the boundaries of the provinces will be futile since it would be outweighed by the mandatory Constitutional Principles.

- 1.5 Constitutional Principle XVIII provides for the majorities required for amendments to the new Constitution which alter inter alia the boundaries of provinces. The new constitutional text will therefore have to include provisions relating to the alteration of provincial boundaries, thereby allowing such alterations subject to prescribed procedures and the attainment of special majorities of the legislatures of the provinces.

2. To summarise, amendments to provincial boundaries may be affected by Parliament

- 2.1 under the present Constitution by -

- 2.1.1 an Act of Parliament in terms of section 37 adopted in accordance with section 62 (e.g. the amendment of section 124 or Schedule 1);

2.1.2 a proclamation or Act of Parliament in terms of section 124(14) or (15) respectively, giving effect to -

- (a) an alteration pursuant to a referendum held in terms of section 124(3) upon a section 124(3)(b)-petition;
- (b) if the period of time stipulated in section 124(8) is extended by means of an Act of Parliament amending that section in accordance with section 62, an alteration pursuant to a referendum held in terms of section 124(3) upon a section 124(10)-petition or an alteration in terms of section 124(12); and

2.2 under amendment procedures provided for in the new Constitution, which procedures must comply with paragraph 4 of Constitutional Principle XVIII.

Pretoria
6-10-1994

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COMMISSION ON PROVINCIAL GOVERNMENT

SUBMISSIONS REGARDING PROVINCIAL AND LOCAL GOVERNMENT SYSTEMS

Interested bodies are invited to submit written submissions to the Commission in regard to any or all of the matters on which it is required to advise the Constitutional Assembly, including -

- (a) the finalisation of the number and boundaries of the provinces of the Republic;
- (b) the constitutional dispensations of such provinces, including the constitutional structures within such provinces as well as the method of their election and their authority, functions and procedures;
- (c) measures, including transitional measures, that provide for the phasing in of new provincial constitutional dispensations;
- (d) the final delimitation of powers and functions between national and provincial institutions of government;
- (e) fiscal arrangements between the institutions of national government and those of the provincial governments; and
- (f) the powers and functions of local government.

It must be noted that all recommendations of the Commission will have to comply with the Constitutional Principles and must take into consideration all the matters listed in section 164(3) of the Constitution, namely historical boundaries, administrative considerations, rationalisation of existing structures, cost-effectiveness, minimising of inconvenience, demographic considerations, economic viability, developmental potential and cultural and language realities.

In view of the limited time available to the Commission to make its recommendations, all submissions are required to reach

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not later than 30 November 1994.

THOZAMILE BOTHA
CHAIRPERSON