THESE DRAFT MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE AD HOC COMMITTEE, THE PLANNING COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION. THE MINUTES ARE STILL TO BE RATIFIED BY THE AD HOC COMMITTEE.

DRAFT MINUTES OF THE MEETING OF THE AD HOC COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION HELD AT 9H00 ON TUESDAY, 31 AUGUST, 1993 AT THE WORLD TRADE CENTRE.

PRESENT: Mrs S Camerer (Convenor)
Prof H Cheadle
Chief Gwadiso
Mr A Leon
Mr P Maduna
Mr S G Mothibe

MINUTES: Ms N Sithebe-Tsotetsi (Administration)

1. AGENDA:

1.1 It was suggested that the meeting should adjourn at 3:45 as some members had other commitments at that time.

1.2 It was noted that the experts who had sent submissions would not be present at the meeting, and members of the Committee expressed their disappointment regarding the rejection of the proposal to have the experts at the meeting as they had hoped to discuss the issues with the experts in person.

1.3 It was suggested that the Committee could deal with other issues instead of the meeting with the experts, and it would be decided after the meeting whether the experts would still be needed.

1.4 The meeting was adjourned so that the Committee could find out from the Planning Committee whether to proceed without the presence of Mr Maduna. The meeting was reconvened when Mr Maduna arrived at 9h40.

1.5 It was agreed that the last five items on the previous minutes Item 3.2.1 should be discussed.

2. CLAUSE 17. ACCESS TO INFORMATION

It was agreed that the clause should be left as it is in the report.

3. CLAUSE 18. ADMINISTRATIVE DECISIONS

The Ad Hoc Committee agreed that the following principles shall apply:

3.1 No person's rights shall be determined or infringed by public administrative decisions, proceedings or actions which are unlawful, procedurally unfair or not justifiable.

3.2 The rights set out in (1) shall only apply to persons with a direct and substantial interest in such decisions, proceedings or actions.

3.3 The concept of lawfulness is included in order to address the concern regarding "ouster" clauses. The Ad Hoc Committee asks the Technical Committee to consider whether this issue should be dealt with differently by including a clause to the effect that the courts have inherent jurisdiction to review administrative decisions. Certain members of the Committee feel that it is not necessary as the rights in a bill of rights are always justiciable.

THE MEETING WAS ADJOURNED AT 10H30 TO ALLOW MR MADUNA AND MR MOTHIBE TO ATTEND THE NEGOTIATING COUNCIL. THE MEETING RECONVENED ON THEIR RETURN.

It was suggested that the meeting with the Technical Committee should be postponed so that the Committee can have time to discuss more issues before meeting with the Technical Committee.

It was suggested that the Committee would hand over the principles to the Technical Committee to draft, then the Committee would look at the drafts and return them to the Technical Committee which would then hand them over to the Negotiating Council for resolution.

While the other members were waiting for the return of Mr Maduna and Mr Mothibe, it was suggested that the Chairperson should meet with the Planning Committee to discuss the Committee's timetable and find out when the report is expected.

3.4 The Ad Hoc Committee supports the proposal made by Judge Olivier (copy attached) that the principle of procedural fairness be contained in a separate sub-clause together with the right to be furnished with reasons for a decision. The Committee also supports the inclusion of a reference to the rules of natural justice in the clause. This provides for continuity of concepts in present law.

3.5 The concept of justifiability should be included to compel the decision maker to link reasons for the decision and the decision itself and to oblige systematic and proper decision making; equally the prerogative of the decision maker to make policy choices in the interests of good governance should not be usurped.

[NB. The Ad Hoc Committee suggests the use of "justifiable" rather than "reasonable" because of the legal uncertainty which could be attached to the use of "reasonable." In contrast "justifiable" has specific meaning with reference to Australian and United States provisions (copies attached)].

3.6 In principle the onus of proof should rest with the person alleging an unjustifiable administrative decision.

4. CLAUSE 20. EVICTION

It was suggested that this clause should be discussed on 1 September 1993.

5. Mr Maduna was congratulated by members of the Committee on his appointmment to the ANC National Executive Committee.

6. NEXT MEETING

6.1 It was suggested that on 1 September, the Committee should have a preliminary discussion on customary law.

6.2 It was suggested that clauses 21 and 23 would be discussed at the next meeting.

THE MEETING ADJOURNED AT 12H00 SO THAT THE CHAIRPERSON COULD CONSULT WITH THE PLANNING COMMITTEE. THE MEETING RECONVENED AT 14H20 WITH THE TECHNICAL COMMITTEE.

A CLAUSE ON ADMINISTRATIVE DECISIONS IN A BILL OF RIGHTS

Clause 18 of the Draft Interim Bill of Rights

Clause 18 of the Draft Interim Bill of Rights makes provision for certain rights of the individual concerning administrative decisions. It reads as follows:

> 18 (1) Every person shall have the right to lawful and procedurally fair administrative decisions.
>
> (2) Every person shall have the right to be furnished with reasons in writing for an administrative decision which affects his or her rights or interests.

Subclause (1)

Subclause (1) of clause 18 is drafted in wide terms. The proposed right relates to "lawful and procedurally fair administrative decisions". The term "lawful" is very wide and is closely related to the concept of "legality", upon which the validity of administrative decisions are based. In other words, the term "lawful" can refer to and include all the requirements for a valid administrative decision. The phrase "procedurally fair" is in essence a formulation of what is termed "the duty to act fairly" which is the modern formulation developed by the courts of the principles of natural justice, that is the "audi alteram partem" and "nemo index in sua causa" maxims.[1] Nevertheless, it should be noted that the right to procedurally fair administrative decisions is not qualified. This implies that all administrative decisions must comply with the requirements of procedural fairness. However, at present the principles of natural justice are applicable only where an individual's rights, interests or legitimate expectations are affected. In other words, the

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1 See, for example, Administrator, Transvaal v Traub 1989 4 SA 731 (A) at 758H-I and Administrator, Cape v Ikapa Town Council 1990 2 SA 882 (A) at 889I.

proposed formulation appears to extend the application of the principles of natural justice to all administrative decisions irrespective of whether such decisions affect an individual's rights, interests or legitimate expectations. It follows that all decision-makers, who make administrative decisions, will be obliged to give notice of all impending administrative decisions and to give the individual concerned an opportunity to be heard either orally or in writing. It is submitted, with respect, that the application of the very important principles of natural justice or the duty to act fairly or the principle of procedural fairness is simply too wide.

The following comment is appended to clause 18(1) of the Draft Interim Bill of Rights:

> One of the parties suggested the inclusion of the words (sic) "reasonable" after the word "lawful". This will have far-reaching consequences for South African Administrative Law and it is for the Council to decide on this issue. The Committee does not support the introduction of this notion at this stage.

Unfortunately, the Committee does not give reasons for its proposition that the introduction of the standard of reasonableness will have far-reaching consequences for our administrative law. It also does not explain why it does not support the introduction of the said standard at this stage.

It might be argued that the standard of reasonableness could give the courts an almost unlimited power to interfere on review with administrative decisions. However, this argument cannot be supported. The Commission has already recommended in its Report on the Investigation in the Court's Power of Review of Administrative Acts that the standard of reasonableness should be one of the requirements for valid administrative decisions.[2] In this regard the Commission stated the following:[3]

> The Commission agrees with the principle that the quality of the decision should carry more weight than the manner in which the decision is made. Moreover, by applying this principle together with the requirement of reasonableness, the Commission is convinced that the courts will be able to clearly obviate a waste of time and expenditure with regard to the review of administrative acts and that the quality of administrative acts will inevitably improve.

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2 See clause 3(1)(f) of the proposed Bill on Judicial Review at 252 of the Report.

3 Report at 246.

The recommendation of the Commission is based upon the submission of the Honourable Mr Justice H J O van Heerden, Judge of Appeal and Chairman of the Commission, and is supported by all the members of the judiciary who commented on it.

Moreover, the standard of reasonableness is contained in section 5(2)(g) of the Administrative Decisions (Judicial Review) Act, 1977, of Australia. The standard has recently been provided for in Article 18 of the Namibian Constitution of 1990. Similarly, in terms of section 10(e) of the American Administrative Procedure Act, 1946, the requirements for valid administrative decisions, if taken together, form a wide requirement that such decisions must be reasonable and bona fide.

It is submitted therefore that there appears to be no reason whatsoever why reasonableness should not be provided for in a provision relating to administrative decisions in a Bill of Rights.

Moreover, clause 18(1) of the Draft Interim Bill of Rights does not explicitly provide for the entrenchment of the Supreme Court's inherent jurisdiction to review administrative decisions. This is absolutely essential if one wishes to outlaw the so-called ouster clauses.

It is also submitted that a provision relating to the entrenchment of the Supreme Court's inherent jurisdiction and the provision of reasonableness and lawfulness as standards for valid administrative decisions should be included in a subclause relating to an individual's right of access to the courts.

It is further submitted that the standard of procedural fairness or the principles of natural justice should be accommodated in a separate Article in the Interim Bill of Rights.

Subclause 18(2)

Subclause 18(2) of the Draft Interim Bill of Rights grants to an individual the right to be furnished with reasons in writing for an administrative decision that affects his or her rights or interests. It is submitted that the provision of such a right is vitally important for rational and informed decision-making. Nevertheless, the restriction of the application of the right to every person whose rights or interests are affected by an administrative decision is too limited. What about the case where

a person has a legitimate expectation? It is submitted that a far better and acceptable approach would be to link the right to be furnished with reasons with the right to the application of the principles of natural justice.

Recommendations

In view of what has been stated above, the following recommendations are made:

(a) Clause 16 should be amended by the insertion of the following subclause:

(2) Everyone prejudiced or affected in his or her interests by an unreasonable or unlawful administrative act has the right to have recourse to the Supreme Court to review the said act by virtue of its inherent jurisdiction or any other relevant legislation.

(b) Clause 18 should be deleted in its entirety and be replaced with the following clause:

Rules of natural justice

Everyone has the right to have the rules of natural justice applied in administrative proceedings and actions in which, on the grounds of findings of fact and of law, the rights or legitimate expectations of an individual or a group are infringed or likely to be infringed, and in such cases every person having an interest in the matter has the right to be furnished in writing to him or herself on demand with the reasons for a decision.

4/N/pjjo/admin.dec

— US : Administrative Procedure Act (1946)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(A) and (E) are mutually exclusive alternatives, applicable in different contexts

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Appendix A

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Administrative Decisions (Judicial Review) Act (Australia) 1977 Act also attempts to spell out as fully as possible the grounds on which a decision may be reviewed, as follows:

> '(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
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> (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
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> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
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> (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
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> (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
>
> (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
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> (g) that the decision was induced or affected by fraud;
>
> (h) that there was no evidence or other material to justify the making of the decision;
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> (j) that the decision was otherwise contrary to law' (s5(1)).

Review may be sought on any one or more of these grounds. Note the omnibus nature of sub-section (j), clearly indicating the intention to leave the door open for the development by

(from Corder)