Verbatim Transcriptions/AL

CASE NO. 17474/93

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

1993-09-09

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.
DATE 16.9.1993 SIGNATURE

In the matter between:

THE GOVERNMENT OF THE SELF GOVERNING TERRITORY OF KWAZULU Applicant

Return for final rolls (10)

versus

M J MAHLANGU Respondent

J U D G M E N T

Z. Eloff 20.9.93

ELOFF JP: This is the judgment of the full court. The question which primarily arises for consideration in this application relates to the juridical basis of certain procedural arrangements made by the negotiating parties at the (20) multiparty negotiation conference presently underway at the World Trade Centre, Kempton Park.

The importance of this question lies therein that the answer thereto determines whether this court has jurisdiction to pronounce on or to intervene in certain of the procedures adopted and rulings made at the conference. To put the matter in simple terms, only if the applicant, which is the Kwazulu Government, can satisfy the court that the procedural arrangements by which the multiparty negotiating process has been conducted, amounts to a binding contract enforceable in law (30)

with reciprocal rights and obligations, can it come to this court for the remedies set out in the notice of motion.

In order to understand the applicant's claims and the answers presented thereto, it is necessary to briefly summarise the background circumstances as set out in the affidavits. The starting point occurs in late 1991, when some 20 parties initiated negotiations to bring about a new constitutional dispensation for South Africa. Thus was established the Convention for a Democratic South Africa, (CODESA). The Inkatha Freedom Party (IFP), a party which holds sway in the Kwazulu Government, was one of the initiating parties at CODESA. It was, of course, necessary for the participants at CODESA to devise procedures for the negotiating process. Standing rules were created which governed the debates and which established methods for determining whether adequate consensus on the issues under discussion had been achieved. After months of debate, when consensus had been reached on several questions, one of the negotiating parties, the African National Congress (ANC), suspended its participation. CODESA came to an end. Several months later, bilateral negotiations between some of the main players resulted in a resuscitation of the negotiating process. The first step in the fresh formal talks was the setting up of a planning conference, which in turn established a facilitating panel or committee to devise the initial procedures. On 5 March 1993 the facilitating committee agreed on the main procedures for the first planning conference. The minutes of the meeting of 5 March 1993 show that rules were suggested to determine whether sufficient consensus on any point under debate had been achieved. The next day the planning conference met, adopted the suggestions

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of the facilitating committee, and the process got underway.

Standing rules for the process as a whole had still to be formulated, and to that end a sub committee of the facilitating committee was set up. It submitted a preliminary report on 9 March 1993, which, after debate in the planning conference, was followed by a further report which was tabled with the conference on 30 March 1993. The rules proposed in the report were unanimously adopted by the conference and acquired the status of "standing rules of procedure for the multiparty negotiating process". Those rules provided who the partici- (10)
pants were. They were 26 in number, including political parties, parties, governments and groups such as the traditional leaders of each province.

The rules further provided for various structures, including the plenary meeting, the negotiating forum and the negotiating council. The rules set out how many delegates might represent each participant at the various meetings. It again dealt with the question of "agreements and decisions" as follows:

"4.1 All agreements are to be arrived at and decisions (20)
taken by general consensus.

4.2 If general consensus cannot be achieved, the method of sufficient consensus will be used.

4.3 Sufficient consensus means that:

4.3.1 there is lack of general consensus;

4.3.2 there is enough agreement for enough participating parties to enable the process to move forward.

4.3.3 Parties who disagree, can record their objections or rejections formally, but will, in (30)

the /...

the spirit of co-operation, not hinder the process from going forward.

4.4. The ruling that there is consensus/sufficient consensus or not, shall be taken by the chair in his/her discretion. However,

4.4.1 Before ruling that there is sufficient consensus or not, the chair shall ensure that the disagreeing parties, especially those who consider themselves materially affected, as well as the meeting, shall have had sufficient opportunity to utilise a variety of mechanisms in order to reach the widest possible consensus. In particular such mechanism shall include adjournments to enable informal discussions between participants, setting up technical committees composed as the meeting deems appropriate for the particular matter under consideration, as well as allowing participants to consult their principals. The chair and the meeting shall decide upon the specific mechanism/mechanisms on the basis of the nature of the issues around which the disagreement exists, with the view to arriving at consensus/sufficient consensus. These mechanisms are intended for resolving substantial issues and not for formal and administrative decisions.

4.5 The ruling that there is consensus/sufficient consensus or not, can, however, be challenged by any party who disagrees. The meeting will then deal

with/...

with it as is appropriate."

At the first meeting of the negotiating forum the rules were adopted with minor amendments, none of which affect the just quoted paragraph. The applicant as well as the IFP were parties to the resolution.

More or less at this time the phrase "multiparty negotiating process" was coined to describe what was going on. As in the case of CODESA, the debate took place at the World Trade Centre.

From April 1993 onwards several meetings of the negotiating council were held. The participants agreed to set up a panel of chairpersons who took turns to preside. The deponent to the founding affidavit in this application was on the panel and took the chair at times, as also the two gentlemen who are cited as respondents in this application. And there were others. At some of the meetings the delegates were not unanimous and the chair had to rule on whether sufficient consensus had been achieved.

To complete the picture of the setting in which the negotiating process progressed, we should mention that the negotiating council established a number of technical committees to facilitate discussion and to assist in establishing consensus. The relevant resolution records that these committees were not "fora for negotiating substantial issues"; they were required to prepare reports based on CODESA documents on written submissions of the negotiations and on specific instructions of the negotiating council. After submission of reports by the technical committees they would be debated at the negotiating council.

We now turn to the applicant's complaints. They all

relate/...

relate to rulings made at various times at meetings of the negotiating council and the negotiating forum. Those rulings were inter alia made on the debate concerning two related issues. The first is as to the form of the new state. Put simplistically, should there be a federal of a unitary form of state? The second is as to who should draft the new constitution. Should its content be settled before an election, or should it be drafted by a democratically elected constitution making body?

The chairpersons from time to time, in an effort to keep the process going, made rulings on whether sufficient consensus had been reached. The following rulings come under attack in these papers:

The first is a ruling made on 15 June 1993. The relevant debate started off with a motion which was put forward on 3 June 1993 on behalf of the ANC as a compromise resolution in regard to question of elections and the date thereof -

> "That the date of the election shall be 27 April 1994, but, however, with the view to maximise consensus on this matter, the negotiating council decides to finalise this matter on 15 June 1993."

By way of reaction the applicant tabled a motion with motivation, which was recorded as addendum B to the minutes of the meeting of the negotiating council held on 15 June 1993. The IFP filed a supporting motion which became annexure C to the minutes of the meeting of 15 June 1993. The proposal was that it be resolved that:

> "1. the negotiating council shall not proceed to negotiate and shall not endeavour to agree on the constitutional principles recommended by the technical

committee, including the principles relating to the identification of powers and functions of the SPR's until the technical committee has reported to the negotiating council on the various alternatives on the constitution making process;

2. the negotiating council shall consider inter alia proposals for

2.1 a fully fledged federal constitution inclusive of a complete bill of rights compatible with the highest international standards of human rights protection, a jurisdictional constitutional court and standard procedures for constitutional amendment;

2.2 a constitution making process capable of capitalising on a registering ground of democracy building sub processes, such as the adoption of the constitution of the state of Kwazulu, Natal, or the SATSWA initiative, incapable of co-ordinating ground of constitution development with top down negotiations.

3. The negotiating council instructs the technical committee on constitutional matters to make recommendations to it on

3.1 the powers, functions and structures of the SPR's in the next constitution of South Africa, with the view to leaving residual powers of the SPR's and ensuring that the new SPR's are established as a federation of states prior to or at the same time of the next elections;

3.2 the constitution making process to be followed, including/...

including the structures that need to be established so as to finalise the next constitution of South Africa on the basis of a one phase process which relies on ground up democracy building sub processes to support the creation of SPR's;

3.3 the procedures to be followed in the drafting and adoption by the multiparty negotiating forum of a federal constitution which would establish a federal system prior to or at the same time as the next elections.

4. that any final determination of the election date be postponed until the negotiating council has adopted a final decision on the aforesaid and on the process of constitutional development which would lead to elections, in order to enable us to determine what phases must precede and prepare elections and the function and purposes of elections at central and regional levels in relation to the next constitution of South Africa."

The applicant then withdrew its motion, "but to leave the motivation standing" and supported the IFP motion. The motion was debated, whereafter the delegates were asked to vote. 15 interest groups were against the IFP motion and eight were in favour, with three abstentions. The then chair person, Mr M J Mahlangu, who is the first respondent in these proceedings, ruled that there was not sufficient consensus for the IFP resolution. In its founding affidavit the applicant's spokesman submits that "this is tantamount to a decision that there was sufficient consensus" for the refusal of the adoption of

the/...

the IFP motion. We should at once say that we have difficulty in understanding the logic of the submission. Be that as it may, efforts were next made to get the planning committee to find a solution.

Discussions ensued, in the course of which the government negotiator suggested a compromise, but that did not overcome the impasse. Still further debate was conducted in the negotiating council. It was at one stage suggested that the IFP motion should stand over for further discussion. The IFP rejected the suggestion and left the meeting. (10)

The applicant complains, as we understand its case, that the chair persons erred in holding that there was not sufficient consensus for the IFP motion in that he did not afford the applicant and the IFP sufficient opportunity to utilise the mechanisms contemplated by Rule 4. We should mention that there is on the papers a dispute on one or two aspects of this matter. In view of the conclusions reached on other aspects of the case, we need not further analyses the dispute.

The second complaint relates to the procedure allegedly adopted after the ruling on the IFP motion. The applicant (20) avers that this second ruling was made on 15 June 1993. As we understand the papers, the position is as follows: As mentioned previously, on 3 June 1993 the negotiating council adopted the resolution by sufficient consensus to recommend to the negotiating forum that the election date be 27 April 1993, but that the matter stand over until 15 June 1993 in order to maximise consensus. On the latter date, as we understand the papers, it was merely noted that as none of the parties had changed its position and no greater consensus had consequently been achieved, the resolution of 3 June 1993 still stood as one (30)

adopted/...

adopted by sufficient consensus. The nub of the applicants' complaint appears to be that this attitude could not have been taken in the face of the fact that eight persons had expressed themselves earlier in the day on the terms of the IFP's defeated motion.

The third complaint relates to a resolution of the negotiating council taken on 30 June 1993 whereby it requested the technical committee on constitutional issues to draft a constitution providing for certain prescribed matters for consideration by the negotiating council. The nub of the complaint appears to be that the technical committee will be required to draft a constitution only on the transitional government model, not on the federal models. It is said that the applicant or the IFP should first have been afforded the opportunity of invoking the mechanisms provided by Rule 4(4) to counter the request.

The fourth ruling complained of relates to a motion or motions moved in the negotiating forum on 2 July 1993 that the aforesaid second and third resolutions be ratified. The chairman is alleged to have found that there was sufficient consensus for the motion. The complaint is that there were parties disagreeing with those resolutions and that the mechanisms provided for in Rule 4(4) should have been invoked.

In its notice of motion the applicant seeks orders as follows:

"1. Declaring that the phrase 'sufficient consensus' as it appears in the 'Standing Rules of Procedure for the multiparty negotiating process' attached to the affidavit of Dr Baldwin Sipho Ngobani, marked annexure A, is quantitatively and qualitatively

vague/...

vague and ambiguous to the extent that it cannot serve as a proper guideline for the exercise of a discretion as to whether consensus exists or does not exist.

2. Reviewing and setting aside a decision of the first respondent, M.J. Mahlangu, on 15 June 1993 in his official capacity as chairman of a meeting of the multiparty negotiating council that no consensus or insufficient consensus existed for the adoption of a motion as reflected in paragraph 5.2.8 read with addendum C of the minutes of the said meeting, attached to the affidavit of Dr Baldwin Sipho Ngobani marked annexure H.

3. Reviewing and setting aside the decision of the first respondent, M.J. Mahlangu, on 15 June 1993 in his official capacity as chairman of a meeting of the multiparty negotiating council that sufficient consensus existed for the adoption of a motion that an election date be set and setting such date for 27 April 1994 as reflected in paragraph 5.3.4 read with addendum E of the minutes of the said meeting attached to the affidavit of Dr Baldwin Sipho Ngobani, marked annexure H.

4. Reviewing and setting aside the decision of the second respondent, P.J. Ghourdon, on 30 June 1993 in his official capacity as chairman of a meeting of the multiparty negotiating council that sufficient consensus existed for instructing the technical constitution making committee to proceed with the drafting of a constitution as reflected in paragraph

5.6/...

5.6 read with addendum B of the minutes of the said meeting, attached to the affidavit of Dr Baldwin Sipho Ngobani, marked annexure A.

5. Reviewing and setting aside the decision of the third respondent, P.J. Ghourdon on 2 July 1993 in his official capacity as chairman of a meeting of the multiparty negotiating forum that sufficient consensus existed for the adoption of a resolution by the multiparty negotiating forum ratifying the decisions referred to in prayers 2, 3 and 4 above; and

6. That the respondent pay the costs of this application."

The respondents are the two chairmen referred to. It is not clear whether these chairmen are cited as representing the entire negotiating group. This may present a difficultly all of its own for the applicants. However, in view of the conclusions reached on other aspects of the case, we need say no more about it. Notice of the application was given to the 26 parties taking part in the multiparty negotiating process.

The main answering affidavit was made by Mr P.J. Ghourdon, who said that he is attesting thereto on behalf of all of the respondents. There were two supporting affidavits. A replying affidavit was filed.

By reason of the national importance of this matter, this court was constituted in terms of Section 13(a) of the Supreme Court Act, no. 59 of 1959. We now discuss the jurisdiction of the court to grand a declaratory order as sought in prayer 1 and to review the rulings as claimed in prayers 2 to 5.

The powers of the court to grant declaratory orders flow

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from Section 19(1)(a) of the Supreme Court Act 59 of 1959, which provides that the court may

> "(iii) in its discretion, and at the instance of any interested person, ... enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

The important element in this section is that the power of the court is limited to a question concerning a right. The nature and scope of the right might be inquired into, but in the absence of proof of such a right, or at least a contention that there is a right, the court has no jurisdiction. This is consistent with the well established principle that courts are not there to rule on abstract concepts or on any dispute, and, as far as declaratory orders are concerned, only on legally recognisable and enforceable rights. We have accordingly to address the question whether the applicant has established a right.

The question whether the applicant has alleged and established a right, is again of importance in relation to the remaining prayers in which the applicant asks the court to review various decisions of various chairmen of the negotiating council and the negotiating forum. In this regard it has again to be borne in mind that in general, in a non statutory context, the court will only exercise powers of review where contractual ties render such a course possible. Our courts have frequently exercised powers of review in regard to decisions of non statutory bodies, but in all those cases that was done because the body, such as a club, political party,

Universitas, or such like association, was created by agreement, and the agreement expressly or by clear implication provided that certain things, for example expulsion of members, would be done in a particular way.

The jockey club cases afford useful examples of what I am discussing. Many decisions were given by way of review of disciplinary decisions taken concerning jockeys. Those powers of review were exercised because the jockeys concerned contractually bound themselves to a club, and the contract enjoined the disciplinary body of the club to act in a particular way, for example by applying natural justice. The fons et origo of the power of review in every instance was the agreement of membership of the jockey club. The significance of the existence of a contract for the exercise of the powers of review was mentioned in the case of Marlin v the Durban Turf Club and Another 1942 (AD) 112 at pages 126 to 127, where TINDALL JA said;

> "The said test of fundamental fairness, however, must be applied with due regard to the nature of the tribunal of adjudicating body and the agreement, if any, which may exist between the persons affected. In the present case the tribunal's jurisdiction really depends on a contract between the appellant and the jockey club."

The requirement of a contractual basis in domestic review proceedings is also reflected in a church dispute, that of Theron v Die Ring van Wellington van die NG Sendingkerk in Suid-Afrika 1976 2 SA 1, where JANSEN JA said at page 21D:

> "Dit word algemeen aanvaar dat die beginsels van hersiening wat op die handelinge van statutêre liggame van toepassing is, ook geld in die huishoudelike tribunale

wat/...

wat uit kontrak ontstaan."

In considering then whether the applicant makes out a case for review, we have to consider whether it has proved a contract which the court can enforce by the remedy of review. I should point out that counsel for the applicant conceded that the applicant had to prove a contract in order to qualify for relief.

It is necessary to stress that the sort of contract or agreement which has to be established, is one entered into with the intention that it can be enforced. It is no doubt true that the fact that the 26 parties meet at the World Trade Centre is the consequence of an agreement that they would do so and the fact that they devised standing rules of procedure took place in consequence of an agreement. In this regard account might be had to the following dictum in Estate Breet v Peri-Urban Areas Health Board 1955 3 SA 523 (A), where VAN DER HEEVER JA said (at page 532F-H):

> "The absence of consensus may render an ostensible contract void, but it does not follow that whenever two or more persons are in agreement they contract with each other. Many legal situations arise in which consensus was a sine qua non to validity but cannot be said to be contractual."

What is required before a court can be approached to exercise powers of review, is that the contract should appear to have been entered into and formulated with the intention that it would be final and binding and legally enforceable. The element of intention to enforce was crisply stated in the decision in Rose and Frank Company v J.R. Crompton and Others Limited reported in 1923 2 KB 261 at page 288, where it was

said/...

said:

"Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties did not intend that the agreement shall give rise to legal relations."

The point was put as follows in the decision in Ford Motor Company v Amalgamated Union of Engineering and Founding Workers 1969 2 All E.R. 481 at page 496D-E: (10)

"The fact that the agreements prima facie deal with commercial relationships is outweighed by other considerations, by the wording of the agreements, by the nature of the agreements, and by the climate of opinion voiced and evidenced by extra judicial authorities. Agreements such as these, composed largely of optimistic aspirations, presenting great practical problems of enforcement and reached against a background of opinion adverse to enforceability, are, in my judgment, not contracts in a legal sense and are not enforceable at law." (20)

With these remarks in mind, I address the questions, which are in a sense related, whether the applicant has proved, for the purpose of prayer 1, that it had a right enforceable at law in relation to the process and (b), whether it had a contract intended to be enforceable with the other participants at the conference.

The founding affidavit contains no such averment. The deponent very briefly sketches the events which led to the formation of the multiparty negotiating process. He describes the structures which were established. He often makes (30)

statements prefaced by vague phrases such as "it was perceived" or "it was felt" without saying when and by whom and for what reason it was felt of perceived. He once uses the word "agreed" in the sentence reading: "It was agreed that a panel of persons be elected who would serve as chairpersons", but that falls far short of a firm allegation that a binding contract was intended.

From the averments in the founding affidavit one recognises a process by participating parties to negotiate a transition to a democratic dispensation in South Africa. One understands that those participating in the process do so not by way of compulsion, but because they recognise the existence of a moral and political commitment to endeavour to ensure a peaceful solution to diverse claims, contentions, disputes and attitudes. The mere fact that the participants set up structures and rules relative to the negotiating process, does not vest that which they are doing with the quality of an enforceable agreement. It was certainly necessary for orderly debate and the achievement of solutions that mechanisms should be created to facilitate that process, but that is as far as it goes. It means no more than that they devised a modus vivendi to facilitate the negotiating process.

I conclude that, based on the founding affidavit per se the applicant has not established a right, nor an agreement enforceable at law. The matter is, however, taken a step further in the answering affidavit. The main deponent specifically states that the purpose of the participants at the World Trade Centre is to negotiate a constitutional settlement. He adds:

"6.8 Those participating in the multiparty negotiating

process/...

process do so not by way of compulsion, but by way of a moral and political commitment to ensure a peaceful transition to democratic rule in South Africa. Their purpose is to negotiate a constitutional settlement. This is therefore essentially a political process. The sanctions for not negotiating and coming to a settlement are political and economic. They were never intended to be legally binding and, I submit, not capable of being legally enforced. No parties legally bound by any decision taken or agreement reached, they do no more than bind themselves in honour to respect the democratic consensus. The said parties are free, if they so choose, to ignore the democratic consensus and indeed to withdraw from the process in its entirety.

6.9 The culmination of the negotiations, of successfully completed, will be agreements in terms of which the South African government and the governments of Transkei, Bophuthatswana, Venda and Ciskei, the TBVC states, will have to pass legislation to give effect to the proposals concerning a transitional executive council, to pass laws such as the Independent Broadcasting Authority Bill, the Independent Media Commission Bill, the Independent Electoral Commission Bill and Elector Bill and to make amendments to the Republic of South Africa Constitution Act 110 of 1983. Such agreements to pass legislation can manifestly never be binding in law. Indeed the governments of Bopthuthatswana, Ciskei and Venda have already indicated that they do not at this stage intend to introduce legislation through their parliaments for introduction of a transitional

executive/...

executive council. It follows that the procedures agreed upon and the negotiation of such agreements were never intended to be legally binding. They are binding in honour only.

6.10 Agreements reached in the negotiating council and the negotiation forum are tentative agreements until such time as there is specific agreement as to implementation. On 30 April 1993 the negotiating council unanimously adopted a resolution to the effect that agreements are not binding until there is agreement on the interpretation, an agreement on all the key elements that might constitute a cluster of agreements. The resolution adopts what is called the explanatory memorandum which is at pages 102 and 103 of the application."

In his replying affidavit Dr Ngabane replied as follows:

"7.3 On a question of the agreements entered into allegedly not being binding on the participants, I wish to draw attention to the following;

7.3.1 I believe that all the participants at the multiparty negotiating process are fully aware of the momentous importance of the negotiating process.

7.3.2 I disagree that the participants are only bound at honour to respect the democratic consensus. The proposition that the setting parties are free, if they so choose, to ignore the democratic consensus, is a startling perception. It is tantamount to say that the participants are wasting their time all these months, while

incurring/...

incurring the huge expenditure of monies which accompany the process.

7.3.3 It bears reference that to the best of my understanding the multiparty negotiating process is financed by the RSA government from funds specially approved for that purpose. In other words, it is tax payers' money which, according to the respondents, may very well be spent in vain.

7.3.4 It is also relevant that it was the South African government who, in my opinion, initiated the negotiating process. First with CODESA and now the multiparty negotiating process. It is stated on many occasions that it is committed to a peaceful negotiated political and constitutional settlement in South Africa and that it will give effect to the decisions and agreements which are reached at the multiparty negotiating process.

7.3.5 I can think of no reason why the bona fides of the South African government should be questioned. Certainly the applicant believes that what happens at the multiparty negotiating process will in fact determine the future constitutional dispensation of South Africa.

7.3.6 In fact, all the indications are that the South African government will pass legislation agreed at the multiparty negotiating process in order to allow our elections on the basis of universal suffrage to be held. The State

President announced in public that the parliamentary session might have to be rescheduled to give the multiparty negotiating process more time to agree on the relevant legislation. This is recognised by the respondents in paragraph 7.13.

7.3.7 The relevant legislation is set out by the respondents and it includes legislation to give effect to the proposals concerning a transitional executive council, the Independent Broadcasting Authority Bill, the Independent Media Commission Bill, the Independent Electoral Commission Bill, the Electoral Bill and amendment to the South Africa Constitution Act 110 of 1983.

7.3.8 One cannot assume for purposes of participation or not that the South African government will refuse to fill its undertakings.

7.4 The applicant and I believe that there is certainty that the negotiating process will lead to constitutional change by the South African Government.

7.5 In any event, the applicant is advised that it is not a requirement that the issues in regard to which a decision was made, have to be binding in law, in contract or statute in order to render it reviewable. Argument will be addressed in this regard at the hearing of the application."

We do not discern a dispute in these paragraphs of the facts alleged in the answering affidavit which show that there was no animus contrahendi in the sense required to found a legally

enforceable contract. Indeed, paragraph 7.5 comes close to admitting that there was no contract, or the need to prove one. And as mentioned previously, the applicant's counsel conceded the necessity of proving a contract.

Apart from what is said in the replying affidavits, there are factors which militate against the notion that a legally enforceable agreement was intended. The applicant himself walked out of the conference on 15 June 1993 and has since remained absent. By so doing, it negated what would have been a fundamental understanding underlying the multiparty negotiating conference if an enforceable agreement was intended. On another occasion it challenged a decision of sufficient consensus as though it was not legally binding. The papers indicate that other participants also felt free to discontinue the process. The diversity of the parties and the fact that some are groups such as the traditional leaders of a province, governments and political parties, militate against the idea that they consider themselves bound by agreement to maintain the process. It is in this general context also relevant that it is generally accepted that the resolutions of the meetings of the structures created by the multiparty negotiating process are not binding in law; they are merely in the nature of recommendations, firstly for consideration by the next meetings in the negotional hierarchy and possibly later by the passing of statutes.

The decisions of the negotiating council are moreover subject to the concept of "pigeon holing", that is in effect an understanding that as and when individual agreements are made, they are tentative only in the sense that they are pigeon holed pending finalisation of the larger packets of agreements

of/...

of which they form part and a further agreement on its implementation.

And above all, the ultimate object is the attainment of broad consensus on a new political dispensation. All of this can only be achieved by the passing of appropriate legislation by the Republic of South Africa Parliament and the legislatures of the TBVC legislatures. And in this regard one has to remember that not even the RSA government negotiator, nor those of the TBVC states, can legally commit themselves that such legislation will be passed. All that can be achieved at the end of the day is an understanding binding in honour only.

It is in these circumstances inconceivable that the parties intended to create a legally enforceable decision making process, only to produce an understanding that lacks legal efficacy.

We accordingly consider that the applicants have failed to establish the jurisdictional premise for any form of relief. This conclusion renders it unnecessary to consider the other issues. We would add however that to the extent that the remedies are discretionary, it would seem to us that it would be inappropriate to interfere in the course of a political process which is still far from being concluded. This also renders it unnecessary for us to decide whether there has been strict compliance with the rules of procedure, a matter which is at least debatable.

Having said that, we can only emphasize the need for debate and that the continuing participation of all the parties appears to be the only method to achieve the end to which all parties profess to aspire.

The application is dismissed with costs, including the costs involved in the retention of three counsel.

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