



CONSTITUTIONAL ASSEMBLY

"ARBITRARILY" IN SECTION 25(2)

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 14 March 1996
RE: Panel and Tech Comm 4 Memorandum on *"The Effect and Desirability of the use of the word "arbitrarily" in Section 25(2) of the Working Draft."*

We enclose for your consideration a document produced by the Panel of Experts and Technical Committee 4 entitled, *"The Effect and Desirability of the Use of the Word "Arbitrarily" in Section 25(2) of the Working Draft."*

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3

E-mail: conassem@iaccess.za



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THE NEW CONSTITUTION

PANEL OF CONSTITUTIONAL EXPERTS TECHNICAL COMMITTEE 4

MEMORANDUM

To: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 14 MARCH 1996

RE: THE EFFECT AND DESIRABILITY OF THE USE OF THE WORD "ARBITRARILY" IN SECTION 25(2) OF THE WORKING DRAFT

1. INTRODUCTION

The CC has requested the Panel of Experts and Technical Committee to advise on the effect and desirability of the use of the word "arbitrarily" in S 25(2) of the Working Draft which reads:

"No one may be evicted from their home **arbitrarily** and without an order of court made after considering the relevant circumstances".

2. EFFECT OF THE USE OF THE WORD

- 2.1 The casting of subclause (2) in the negative has a corresponding effect on the meaning of the word "and" after the word "**arbitrarily**" in the subsection. The subsection in effect means that 2 conditions need to be complied with for the eviction to be improper in terms of the subsection namely, the eviction must be both arbitrary **and** effected in terms of an order of court. The subsection therefore contemplates that
- 2.1.1 an eviction permitted by legislation which is considered not to be arbitrary can be made with impunity even if it is made without an order of court; and
- 2.1.2 an order of court authorising an eviction, could in theory, legitimate what would otherwise be an arbitrary eviction.
- 2.2 If the consequences in 2.1 are intended by the parties, the section must remain as drafted.
- 2.3 It is considered advisable to furnish our view of what the effect of the section would be if the word "and" in the subsection was substituted with the word "or". In that event, the only one of the two conditions must exist

for the eviction to be improper. In other words, eviction will be improper if:-

2.3.1 it is arbitrary even though there is an order of court; or

2.3.2 it is not arbitrary and there is no order of court.

2.4 The difficulty is that the section contemplates the existence of an order of court even if the eviction is arbitrary.

3. DESIRABILITY OF THE USE OF THE WORD

3.1 It is accordingly suggested that the use of the word "arbitrarily" is undesirable in the way it has been used in the subsection.

3.2 It is however, at least arguable that if the concept of arbitrariness is left out altogether, courts of law might be obliged to grant orders of eviction where the legislation authorizing such eviction contains arbitrary elements resulting in an arbitrary eviction in substance.

3.3 This problem can be avoided by the following formulation which is recommended:

No one may be evicted from their homes without an order of court made after the court has considered all the relevant circumstances and only if the eviction is not arbitrary.