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**SOUTH AFRICAN GOVERNMENT OFFICE
- WORLD TRADE CENTRE -**

12 July 1993

Head of the Administration
Multi-Party Negotiating Process
World Trade Centre

Dear Dr Eloff

**SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT FOR THE
ATTENTION OF THE TECHNICAL COMMITTEE: FUNDAMENTAL
RIGHTS DURING THE TRANSITION**

1. Attached is a submission by the South African Government entitled ***ENFORCEMENT OF FUNDAMENTAL RIGHTS AGAINST NON-STATE BODIES AND PERSONS.***
2. Kindly transmit the document for immediate attention to the Technical Committee.

Yours sincerely


GOVERNMENT OFFICE: WORLD TRADE CENTRE

DEK

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The Planning Committee
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Verwysing/Reference

1993 -07- 09

Dear Mr Van der Merwe

ENFORCEMENT OF FUNDAMENTAL RIGHTS AGAINST NON-STATE BODIES AND PERSONS

I enclose herewith the Government's comments regarding the possible enforcement of fundamental rights against non-state bodies and persons for submission to the Technical Committee on Fundamental Rights during the Transition.

With kind regards


HEAD, MINISTERIAL SERVICES

COMMENTS BY THE GOVERNMENT REGARDING THE POSSIBLE ENFORCEMENT OF
FUNDAMENTAL RIGHTS AGAINST NON-STATE BODIES AND PERSONS

1. The Government is of the opinion that the horizontal application of a bill of rights cannot be supported from a legal point of view for the simple reason that if adopted it will cause havoc in our private law and clog the constitutional court with litigation which is essentially a matter of private law.

2. A bill of rights to be included in a constitution belongs to the sphere of public law, not private law. The purpose of a bill is to protect the individual against the activities of the State. It regulates relations between the State and individual, not between individual and individual.

3. The following authority for this elementary legal principle can, amongst others, be cited:

- (a) Corpus Juris Secundum - para 446 (An authoritative American legal work comprehensively covering human rights law)

"The purpose of the Bill of Rights is to protect the people against arbitrary and discriminatory use of political power. Broadly stated, the very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts;"

"Also, the Bill of Rights is a remedy which protects the individual against invasion by the government, or any branch thereof, and which provides a barrier to secure the rights of minorities, and to protect the individual against the arbitrary exactions of majorities, executives, legislatures, courts, sheriffs, and prosecutors."

(b) The Law of South Africa, vol 5, para 9

"LIBERTIES OF THE SUBJECT

9. The rule of law The concept of the rule of law has been subjected to a wide range of interpretations. In general it may be said to be viewed, by those who favour a 'liberal' conception, as a constitutional doctrine governing the relationship between the subject and those persons and bodies wielding governmental power in the state, in terms of which -

- (a) powers of government are exercised only in accordance with previously established general rules having a reasonably specific reference;
- (b) certain "fundamental" rights and liberties of the subject, and the principle of equality before the law, are recognized and protected by substantive legal provisions; and

(c) certain minimum standards of 'procedural justice are maintained in the application of the law and the adjudication of disputes.'. (underlining supplied)

(c) The Constitution of the Federal Republic of Germany, Art 1(3)

"The following basic rights shall bind the legislative, the executive and the judiciary as directly enforceable law."

Fundamental rights are not designed to protect the individual from the acts of his fellow individuals.

(d) Corpus Juris Secundum - para 456

"Application to Governmental or Private Action

The First Amendment guaranties only restrain action undertaken by a government, federal or state, and do not circumscribe action by private individuals and entities.

The First Amendment guaranties are limitations on action by a government, federal or state only, and do not circumscribe action by private individuals and entities. More specifically, the Constitution does not prohibit a private person's infringement of another person's First Amendment rights, but forbids only such infringement which may properly be attributable to the state, and so long as private

action does not constitute state action, it is not subject to constitutional oversight. However, when private action becomes imbued with a governmental character, or when government significantly insinuates itself into the operative activities of private parties, action by private parties may be subject to all of the constitutional limitations on governmental action."

- (e) Sieghart, The Lawful Rights of Mankind, p 109

"But the anomaly is a necessary consequence of the particular characteristics of human, as opposed to other rights. These are, after all, designed primarily to protect the citizen from the acts of neglects of his public authorities, not from those of his fellow citizens. The latter is the function of ordinary law, not inhuman rights law, and if the state can be held responsible for them at all, it can only be through Drittwirkung (see Chapter 9)."

- (f) The proposed British Bill of Rights drafted by Anthony Lester QC, et al, p 19

"Public authorities and private persons

A Bill of Rights is mainly intended to protect individuals and minorities against the misuse of power by government bodies and other public authorities. It is not designed to be a direct source of rights and obligations as between

private persons - for example, so as to enable a disabled worker to sue a trade union, an employee to sue their employer for discrimination, or an individual to sue a peeping Tom neighbour for breach of privacy."

- (g) The proposed Bill of Rights drafted by J Jaconelli, Enacting a Bill of Rights, p291 and 294

"1. Subject to the limitations contained in Part II of this Act, every person within the jurisdiction of the United Kingdom shall enjoy the fundamental rights and freedoms secured in this Part as against persons or bodies exercising governmental or public powers." (underlining supplied)

"The words '... as against persons or bodies exercising governmental or public powers' indicate that there is to be no Drittwirkung in the draft document. It is felt to be inappropriate and undesirable that the same instrument which governs relations between individual and State should also have to strike the necessary balance between individual and individual.

Moreover, it is important that this issue should be expressly resolved on the face of the instrument, rather than left to subsequent judicial decision. It is noteworthy that the question whether the Canadian Bill of Rights is applicable against private individuals and non-governmental

bodies seems to have been ignored, even by the commentators."

(h) Corpus Juris Secundum, para 717 and 719

"The central purpose of the equal protection clause of the Fourteenth Amendment is to prevent state action which discriminates on the basis of race or colour. Thus, discrimination by a state or municipality against any person within its jurisdiction because of race, ethnicity, national origin, or colour, generally constitutes a denial of the equal protection of the laws. As observed by the court, laws which brand persons inferior because of their race or colour, and thus act as a stimulant to prejudice, are inconsistent with the equal protection clause."

"719. Individual Acts; Private Contracts

Equal protection does not forbid discrimination on a private level, unless state action is involved.

The constitutional mandate against racial discrimination does not apply to private contracts or to the action of an individual in invasion of the rights of another individual, unless state action is involved."

3. This does not, however, mean that a bill of rights has no effect on private legal relations. Apart from its clinical legal

Effect to protect the individual against the abuse of power by the State, it also serves as a standard of values for good government. Good government in accordance with the ideals of a bill of rights would require the State not only to refrain from infringing fundamental rights, but also to actively pursue the attainment of these ideals. This it does by promoting, for instance, equality among its citizens by all the means at its disposal, including legislation. Such legislation would operate horizontally and regulate legal relations among individuals.