

CHAMBER OF MINES OF SOUTH AFRICA
5 HOLLARD STREET . JOHANNESBURG . 2001

DS2

OFFICE OF THE LEGAL ADVISER

P.O. Box 809, Johannesburg, 2000
Telephone 838-8211
Telegraphic Address: Bullion
Telefax (011) 834-3176
834-1884

Your Ref.:

TELEFAX

Our Ref.:

FAX NO. 397-2211

DATE 24 August 1993

No of pages transmitted: 8

TO: MS M EMMETT
WORLD TRADE CENTRE
P O BOX 307
ISANDO 11600

FROM: S OBERHOLZER
ASSISTANT LEGAL ADVISER
CHAMBER OF MINES OF SOUTH AFRICA
JOHANNESBURG

Dear Madam

TRANSITIONAL EXECUTIVE COUNCIL BILL

There is attached under cover of a letter by the President of the Chamber of Mines a memorandum by the Chamber containing representations on the Transitional Executive Council Bill.

We would be grateful if you would submit the memorandum to the Technical Committee on the Transitional Executive Council Bill as well as to the Negotiating Council of the Multi-Party Negotiations.

Yours faithfully



S O OBERHOLZER
ASSISTANT LEGAL ADVISER

Enclosure:

SO/MV/B.rights.fax1

440

END

CHAMBER OF MINES OF SOUTH AFRICA
Serving South Africa's Private Sector Mining Industry since 1889



5 Hollard Street
Johannesburg 2001
PO Box 809
Johannesburg 2000

Telephone: (011) 838-8211
Telegraphic Address: Bullion
Telex: 4-87057 SA
Telefax: (011) 834-1884

/JGH

20 August 1993

Delegates to the Multi Party Negotiations
World Trade Centre
KEMPTON PARK
1819

Dear Delegate,

You and your colleagues at the Multi Party Negotiations currently determining the mechanisms to prepare for and manage the country's first fully participatory elections are busy with one of the most complex and important areas of the whole constitutional negotiation process.

Much progress has been achieved in the short time available. The Chamber of Mines has studied some of the documents prepared by the Technical Committees with interest. On behalf of its members, the Chamber has prepared some comments on the Transitional Executive Council Bill. These are offered in a constructive spirit out of a concern that the Council be so established that it may perform its duties quickly, fairly and with due authority, unencumbered by non-essential tasks and utilising wherever appropriate existing agencies already active in the field.

We believe these comments merit urgent attention.

Yours faithfully,

R.M. GODSELL
PRESIDENT

441

**COMMENTS ON THE 8TH WORKING DRAFT OF
THE TRANSITIONAL EXECUTIVE COUNCIL BILL**

1. *The objects of the TEC in relation to its powers and duties*

The objects of the TEC are set forth clearly and in some detail in clause 3 of the draft Bill. Clause 3(a) refers to the creation and promotion of a climate for free political participation by specific means, namely: eliminating impediments to legitimate political activities; eliminating intimidation; ensuring that political parties are free to canvass support from voters, hold meetings and have access to voters; and ensuring that no government or administration exercises any of its powers in such a way as to advantage or prejudice any political party. Clause 3 goes on to provide in subclauses 3(b) and (c) for the TEC to create and promote conditions conducive to holding free and fair elections and to perform other functions that may be assigned to it under the Bill or any other law.

Despite this wide range of objectives, it is apparent from the succeeding clauses in the Bill relating to the powers and duties of subcouncils of the TEC that a disproportionate focus has been placed on powers aimed at ensuring that no government or administration exercises any of its powers wrongly. In the result less attention is given to the means by which the TEC can achieve its other objectives set forth in clause 3 (for example, that of eliminating intimidation and promoting free political activity).

On the other hand, although the Bill gives the TEC a variety of powers that may be used for the purpose of achieving the TEC's objects, it is not readily apparent in a number of instances how certain of the powers so given can be applied for the purpose of achieving the stated objects (for example, clause 12(e) regarding regional and local government budgets, and the restructuring and rationalisation of regional and local government administrations; clause 13(5) regarding regulations under the Police Act, 1958; clauses 14(1)(f) and (g) concerning matters related to a future

442

END

defence force; clauses 15(1)(d) and (e) concerning the rationalisation of treasury functions and the privatisation or tendering out of functions performed by State departments; clause 15(4) concerning information about new posts and the filling of certain vacancies in the public service; and clause 16(a) concerning consensus on matters affecting South Africa's long-term interests).

It is noted that the headings to clauses 12 and 17 refer to powers and duties of the various subcouncils. This would suggest that it is intended not only to empower the subcouncils to do certain things but to oblige them to do them. However, with the exception of clause 13 (which concerns law, order, stability and security) and clause 16 (concerning foreign affairs) the text of the clauses in question does not impose any duties on the subcouncils but merely clothes them with powers. Again, it is submitted that the Bill should be more focused in granting powers and imposing duties where these are strictly necessary lest the TEC, through its subcouncils, impedes rather than promotes the achievement of its own objects (for example, by rendering the security forces incapable of acting properly and effectively).

The TEC is no doubt necessary in order to provide multi-party oversight over the transitional phase leading to the election of a new government. Its job should be to ensure that as far as possible Government agencies, political parties and others conduct themselves in a way conducive to free and fair elections. It will have to work with a wide range of agencies and institutions as they currently exist. Given the urgency of the TEC's tasks, the limited time it has in which it has to achieve them and that the TEC will be dissolved on the assumption of office by the members of the first Cabinet appointed after the election, the TEC does not have the time nor, would it seem, the capacity to create new agencies to take over this work. The task of transforming such existing bodies into institutions appropriate to a democratic society should not be placed on the shoulders of the TEC. Although urgent, it is a matter for appropriate agencies to embark on with due accountability and proper mandate after the election. There is a concern that by trying to do too much the TEC will fail to achieve its primary purpose.

443

2. *The structure of the TEC*

Clause 8 provides for the establishment of 6 subcouncils and makes provision for additional subcouncils to be established. By clause 9, members of a subcouncil shall not exceed 6 persons who need not be members of the TEC. Although great care has been taken in clause 7(3) to limit the exercise by a subcouncil of any powers delegated to it by the TEC, we have a concern that the limit on the number of members in a subcouncil may be unrealistic and that the number of members should be doubled so as to ensure that each subcouncil reflects a broad cross section of opinion rather than a potentially narrow range of opinion. As indicated above, there is a grave danger that the TEC may dissipate its energy through the establishment of too many subcouncils rather than a limited number of councils dealing with the TEC's core responsibilities of promoting free political activity, law and order, stability and security, limiting violence and promoting peace.

As presently drafted the Bill provides for an excessive degree of centralisation. This will add unnecessarily to the workload of the TEC and its subcouncils. The country already has a number of independent agencies acting nationally and regionally in most of the areas the TEC is concerned with. A preferable approach would be to strengthen these agencies rather than seek to duplicate their activities. This would have the benefit of lightening the load on the TEC in the short term while also providing more effective structures to monitor sensitive issues long after the TEC has gone.

Thus under the Policing function, the Police Board was established to act as an independent complaints agency and to promote greater community co-operation with the police. If it has been deficient in this regard, the matter should be addressed directly, rather than establishing further procedures and bodies under the auspices of the TEC. The National Peace Secretariat has also established a network of police reporting contacts which could be better utilised.

444

As far as possible, all powers should be exercised by exception, rather than as a matter of course. It should be up to concerned citizens or parties to alert the TEC when it is feared that matters are being handled against their interests by whatever agency, rather than saddling the TEC with the task of reviewing a vast array of policy and management issues.

3. *The relationship between governments and the TEC*

The precise nature of the relationship between existing governments and the TEC under the Bill appears to be quite subtle and should be clarified in the Bill. On the one hand, clause 4(1)(b)(ii) requires participants in the TEC to undertake in writing to be bound by and to implement the decisions of the TEC. However, clause 2 stipulates that the TEC "shall have the executive and other powers set out in this Act or in any other law". The underlined portion of the preceding quotation from clause 2 suggests that the TEC shall have every single statutory power that exists. It is assumed that this is not intended and that clause 2 should be amended to refer to powers that may be assigned to the TEC under any other law.

On the other hand, clause 13 will ensure that no state of emergency may be maintained without the support of both the Government and the Subcouncil on Law and Order, Stability and Security or, where they do not agree, unless the civilian members of the Police Board have ruled in favour of the state of emergency. Presumably this constitutes an exception to the Government's undertaking to be bound by decisions of the TEC.

With regard to the Police Board, it is understood that the Board referred to is that established under clause 3.3 of the National Peace Accord. The function of that Board, as described in clause 3.3.3 of the National Peace Accord, is to make recommendations to the Minister of Law and Order "in regard to the policy relating to the

445

training and efficient functioning of the Police ... It is therefore
extremely questionable whether the persons who serve on

END

that Board are best equipped to arbitrate on the declaration of a state of emergency.

A further qualification of the undertaking in clause 4(1)(b)(ii) is to be found in the dispute resolution procedure set forth in clause 21 which calls for the "Election Adjudication Directorate" or, if an appeal is made to it, the "Independent Electoral Commission" to arbitrate on certain disputes within the TEC.

A further question regarding the relationship between the South African Government and the TEC arises from clause 26 which clause provides that the State President may, with the concurrence of the Council, repeal or amend the conditions of the Transitional Executive Council Act. When clause 26 is read in conjunction with clause 4(1)(b)(ii) it would appear that the TEC may have the capacity to require the State President to amend the Act when such amendment constitutes the implementation of a decision of the TEC. On this reading the TEC would have very considerable and unchecked powers.

4. *The Chief Justice*

Greater use should be made of the office of the Chief Justice during the transition. This is a function created to weigh conflicting matters of national interest and to review controversial decisions of great moment. The Chief Justice has constitutional authority, experience and tradition which will be of much assistance in managing the transition. It may be helpful to shore up the political credibility of the judiciary with the creation of assessors to serve in a tribunal with the Chief Justice to oversee the process and provide a review panel for conflicts with or within the TEC.

It would be far better for disputes contemplated in the Bill to be handled by the Chief Justice than by the arbitrators referred to in the Bill. The Chief Justice is the one institution which can be expected to rule impartially in the national interest.

447

One of the concerns with the present proposal for the TEC is that by bringing almost every facet of political life under its scrutiny, it will simply create a new, elevated platform for party battles. And its large, cumbersome agenda could provide ample space for manipulation for party gain. Thus rather than hoping to eliminate party advantage from the conduct of government and the elections, it could actually extend and perpetuate it. Greater use of the Chief Justice may help to defuse this.

5. *Sanctions*

No mention is made of how the TEC can enforce its decisions against recalcitrant governments or parties (or, indeed, former parties). This is a fundamental concern for any agency trying to level the playing fields. The National Peace Accord has failed so far to get the parties to call rogue elements to account. What chance is there for the TEC to succeed where the NPA has failed unless it is given appropriate powers to enforce its decisions. This matter requires careful attention as part of the broader issue of the relationship of the TEC to both formal and informal power structures.

JOHANNESBURG
18 AUGUST 1993

/MV/B.rhisa.gon3

448

END