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Comrade Zola Skweyiya
Chairman
Constitutional Committee
African National Congress
PO Box 31791
Lusaka
Zambia

Dear Zola

Nathaniel Masemola's letter to you was copied to me and I received it this morning. As the telephone reception in Lusaka is rather erratic (I have tried a couple of times today), I am faxing this response to Nathaniel's intervention.

It is quite clear from the statements that Gerrit Viljoen has made in the last month that their priority is to arrive at a constitutional arrangement in advance of an election which, from the latest briefing to South African lawyers last week would be in the form of a referendum of all groups. They persistently reject the idea of a constituent assembly because the regime wants the constitution to be accepted by all parties in advance of such an election, with the regime playing the central or determining role in the adoption of particular options.

It is therefore clear to me that the work of the Constitutional Committee has to be accelerated and much greater urgency shown in terms of research, reports and assistance. I am not sure whether there is any profit in meeting in the way we did in Cape Town as it was simply a re-hash of the May Lusaka meeting with verbal reports being made. We ought not to move to a more professional mode of work and you ought to insist that chairs of the Commissions provide progress reports so that discussions can take place in advance of any future meeting of the Constitutional Committee.

My principal objection to giving priority to the drafting of a constitution is that the actual provisions of such a document are the result of choosing one or another option. The choice of such an option is the result of a political decision. In order to make such a choice, we ought to be clear about the issues and what is involved.

I will try to concretise this by giving an example. Nathaniel's Commission deals with the economy. One of the important matters we have to discuss is the way in which property is to be protected under the Constitution, if at all. The Constitutional Guidelines provide some assistance; the regime's Law Commission Bill of Rights not only

entrenches all property rights but extends this concept to contractual rights, resulting in what Albie has called the 'privatisation of apartheid'. We ought therefore to be armed with a document which traces the result of choosing the US Supreme Court approach to property rights, the European Convention system and other approaches. We ought also to be clear about what property rights should invite compensation if there is nationalisation and the extent of such compensation.

There can be many other examples, especially in relation to what political order is to be adopted and the kind of human rights we want to be entrenched. Nothing is self-evident in these areas. We ought also to give serious consideration to the way the Constitutional Committee will service the Task Force on Negotiations which, I understand, the NEC has already set up.

The lessons of Namibia should be looked at carefully. SWAPO had a prepared constitution which they submitted to the working group set up by the National Assembly after the November 1989 elections. The initial stage of full-blown negotiations soon deteriorated to responses governed by the need for crisis-management whereby SWAPO accepted counter-proposals simply to reach an agreement. This became very evident with the decision that March 21st should be Independence Day and agreement had to be reached before that day. This is no way to adopt a Constitution. The people were totally ignored in this exercise.

The other major objection to drafting a Constitution without reference to our constituencies is that our work will have to be conducted in conditions of secrecy. Leaks are inevitable and they will leave a sour taste in the mouths of people like COSATU, the UDF and other 'internal' forces whom we cannot consult at this stage.

I propose, therefore, that the following approach be urgently considered by you:

- (1) that the chairs of the Commissions be required to produce reports with proposals for the way in which constitutional provisions be identified in their area;
- (2) that we work out our relationship with the Task Force on Negotiations and on our own role;
- (3) that we identify specific areas of crucial political importance in relation to the Constitution and ask our own experts as to how we should deal with them;
- (4) that no decision be taken about actually drafting a Constitutional document until you have consulted the NEC,

following soundings with the people inside the country.

Finally, I suggest that whatever we have written should be exchanged among ourselves so that we have a clearer understanding ourselves of our own views.

I hope that this response to Nathaniel will generate a debate among ourselves and I look forward to your views.

With best wishes

Yours sincerely

Kader

Kader Asmal

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