

Ww

C-O*DeEeSeA
SIS \\\SS

Mr D Mcleish
1 Komatie Rd
Emmerentia
Ext 1

JHB

9/3/92

Thank you for your letter dated 15/2/92.

We all have indeed placed our trust in the good guidance of our Lord to make this CODESA process succeed.

We can assure you that there is total commitment from all to making it work, as we are sure that with the support of people like yourselves we must definitely succeed.

Yours Faithfully

Wye

Murphy Morobe
(Head: CODESA Administration)

S
COMENTION FOR 4 DEMOCRATIC SOUTH AFRICA
@

PO Box 307. Isando, 1600, South Africa.
Telephone (011) 397-1198/99. Fax (011) 397-2211

MAR 38°92 16:09 MA_MCLOUCHLAN Pot

s

M.A.MeLOUGI ILIN tent

Johannesburg

Atterney, Notary & Conveyancer Telephone: (011) 728-8152 /3
Fax: (011) 728-2029

Micheet Arthur McLoughlin â\200\230

AO. Dax 22099

Parkview 2122

Our Ref: â\200\224-
Yourke; M A McLOUGHLIN/W11 MAM-M66 dchaniatinny

The Chairman 30 March 1992

Group 3 (Constitutional Affairs)

CODESA

TELEFAX -

Dear Sir,

re 13 CONSTITUTION AND BILL OF RIGHTS

Members of the public were requested and invited to make representations to CODESA over the deliberations for a new constitution and bill of rights. In accordance with the said invitation and in an effort to make a possible contribution to the debate over a truly democratic dispensation whereby the new constitution will truly be of the people, for the people and by the people and, in terms) of which, the rulers are truly the servants of the people and not the reverara, I have the following points to make which I feel need to be addressed, namely s-

1. CONTROL OF THE ARMED FORCES

| 2 It has been suggested, that elements within either the

FAX wm Codesa

Â\$ SADF or the police are, with or without the connivance of their superiors, actively attempting to destabilize the negotiating process towards a just dispensation for all, Alternatively, that different factions amongst the blacks are jockeying for position and that a "third force" is assisting one or other element in this regard, These are not idle allegations and one has only to look at recent press reports with regard to TV

| producer, John Drury, of the BBC's "Assignment"

, programme and, the continued local perception of

Such a third force, to realise that certain people are definitely trying to destabilize the democratic, negotiating process. Whoever is responsible, and it

could, into alia, be the elementa in the security
forces referred to, power needs to bo controlled ina
new Soullh Africa. No Constitution, or sill of Kights,
whether justiciable or not, will be of any force or
effect, if the Armed Forces are controlled,
effectively, by one man or, a small clique of Generals.

Sue shudders when a whole band of ex-Generals,
publicly advocated a No vote to the deliberations at
CODESA. As Groucho Marx once said "Military
intelligence is a contradiction in terms!"

Post-it ices

Pace: _}

= 2211

ATTENTIONOF: Tine Choseman

FAX NO:

FAXNO: 7b ~

I suggest that one way of insuring that a new
govoernmont/.....

PAGE 2

government is not overthrown by the military, would be to decentralise security on a regional basis, so that no military council can take over the government by way of a Coup d'etat unless such regional military power has the support of the generals from all the other decentralised regions. This may lead to a more expensive military establishment but, will be well worth the cost if democracy is to be ensured. I have, to date, not heard any of the leaders of the various political parties at CODESA comment on control of the military in a new South Africa and, as Africa has a poor record of democracy and a good record for military takeovers, whatever constitution is in place, I feel that this important issue needs to be addressed publicly as well as being debated at CODESA. After all, if the Armed Forces are to be the guardians of the constitution and the bill of rights who, in turn, is to control the Armed Forces? They should be subject to even more stringent checks and balances than Parliament, to avoid any abuse of power,

"THE NATIONAL INTEREST"

This concept, which is used by governments world wide, including the great democracies, to cover up embarrassing actions and misdemeanors on their part, needs to be subject to scrutiny within a true democracy. Accordingly, will provision be made in the constitution or the Bill of Rights, for all information under the government's control, to be subject to Scrutiny by the courts, (in camera, if necessary), to ensure that "the national interest" is not subject to the perverted, subjective whim of the state or its officials, I believe that it is necessary, that all state information and documents be freely accessible to the people, unless the government or its officials, themselves, apply to a constitutional court for such information or documents to be held secret, in the national interest. The inconvenience, to the government and its officials, of having to take positive action, will be far less than the damage caused to democracy if "the national interest" is left to the discretion of some politician, who may have something to hide. The US Freedom of Information Act, is a precedent, which should be looked at by CODESA, as a starting point and could be adapted, in its scope to suit local conditions,

ADVISORY COMMITTEES

I understand that in Germany the Ministers of State/....

MAR 36

Â°92 16:18 MA_MCLOUCHLAN

Page 3

State are advised by Committees in thoir respective areas of responsibility. These committees are made up of the best brains in the country, whatever the political persuasion of the individuale an committees are, The Minister may reject the committeesâ\200\231 advice on any particular matter, but does not do aso lightly. â\200\224 This is just another check against the taking of arbitrary decisions by politicians.

THE AUDITOR GENERAL

Although the Auditor-General is only responsible to Parliament, his position would be greatly strenghtened and, 48 a civil servant, he would be free from political manipulation, if his report to parliament was given jointly, with a report from an independent team of auditors, made up of respected firms within the auditing profession. This would cost extra but, would be more then adequately compensated, by tho provontion of corruption within the Government and Civil Service. I was recently shocked to read that in one of the Provinces, Iana than 50% of tho municipalieies had balanced their books for the year or submitted their balance sheets to the Province. Some ,apparently, were more than one year in arrears. This should not be &llowed. Tf a Municipality is more that 6 months in arrear, a team of auditors, should immediately be sent in and the management committee suspended until the results of the audit is known.

RESERVE BANK

As in the case of the Bundesbank, the Reserve Bank should be completely free from political manipulation and the constitution should incorporate provisions Similer to those in the German Constitution on this point.

DEFICIT FINANCING AND MONEY SUPPLY

I believe that deficit financing is wrong in principle and, if resorted to, should be iimited to a maximum of of 3% of the gross domestic product and then only for Shoxt periods when an economy is in a receassion/ depression. An Act similar to the Gramm Act in the United States, forcing the government to reduce the deficit, if this is not done voluntarily, should be included in the Legislative armoury. This type of Legislation would not be necessary, if deficit financing is covered by the Constitution/Bill of Rights, Similarly, money supply should be controlled, and put within limits, insofar as increases are concerned, In this regard, the money supply should be covered by the Gold and Foreign Exchange Reserves to a certain percentage, gay, 25%. This discipline is necessary, to avoid inflation, which impoverishes the Nation, and is a fraud on ite citizens.

Page 4

EXCHANGE CONTROL

This is an Lalygullus contre: Brought in by the Finance Minister of the Nazi Regime in Germany in 1930's. It is undemocratic, and should be outlawed in a new Constitution. All arguments for retention of exchange control should be seen for what they are - spurious! A Citizen who has paid his taxes, should be allowed to invest his money, wherever he wishes, particularly, as the world is now becoming a global village, The country's currency will initially depreciate but, if exchange control is banned in the Constitution, this would be short term and investment will pour into the country, when investors realise that their investments are safe, and may be repatriated, without any intervention by whatever government. of the day is in power. Similarly, citizens of the country will not be inclined to remove their Capital as they will be secure, in the knowledge that their money can be moved, without let or hindrance from the government. If we call ourselves a free enterprise economy, we must not only pay lip service to the concept, but show this clearly by protecting it within the Constitution/Bill of Rights,

6. THE CALLING OF REFERENDA

In any truly democratic country, where the will of the people is to be given expression to, the right to call referenda on various issues, local, regional or national, should be encouraged, provided, of course, any person or group, wishing to call a referendum, has sufficient support for the issue to be aired. None of the delegates at CODESA who truly believe in a full democracy, should object to the constitution and bill of rights encompassing this matter.

124% ATEA OF JUSTICE 1 AND RETRO ACTIVE LEGISLATION
Enclosed is an extract from Wille's Principles of South Africa Law, 6th edition, pages 14, 15 and 16 which clearly set out the qualities required by the rule of positive Law namely, that, all Laws should be t=

(1) Reasonable

impartial
Certain
Comprehensive

Publicly promulgated
in accordance with public opinion.

Of ee
A U1 & w a
eee â\200\234eee ee eee eee

(TF ewes

IT believe these qualities should be the cornerstone of all

legislation in the new South Africa and, in this regard, I particularly refer to the last two sentences of the paragraph headed "Promulgated", to wit, legislation which is made to apply to actions that were committed in the past, and which changes the law, is called retrospective or *ex post facto* legislation. It is, obviously, unfair and is almost universally condemned. Is the question of *ratra* active legislation on the agenda at CODESA? If not, I suggest that it should be placed thereon and, hopefully, condemned, in line with a democratic constitution.

8. APPOINTMENT OF JUDGES

If the powers of the Executive, Legislative and the Judicial arms of Government are, hopefully, to have equal powers of veto against each other in a new constitution then the appointment of Judges is an important issue and should not be controlled, directly or indirectly, by the Executive and/or Legislative arms alone. At best, I believe that these other arms of government should be given a maximum of a 50% right to the appointment of judges and that the balance should rest with the legal profession as a whole or, possibly, it and other relevant constituencies. In the event of an impasse, the Appellate Division or the Constitutional Court should act as the final arbiter.

CARTELS AND MONOPOLIES

The proliferation of cartels and monopolies in the South African economy exist despite Legislation under the Monopolies Act and the existence of the Competitions Board. These seem to be ineffective, essentially, against the continuance of these cartels and monopolies. They are essentially undemocratic, if not immoral, and have been allowed to develop by virtue of the historical, undemocratic nature of our society. The = Aigunwul char they need to exist to fund multi-million or multi-billion Rand contracts is not acceptable. If a need for such financial muscle is necessary, this can always be achieved by various big companies forming consortia to part-take in joint ventures. The cartels and monopolies should be broken up in an ordered manner over a period of, say, 10 years. Only in this way will free enterprise be seen to be working, in practice, as well as theory. |

CONTROL BOARDS

These bloated bureaucracies have outlived any usefulness they may have had, which is doubtful. They should be disbanded as soon as possible to allow the market to regulate itself. They tend to act as another cost burden to the economy which is unnecessary. If the farmer wants, or needs a marketing arm and a mechanism for smoothing out fluctuations in price, he can formulate his own strategies through co-operatives and the like,

Page 6
POLICE

A democratic society needs a dedicated, professional and impartial Police Force which is seen to be such by all its people, in order to be respected. To achieve this, high standards and high pay are necessary.

HEALTH, EDUCATION AND HOUSING

In principle, the Government should act merely as a facilitator and catalyst setting down the principles and standards to be met and applied in each of these areas. It is not, or should not be, the function of Government to act as the *paterfamilias* providing all the people need. The people need to be taught how to catch fish not merely be given the fish. If one is merely given handouts one never learns and a Nation should have enough pride in itself for each of its citizens to learn to stand on his or her own two feet. Provided this principle is accepted, it may be necessary for the State to assist in providing the initial impetus, for instance, by bearing the bulk of primary education. Parents should, however, be asked to contribute a reasonable amount out of their own pockets in accordance with their means. This would not relieve a citizen of his own self-respect and pride as well as his obligation for his own family. It builds character and can only improve the work and responsibility ethic in a Nation. To say that it is the State's responsibility to provide housing, education, health and social welfare for its people is

nonsense. The state should merely stand as a backstop to help the really needy and those who cannot, under any circumstances, help themselves. As stated

previously, a conditional period may be necessary before this principle of self-help can be fully implemented, because of historical imbalances, but the principle should still be accepted and implemented, in a phased manner.

It has the following additional comments to make on various portfolios.

HOUSING

This should be financed over a number of generations, and bonds granted at the finest rate of interest possible, excluding subsidies, and over a period of 50 years, through banks, building societies and insurance companies. This finance should be seen as some form of retribution to our fellow citizens, who have been legally deprived from entering the housing market for so many years. By the same token, these communities must bear their responsibility for payment of bond instalments, lights, water and other services.

EDUCATION

In @ free enterprise society, the State should merely set - the minimum Standards and Principles to meet Overall objectives and leave it, thereafter, to private enterprise to Provide, in whatever form, the uses of various communities. This is well {llustrated in Nobel Prize winning economist MILTON FRIEDMAN'S BOOK "CHOOSE" where he Suggests that a voucher System be Implemented in American schools, in terms of which, each student is subsidised by the State up to a certain amount, depending on the level of education being sought, These vouchers can be cashed in at any institution, which may Charge, either more or less, than the amount of the voucher. â\200\230The institution then obtains payment for the amount of the vouchers received by it from the State and the parent then pays the difference, if any. The better institutions will then sell education at a premium, and in accordance with their . results and facilities, will receive more vouchers than @ school which does not meet the Standards required by the Community, Such a competitive base for an institution, can only be of benefit to the co It will also give freedom of choice of types of education as may be required by parents for their children. In a democracy, it Should not be the Prerogative of the State, to tell parents how their children should be educated other than by way of setting minimum Standards!}

AGRICULTURE

It must be accepted that a redistribution of land will have to occur, to correct the imbalances created by an apartheid society, The 1913 and 1936 Land Acts Protected the interests of the white man alone and, obviously, these imbalances must be redressed, Some Expropriation will be necessary, but farmers should be adequately Compensated by the State. Such compensation Should, however, take into account the tax breaks

received by

g the level of compensation to
Thereafter, the farmer should be treated as any other businessman whose success or failure depends on his = own ability and ingenuity. Farmers have in the past been too protected by the State, at the expense of the other citizens country who do not receive the same AS & rannlt, farmoro Rave be Al liuwed iid up subÅ°stantial capital assets which other citizens have not and, although, their income may be relatively small, the capital value of their assets have increased substantially through the years. Any farmer who has not Set aside sufficient reserves from good years, to cover bad years, has only himself to blame in most for the dire straits in which he himself. The market place must be the arbiter of who should be a farmer or who should

Page 8
HEALTH

The emphasis here should be on preventative medicine and not curative medicine. The State should provide basic clinics throughout the country, together with the education on preventative medicine, to change the culture of health care, Thought should be given to creating incentives for people to encourage them to lead healthy life styles. A National Health Scheme for curative medicine should be based on no claim bonuses being granted to those who do not utilise or abuse the system.

REGIONAL AND LOCAL GOVERNMENT

ae eg na EY aN de

These tiers of Government should be obliged to run their levels of Government, incorporating the same principles, as Outlined above for National Government within the framework of the Constitution/Bill of Rights.

LANGUAGE

I believe that the best way of ensuring National identity, cohesion and communication within a Nation is through a National language. The only language which would seem to fit the bill, from a practical point of view, would be English. If all the people speak one language, they can identify with each other more easily, The United States of America is an example of Peoples of diverse Nations coming together and being unified through the use of one language. This in no way means, that a Particulay ethnies or cultural group should not be proud of, and continue to speak ,their own language, within their Own communities , but it is impractical to expect the Nation as a whole to Bpeak a number of languages.

Naturally, I would expect that in a democracy, a justiciable Bill of Rights . Sine qua non, together with the divi powers as outlined above in national, regional and local politics. I would be pleased to hear that the ahnve Mattoro, if not specifically on the agenda for the debate within working group three, should be Placed thereon. If, however, you do not feel that the issues raised are of sufficient importance to warrant discussion, would you kindly let me know. I would be happy

to appear before your working group, if required, to expand on the themes outlined above.

I truly believe that a Constitution and a justiciable Bill of Rights, incorporating all the checks and balances set Out above, would be something of which all South Africans

Could J sak

cS
MAR 38 'S2 16:14 MALMCLOUCHLAN

Page 9

could be truly proud and, would insure that the politicians and servants of the state can truly say "I serve",
Regrettably, human nature Still seems to be guided by greed, fear and power, and as long as this is the case, the checks and balances, set out herein, will be necessary to insure evenhandedness down Luv the weakest member of society. If such a constitution can be agreed to at CODESA, I, for One, would be happy to accept my new destiny with pride and to serve under any Pregonent, no matter what his race, colour or creed. [would then push for elections to be held as soon as possible.

I do not think that it would be in the interest of the people, as a Whole, for a transitional government to be installed before agreement, in principle, has been reached, on what kind of democracy everyone is talking about,

I shall be glad if you would confirm that my letter will be brought to the attention of all the interested parties

within working group three and look forward to hearing from you,

Yours faithfully

M A MotouGHLT
a

encl:â\200\224

i eles

unsettled hypothesis: but it does not follow from this fact that natural law &

further usefulness. =
The world in general,}

law of nature, chiefly

Grotius, with profound common sense

fundamental principles of that law, and he "

work, De Jure Belli et Pacis, i

be (1) reasonable; (2) impartial; (3) certain; (4) compact, clear ;
(5) publicly promulgated; and (6) in accordance with public Opinion, =

(1) Reasonable

All the authorities are agreed that the first requisite of a rule of law is that it shall
*
be just which is variously termed "just", or "reasonable", or "equitable". They

but their

z African

Fould v Minister of Justice 1967 (1) SA 263 (Ac 276.
Transport (Pry) Ltd 1576 (1) SA 887 (A) at 806: Berron
ini: , Fransveel + Tink 1989 (4) SA 731 (A).

1, Hablo & Kahn Legal System 31-1-84

"Centre 194. One 1 SE Lishln OTe TO

their conduct

OF Vapueness in the wording~
the average person

is changes the law, is called retrospective or ex t
lation. It is obviously unfair, and is almost universally condemned" *
tonlance with public opin.

62; Hallo & Kahn Legal System 32. 44.

i Minister of Pass & Telegraph "Rasoo! 1934 AD 167 at 173, 188, 8 & Carclec

ietitter of Dees 1908 FS 130 at 435. See also Zgilt "McLeod (1904) 21 SC 150 at 152:
Sicgou "The

2 SC 56 at 271; ZY Senctoc "Phatoc 1935 IPD 290 12 291. De Ben,

MAR 38

92 16:15 MA_MCLOUCHLAN

16 1 Principles of South African li

games or activities on Sundays; or from entering urban areas without spe
permission. ig

Equity 4

Equity is a collection of Ptinciples based, like natural law, on conceptions of i
justice; but, differing from it, not on the principles supposed to be instinct
known to all mankind, but on those formulated by a select few, the most experieng
and enlightened jurists of their day. In many states in past ages these jurists ha
realized that their national law was far from perfect; that to apply it strictly wo
many cases work injustice. There Brew Up, in consequence, im these count ig
practice of modifying the rigour of national law by the application of princigg
intended to give fair, or what is called an â\200\230equitableâ\200\231 result; and thi
s collect

Principles was termed aequitas, or equity.2* Such collections became impor
portions of the law in Rome and in England; these systems will, owing to Â¢
influence on our law, be described briefly before treating of the position of Equit
South Africa. 4

Equity in Roman Law

In Roman law, aequitas consisted of a body of principles conceived and develg
by the praetors in order to counteract the harshness and subt

In omnibus quidemi maxime tamen in jure sequitas spectan
especially in law, the principles of equity must be borne in mind. The chief ptincigh
of aequitas were the following: â\200\2344

(1) No one should be enriched to the prejudice or injury of another: Jure natyy
aequum est neminem cum alterius detrimento et injuria fieri locuplere, }

(2) No one can improve his position by means of his own wrong: Nemo exe

delicto meliorem suam conditionem facere potest. No one can, by reason of
subtlety of the civil law, and contrary to the dietates of natural justice, derive a
advantage from his own bad faith: Ne cui dolus suus per occasionem jucis civ
contra naturalem aequitatem prosit.%3 A Variation of these maxims is that no oneÂ¢
deny his own act: nemo contra suum factum venire.% a

(3) The nature of a contract is determined by the intention of the Parties and not

their designation or description of it: Plus valet quod agitur quam quod simul

concipitur.* Similarly, in the interpretation of wills the intention of the testator i
first consideration: in testamentis plenius voluntates testantium interpretanturi;

Equity in English Law

Wy Rnglasd, fous the drreenth century onward, there developed under the ony

Chancellors, a hady of rites whieh Hiodified portions af the alder law of Fnslag
The principles whieh Wiehet the Ccone ad Chancery were those af â\200\230conacieng

fy

ts

â\204¢* Austin Jurispritedene 976-7; Maite Anclent Haw 32; Allen ow in the Making 6 ed
(195H) 3H5, 4

"E1471; Allen 302-9, y

* 1) 50.17.90, -

7) T) 50.17,206; 12.6.14,

17.134.1,

4,

4 i

i

D

1

â\200\234Db 2.

% 4.22.1; Gaius 3, 1.37,

2Â° 50.17.12.

3

Xp

â\200\231

â\200\231

ponâ\200\231, and â\200\230gov
Peuardianship

poteseen cases Â¢

pee course of t

5 % ty, became ar

pominon law

Btions of the co:

Bas fusion of t!

ipetee by Engli:

, Â«

Py

BMdty ie South

Buity, asa syst:

mouth Africa, .+2

wT

Constructed th:

tense of being

pis result follo:

Beommendable Â«

ae assimilated in,

Reno one shall b-

Mawhole of our ja:

tone person to rc

Rformer has, wit!

Himent.* It sho:

Dplication, Â«7

WAG Maxirns to Â¢.

iM faith ot wrongi

tracts; represen

trons benefiting v

sons in property

ims have also b.

M Halsbury (Fsilsham

P Allen 3 A

382,

Malebury (1 Jaisham Â«

B Austin Jurisprudence 6

mr Weinerleins v Coch Bui

Sau (A) at 606,

pe Estate Thomae Ken

1 (1908) PY Bp yes 9:

Warne (ARM np

Cane (asigiea) at dons

F Vort 1.3.5,
4 Umblebt's ease (eure)
m Grotius 4,30). 4, 26
pat Vill below,
ea, Noriie + Poo! NO 19Âçy

On the doctrine of no:
Anchen (

1892)9sc 289; ;

(4) SA 1 (A); Kessoam

ewport & N } f Olivier S,
Bi AD 529 xc 33,

B Surgers v Fraser 1907 J