

Inkatha Freedom Party

**THE STATUS OF INTERNATIONAL MEDIATION  
IN TERMS OF THE  
AGREEMENT FOR PEACE AND RECONCILIATION**

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**1. WHEN**

“international mediation... will commence as soon as possible after [the April 26-28, 1994] elections.”

International mediation does not depend on the development of a deadlock in the negotiation process in the Constitutional Assembly, and is not a tool to solve a deadlock. In fact, the Agreement for Peace and Reconciliation [hereinafter: "the Agreement"] requires that international mediation is to commence even before the constitution-making process in the Constitutional Assembly was properly structured. Therefore, the clear intent of the Agreement is that the constitution-making process should proceed from the basis of the outcome of international mediation which is to set some cornerstones for the new constitution.

The intention of the Agreement is reflected by the history of negotiations which produced the interim Constitution. Simply put, the IFP rejected the notion of an election to empower a Constitutional Assembly charged with the task of writing a new constitution by virtue of majority rule, claiming that some fundamental issues related to pluralism and federalism cannot be decided by majority rule. The IFP indicated that even if the rest of South Africa by overwhelming majority wished to be organized as a unitary state, regions such as KwaZulu-Natal which have constantly expressed a federal demand, have the inherent right to self-rule within the parameters of a federal relation with the rest of the country.

The IFP entered the electoral process which was shaped by the interim Constitution only when there was an agreement that international mediation, and not the Constitutional Assembly, would offer the path to settle the issue of the form of state, or as it is put in the

Agreement, when it was agreed that these issues 'will be ad by way of international mediation'. This language also means that the same issues are not "to be addressed" by the Constitutional Assembly until mediation has taken place.

The fact that the Agreement refers to 'outstanding, issues also indicates that the deadlock produced before elections carries over and is to be solved by way of international mediation before the process which could produce a new deadlock begins. In terms of the Agreement, such outstanding issues would not go to the Constitutional Assembly, irrespective of whatever opinion one might have on the possibility that a new deadlock might or might not take Place in the Constitutional Assembly.

## 2. WHAT

“any outstanding issue in respect of the King of the Zulus ...”

“any outstanding issues in respect of the 1993 Constitution as amended ... “

These two items for mediation reflect and refer to the two items listed in the Consolidated Terms of Reference for international mediation finally agreed upon by the ANC, the IFP and the NP/SAG. The mediators came to South Africa on the basis of these Terms of Reference. During the inaugural ceremony which took place in front of the world press at the Carlton Hotel in Johannesburg, the then Minister of Foreign Affairs, Mr Pik Botha, Mr Jacob Zuma of the ANC and the IFP leader, Dr Mangosuthu Buthelezi all made statements taking pride in the fact that after long negotiations the SAG, the NP, the IFP, and the ANC had agreed on a common set of Terms of Reference.

In this respect, it is worth mentioning that the "object" of mediation as it was set out in the Consolidated Terms of Reference never came into question, and that mediation collapsed only on the issue of its 'purpose" with respect to the electoral process at the time. The ANC and the NP requested that the IFP commit itself to the election date and to the notion that the outcome of mediation would be tabled with the Constitutional Assembly after elections, without'amending the constitution before elections. The IFP demanded that the outcome of mediation be translated into amendments of the constitution before elections. On this issue mediation collapsed, and the Agreement offered the necessary compromise partially amending the Constitution before elections and ensuring the resumption of mediation "as soon as possible after elections:, viz. before the Constitutional Assembly could decide the

matters concerned. Because of the very nature of this compromise it was clear that the "object" of mediation was not in question among the parties to the

Agreement, and was agreed that it would remain the same, and was therefore merely and y referred to as 'outstanding issues'.

Therefore, the Consolidated Terms of Reference are to be considered an integral part of the Agreement. They set out the object of mediation as follows

#### THE ISSUES:

5. *Inter alia* the following areas will need to be explored through international mediation and renewed negotiation:
  - 5.1 the extent of the powers to be given to the provinces, with specific reference to the issue of the central government overrides, exclusivity, residual powers, judicial functions, entrenchment and integrity of provincial autonomy, provincial civil service and police, and jurisdiction over local government [primarily Section 126, Schedule 6 and relating provisions of the 1993 Constitution].
  - 5.2 Fiscal and financial autonomy of the provinces.
  - 5.3 Preservation of provincial autonomy during future stages of constitutional development.
  - 5.4 Autonomy of the constitution-making process at provincial level.
  - 5.5 The adjudicatory role of the Constitutional Court with regard to national and provincial constitution-making.
  - 5.6 Procedure for constitutional amendments and future stages of constitutional developments with specific reference to the entrenchment of fundamental human rights, constitutional guarantees and provincial autonomy.
  - 5.7 Process of rationalization and empowerment of the new provincial governments, with specific reference to certainty in the transfer of existing functions and assets to the new provinces.

5.8 Citizenship and residence requirements for active and passive electoral rights.

6. The international mediation effort shall also address the issue of the claims and demands of His Majesty the King of the Zulu Nation, with respect to the restoration of the Kingdom of KwaZulu, with specific regard to the right of self-determination of people on a territorial basis.

The issues listed under section 5 of the Consolidated Terms of Reference are those which the Agreement refers to as "outstanding constitutional issues". These were the very issues which were

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listed in the Yellow Paper of the Freedom Alliance which in December 1993 both Mr J. Mentz of the IFP and Mr D. Schutte of the NP introduced as amendments to the constitution being debated in Parliament. The same issues engaged the Freedom Alliance, the NP and the ANC in months of very intense negotiations between the beginning of January and the end of March 1994.

The issues listed under section 6 of the Consolidated Terms of Reference are those which the agreement refers to as "outstanding issues in respect to the King of the Zulus". As it is indicated both in section 3 and Addendum 'A' of the Agreement as well as in section 6 of the Terms of Reference, issues related to the King of the Zulus are framed within the parameters of the restoration of the Kingdom of KwaZulu and the role of the Monarchy in the region. In other words, the issue is not centered around the position of the King as a person but rather it relates to the 'institution' which is both "the constitutional position of the King ... and the Kingdom" (see the 'which institutions' of section 3 of the Agreement referring to both).

The issue is defused by "the claims and demands" of his Majesty and clearly relates to the "restoration of the Kingdom". His Majesty spelled out his claims and demands in three epoch making speeches to the Nation and three royal presentations submitted to the then State President Mr F.W. de Klerk, all of which were delivered to the mediators. These claims and demands were the object of very intense negotiations between a delegation of the Kingdom and the SAG between January-April 1994 which culminated in the Skukuza summit. In a nutshell they related to the establishment of the region of KwaZulu-Natal, as per 1834 boundaries, as an

autonomous and sovereign Kingdom (see section 6 of the Terms of Reference: "with specific regard to the right of self-determination of people on a territorial basis".)

The Agreement indicates that this complex institutional operation is to be finalized by means of adoption of a constitution for the province of KwaZulu-Natal. In terms of the Agreement the drafting of a constitution for the Province and international mediation go hand in hand as two parts of the same institutional and constitutional operation. In fact, international mediation is to determine the degree of autonomy and independence within the broader South Africa to be recognized to the Kingdom. Against such determination, the province "shall" draft a constitution which will organize the Kingdom internally, making provisions for the 'institution, role, authority and status' of the Monarch. The Agreement, in Addendum A, carries that the Monarch (not the "King") is an "institution", and it goes without saying that from a legal viewpoint a Monarch can be an "institution" and have 'role, authority and status' only within the parameters of a Kingdom. For instance, nowadays the Kings of Romania and Italy could be regarded as "Kings" but surely not as "Monarchs", for they have lost their respective Kingdoms.

The Agreement indicates that the Monarchy, the Kingdom and the position of the King are to be "constitutional" which means that all legislative and executive powers are to be exercised only by elected representatives. A "constitutional Monarchy" is a well known and established model, which, *inter alia*, represents the chosen form of government of a large number of European countries. In his speeches embodying 'his claims and demands' His Majesty himself indicated that the Kingdom is to be organized as a constitutional rather than an 'executive' monarchy. This perspective also

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throws light on the fact that the SAG and the three major political parties will engage in international mediation deciding the future of the Monarchy as an "institution". In fact as an organ of a constitutional system the Monarch is not dissimilar to other constitutional organs which we decided and defined by the elected representatives. In this specific respect the elected representative have the same responsibility, with the important proviso that in this case they must hear the 'claims and demands' which His Majesty made in the name and on behalf of the nation, - which encompasses past, present and future generations - for the restoration of the Kingdom.

### 3. HOW-

The modalities of international mediation are also defined in the Consolidated Terms of Reference. It might be noted that the Agreement did not define what is international mediation since all parties agreed and understood it is to be the same process which began before elections. In fact, only the same "process could have been ready and ripe to 'commence as soon as possible after elections'. This also justifies the fact that both the then President F W. de Klerk and President Mandela referred to the "resumption" of international mediation during the press conference which presented the Agreement to the world.

The Terms of reference define international mediation as follows:

#### "INTRODUCTION

- I. Following the Summit meeting between the State President, Mr FW de Klerk; His Majesty King Zwelithini Goodwill ka Bhckuzulu; Mr N Mandela and Chief Minister MG Buthelezi held in Skukuza on Friday, April 9, 1994, the African National Congress (ANC) and the Inkatha Freedom Party (IFP) hereinafter referred to as "the parties", have agreed to involve an international mediation panel in their negotiations, which panel shall facilitate the process of negotiations between the parties with respect to the issues set out herein. The statement issued at the meeting is attached herewith and attention is drawn to paragraph 4 thereof.
2. It shall be understood that the panel shall not be an adjudicator but rather an agency dedicated to the facilitation of an agreement between the parties.
3. The panel shall receive and consider such suggestions and evidence as may be submitted to it by the parties.
4. The panel shall be free to consult with any other person(s) as it might decide, and shall be free to request a meeting or meetings with the parties sitting together and/or propose any other procedure for the conduct of negotiations.

#### COMPOSITION

7. The panel will consist of seven individuals chosen by the parties, one of whom shall be the chairperson.
8. The parties shall each be entitled to appoint two South African lawyers properly qualified in South African constitutional law and/or international law who shall be free to attend all meetings of the panel as observers and to be available to assist the panel, at its request.
9. The panel may request such technical and clerical assistance as it may need.

#### MISCELLANEOUS

10. Additional parties may join the international mediation.
11. Any public statement of the mediation panel or of any of its members relating to the pending negotiations shall be issued only with the advice and consent of all parties concerned.

Therefore, the parties should finalize the selection of international mediators in term of section 7 of the Terms of Reference. Since this is the "same" process, preference should be given to the mediators who were chosen during the first stage of mediation if they are still available.

Attention should also be given to logistical arrangements and to the establishment of a secretariat.