

# CONSTITUTIONAL ASSEMBLY

## MINUTES OF THE 27TH MEETING OF THE CONSTITUTIONAL COMMITTEE

FRIDAY 1 SEPTEMBER 1995

### Present

**Ramaphosa MC (Chairperson)**  
**Wessels L (Deputy Chairperson)**

Ackermann, C	Mbete-Kgositsile, B
Bhabha, M	Mchunu, E S
Chabane, O C	Meshoe, K R
De Lange, J H	Meyer, R P
Du Toit, D C	Moosa, M V
Dyani, Z (Alt)	Mulder, C P
Ebrahim, A G (Alt)	Myakayaka-Manzini, YL
Eglin, C W	Ngcuka, B T
Gibson, D (Alt)	Nzimande, B E
Gordhan, P J	Pahad, E G
Green, L M (Alt)	Pandor, G N M (Alt)
Hofmeyr, W A (Alt)	Radue, R J (Alt)
King, T J	Ripinga, S S
Ligege, M G	Sizani, R K
Lockey, D	Skweyiya, Z (Alt)
Mahlangu, N J	Steenkamp, P J (Alt)
Majola-Pikoli (Alt)	Swanepoel, L J (Alt)
Marais, P G	Van Breda, A
Maree, J W (Alt)	Viljoen, C L

Alternates for this meeting: DP: D Gibson; NP: J W Maree and P J Steenkamp; PAC: A G Ebrahim and Z Dyani (Alt).

**Apologies:** K Andrews, K Asmal, P de Lille, A Fourie, F N Ginwala, B S Mabandla, R J A Rabie, D P A Schutte, T Sifora and C L Viljoen.

**Absent:** G J Fraser-Moleketi, S P Holomisa, L B Kgoali, Z Kota, D W Makhanya, L P H M Mtshali, S Mzimela, R Rabinowitz, and P Smith.

### In Attendance:

**Staff :** H Ebrahim, M Sparg, L Zondo, A Meyer, N Msizi, M Ndziba, and M Keegan.

**Independent Panel:** C Murray, M Sedibe-Ncholo, J van der Westhuizen and Z Yacoob.

**Technical Advisers :** H Corder (TC1); and N Steytler (TC5).

## 1. OPENING

Mr. Ramaphosa opened the meeting at 09h17. The meeting adopted the Agenda.

## 2. MINUTES

The Minutes of the 26th Meeting of the Constitutional Committee on 25 August 1995 were adopted with the following amendments:

- i. Paragraph 4.2.i was awkward and would be rephrased as follows: *"The PAC sought clarity as to what status the clause would give to Customary Law."*
- ii. The word *"the"* would be inserted in two places in paragraph 4.2.ii to read: *"and applied by the courts subject to the fundamental rights..."*.
- iii. The word *"generally"* would be deleted from paragraph 4.5.ii.
- iv. The words *"or conditions"* would be deleted from paragraph 4.5.iv(a).
- v. In paragraph 6.2, the word *"when"* would replace *"possibly once"* and *"constiution"* would be spelled correctly.

## 3. MATTERS ARISING

### 3.1 COURTS AND THE ADMINISTRATION OF JUSTICE

- 3.1.1 Mr. Hofmeyr introduced the document entitled, *"Matters Regarding the Judiciary and Legal Systems Draft Formulation,"* included in the documentation.
- 3.1.2 Mr. Ebrahim reported that Judges of the Constitutional Court had forwarded recommendations of a largely technical nature on these draft formulations. It was agreed that the recommendations would be forwarded to the technical committee for their consideration when drafting.

3.1.3 Regarding footnote 1 on page 6, that reads:

<sup>1</sup>*The appointment of the Chief Justice, President of the Supreme Court and other Constitutional Court judges is subject to agreement being reached on the structure of the National Executive.*

- i. The Chairperson ruled that the footnote would be amended to read:

*"<sup>1</sup>The National Party reserved its position and argued that their agreement to this formulation was subject to how*

*the matter of the National Executive was finalised."*

- ii. The Chairperson ruled that the same correction would be made to footnote 12 of the draft formulation.

3.1.4 The meeting adopted subclauses 1(1) - 1(7).

3.1.5 Regarding subclause 1(8), that reads:

(8) *All other matters pertaining to the functioning of any court shall be regulated only by an Act of Parliament or regulations or rules made thereunder.*

- i. The ANC questioned the "peculiar" placement of "only" in this formulation and in 3(i).
- ii. The Chairperson ruled that the Law Advisors would look into this matter.

3.1.6 The meeting accepted subclauses 2(i) - 2(iv).

3.1.7 Regarding subclauses 2(v) and 2(vi), that read:

(v) *Magistrates' Courts and other courts of similar status.*

(vi) *Other courts established by law.*

- i. The NP proposed that:
  - a. Sub-clause 2(v) should only deal with magistrates' courts;
  - b. Provision for "other courts..." should be moved to clause 2(vi); and
  - c. Provision should be made with regard to the establishment of such courts.
- ii. The Chairperson ruled that the matter would be deferred to allow political parties to consider this proposal.

3.1.7 The meeting adopted subclause 3(1)(a).

3.1.8 Regarding subclause 3(1)(b), that reads:

(b) *to consider the constitutionality of any Bill before (passed by) Parliament or a provincial legislature. At the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature acting on a petition by not less than 20% of each of the Assembly or*

*Senate, or legislature, as the case may be, or all the members of all parties not constituting the majority party in such body, and with the leave of the Constitutional Court.*

- i. The meeting agreed that the first sentence would be amended to read:

*(b) to consider the constitutionality of any Bill referred to it in terms of the provisions in this Constitution.*

It was agreed that the Law Advisors could refine the phrase.

- ii. The meeting agreed that the remainder of the sub-clause would be deleted, and its substance debated when dealing with subclause 21(2) of the draft formulation on the National Assembly.

3.1.9 The meeting agreed to subclauses 3(2) - 3(5).

3.1.10 Regarding subclause 3(6)(a), it was agreed that "4(a), (b) and (c)" would be corrected to read "5(a), (b) and (c)".

3.1.11 The meeting agreed to subclause 3(6)(b).

3.1.12 Regarding subclause 4(1), it was agreed that the Law Advisors would provide an opinion on whether this clause would confer to other courts jurisdiction which should vest exclusively in the Constitutional Court.

3.1.13 Regarding subclause 4(2), that reads:

*(2) The Magistrate's Courts and all other courts shall have such constitutional and other jurisdiction as may be conferred by an Act of Parliament.*

- i. The ANC agreed to this clause with the proviso that these courts could not be given jurisdiction to declare any legislation invalid, "except by amending the constitution."
- ii. It was agreed that the Law Advisors would consider this proviso and reconcile sub-clauses 1(7) and 4(2).
- iii. The ANC expressed concern that this formulation used the term "*an Act of Parliament*" where other formulations spoke of "*national law*". The Chairperson ruled that the Law Advisors would look into this.

3.1.14 The meeting agreed to subclauses 5(1) - 5(4), although it is noted that the National Party reserves its position subject to how the matter of the National Executive is finalised.

3.1.15 Regarding subclause 5(5) that reads:

(5) *The Deputy Chief Justice, Deputy President of the Constitutional Court, and all other judges shall be appointed by the President on the advice of the Judicial Services Commission.*

- i. The DP queried the precise meaning of the term "on the advice". The Theme Committee responded that it intended that the President should be bound to implement the advice given.
- ii. The Chairperson ruled that the Law Advisors would consider the matter.

3.1.16 Regarding subclause 5(6), that reads:

(6) *The appointment of other judicial officers shall be regulated by an Act of Parliament.*<sup>13</sup>

The meeting accepted the clause and agreed that there would be no need to refer to the Magistrates Commission as proposed in footnote 13.

3.1.17 The meeting accepted subclauses 5(7) - 5(9).

3.1.18 The meeting also accepted sections 6 and 7 of the draft formulation.

3.1.19 The meeting noted that:

- i. Theme Committee 1 would deal with section 8, on the seats of courts, and section 9 on language; and
- ii. The technical experts were still drafting formulations on the attorneys-general.

#### **4. THEME COMMITTEE 1 REPORT ON BLOCKS 7 AND 9**

4.1 Mr. Mahlangu spoke to the document entitled, "*Theme Committee 1, Report on Blocks 7 and 9,*" included in the documentation.

4.2 The PAC reported that it was withdrawing its submission on block 9 and would submit a new one.

4.3 The meeting accepted clause (i) of the draft formulation under "Name and National Territory". It is noted, however, that the PAC has reserved its position on the name of the country, pending its new submission on the matter.

4.4 Regarding clause (ii) that reads:

(ii) *The national territory of the Republic shall comprise the areas which formed the Republic of South Africa on 27 April 1994, including all islands and waters deemed to be part of such areas.*

i. The ANC suggested that the sub-clause be amended to read:

a. *"The Republic of South Africa comprises [the names of the provinces], including all islands and waters..."*

b. A second sentence could be added stating that the precise boundaries would be defined by an Act of Parliament.

ii. The DP said that reformulation would need to take into account the relevant Constitutional Principles.

iii. The FF said that the final formulation would also depend on final decisions regarding the number of provinces.

iv. The Chairperson ruled that the Technical Experts and Law Advisors would redraft this formulation, taking into account the concerns raised and the relevant Constitutional Principles.

4.5 It was agreed that the matter of the **national anthem** would be left in abeyance to allow the ANC and PAC to prepare their submissions. The shortened version of the two current anthems would be circulated to members of the Constitutional Committee for their consideration.

4.6 Regarding the **national flag**:

i. The ANC requested a comparative study on the inclusion of flags in other constitutions.

ii. The meeting agreed to defer the matter to allow the PAC, FF and ANC to finalise their positions on the current flag.

4.7 Regarding the **coat of arms**, the meeting agreed that:

i. The current coat of arms was not suitable.

ii. The new constitution would contain a clause stating that there

would be a coat of arms as described in a proclamation.

- iii. The Management Committee would seek expert advice to investigate a new coat of arms and the financial implications of changing the coat of arms. The Management Committee would forward proposals to the Constitutional Committee for its consideration.
- iv. There would be an attempt to finalise the coat of arms before the new constitution was finalised.

4.8 Regarding **provincial symbols**, it was agreed that the technical committee would advise the Constitutional Committee on this matter, if need be after they had consulted experts on heraldry.

4.9 Regarding the **seat of government**, the meeting agreed to let the matter stand over, to allow political parties to finalise their positions.

4.10 Regarding **language**, the meeting agreed to:

- i. Forward the matter to the Sub-committee for its consideration.
- ii. Ask the technical committee to advise the Sub-committee on:
  - a. Whether the question of sign language could be catered for by section 3(10)(c) of the Interim Constitution, which deals with the functions of the South African Language Board; and
  - b. What impact the Bill of Rights would have on the draft provisions on language and particularly on the status of "other languages".
- iii. The NP requested that the Law Advisors provide an opinion on whether section 3(10)(b) of the Interim Constitution required that the Pan South African Language Board be consulted before draft formulations on language could be finalised.
- iv. It is noted that the PAC reserved its position on the matter, pending its new submission.

## 5. **THEME COMMITTEE 1 MEMORANDUM ON PREAMBLE AND POSTAMBLE**

5.1 Mr. Ramaphosa introduced the document entitled, "*Theme Committee 1: Discussion on Block 10: Preamble and Postamble*," included in the documentation.

5.2 The meeting agreed that the preamble and postamble would be deferred until the entire draft constitutional text had been completed.

## 6. SUB-COMMITTEE REPORT ON THE NATIONAL ASSEMBLY

- 6.1 Mr. Wessels introduced the document entitled, "*Report of the Constitutional Committee Sub-Committee on Outstanding Issues in the National Assembly Report*," included in a separate document.
- 6.2 The meeting agreed that political parties would reserve their positions pending a debate in Constitutional Assembly on electoral systems.
- 6.3 Regarding "*C. Duration of the National Assembly*", the meeting agreed that:
  - i. The matter would be referred back to the Sub-committee; and
  - ii. The DP would forward proposals on "a fixed term" to the Sub-committee.
- 6.4 Regarding "*D. Speaker and Deputy Speaker*",
  - i. The ANC said that the question of who was the most senior judge needed to be answered and that members of the sub-committee that dealt with judicial matters should be drawn into the discussion.
  - ii. The Chairperson urged private discussions on this matter to commence so that the matter could be finalised.
- 6.5 Regarding "*E. Qualification of Members of the National Assembly*", the meeting agreed that this would stand over until discussions had been concluded on the franchise, on the Senate and on Traditional Authorities.
- 6.6 Regarding "*F. Vacation of Seats*", the meeting agreed to defer the matter until discussions on the electoral system was finalised. It is noted, however, that the ANC expressed concern that the report did not fully reflect the view it expressed during the Constitutional Assembly debate.
- 6.7 Regarding "*G. Sitting and Recess Periods*", the meeting agreed to shelve the issue until the matter of the declaration of states of emergency had been finalised.
- 6.8 Regarding "*H. Assent to Bills*",
  - i. It was agreed that the draft formulation would be corrected to reflect the Sub-committee decision that the word "*Speaker*" be replaced by the words "*State President*". The relevant passage would read:



*"...If Parliament does not agree with the State President's reservations/concerns, the State President shall refer the Bill to the Constitutional Court for a ruling on the constitutionality of the Bill..."*

- ii. The meeting agreed to refer the corrected formulation to the Sub-committee for its consideration.
- iii. It was agreed that the Sub-committee would consider the provision that had been deleted from section 3(1)(b) of the chapter dealing with the Courts.

6.9 The Chair ruled, in addition, that the Sub-committee would examine

- i. What aspects of the powers and functions of parliamentary committees should be included in the Constitution, and
- ii. The proposal that members of the National Assembly should be able to call sittings of the National Assembly during a recess.

## **7. ANY OTHER BUSINESS**

There was no other business.

## **8. CLOSURE**

The Chairperson closed the meeting at 13h00.