

## CONSTITUTIONAL ASSEMBLY

### MINUTES OF THE SIXTEENTH MEETING OF THE CONSTITUTIONAL COMMITTEE

MONDAY 3 APRIL 1995

Present

Ramaphosa, M C (Chairperson)  
Wessels, L (Deputy Chairperson)

Asmal, K	Meyer, R P
Bhabha, M	Moosa, M V
Camerer, S M	Mtshali, L P H M
Cassim, M F (Alt)	Mulder, C P
De Beer, S J (Alt)	Myakayaka-Manzini, Y L
De Lille, P	Ngcuka, B T
Du Toit, D C	Nzimande, B E
Eglin, C W	Pahad, E G
Fourie, A	Pandor, G N M (Alt)
Gogotya, N J	Rabie, J A
Gordhan, P J	Rabinowitz, R
Green, L M (Alt)	Radue, R (Alt)
Hofmeyr, W (Alt)	Schutte, D P A
Kgoali, J L	Seaton, S A (Alt)
Kgositsile, B	Sifora, R K
King, T J	Sizani, R K
Ligege, M G	Smith, P F
Lockey, D	Steenkamp, P J (Alt)
Mahlangu, M J	Van Breda, A
Mahlangu, N J	Viljoen, C
Majola-Pikoli, N T (Alt)	Van Heerden, FJ (Alt)
Marais, P G	Viljoen, C L
Mchunu, E S	

**Appearances for this meeting:** the ACDP gave notice that LM Green would replace KR Meshoe; the ANC gave notice that SJ de Beer would replace C Ackermann and PJ Steenkamp would replace D Mkhanya; the IFP gave notice that I Cassim would replace R Rabinowitz for the first half of the meeting and P Powell would replace S Mzimela for the second half of the meeting.

**Apologies:** C Ackermann, J H de Lange, D W Makhanya, K R Meshoe, S Mzimela, and S S Ripinga.

**Absent:** OC Chabane, GJ Fraser-Moleketi, FN Ginwala, SP Holomisa, ZA Kota, BS Mabandla, and Ngwane.

#### OPENING

1.1 Mr. Ramaphosa opened the meeting at 14h10.

- 1.2 On behalf of the meeting, Mr. Ramaphosa extended condolences to the de Lange family and to the Breytenbach family, both of whom suffered the tragic loss of a family member.
- 1.3 The Agenda was adopted with one amendment: *"Item 6. Agenda for Constitutional Assembly of 24 April 1994"* would be deferred to the next meeting of the Constitutional Committee.
- 1.4 It was noted that Mr. Mtshali, Mr. Sizani, Mr. van Breda, and Mr. Viljoen did not receive documentation, even though their documents had been signed for on the return of service. It was agreed that the Administration would investigate the matter to see what went wrong. In the meantime, Mr. Ramaphosa asked that members enquire with the Administration should they not receive documentation before a scheduled meeting.

## **MINUTES**

- 2.1 The minutes of the Fifteenth Meeting of the Constitutional Assembly on Monday 13 March 1995 were adopted.
- 2.2 Mr. Ramaphosa noted the *"Memorandum Re: Minutes of CC Meeting of 6 March 1995"* included in the documentation. The meeting accepted the document with one amendment: on page 17, "Mr. Eglin" replace "Mr. Egling".

## **MATTERS ARISING**

There were no matters arising.

## **THEME COMMITTEE 5 REPORT ON BLOCKS 1 - 4**

- 4.1 Mr. Schutte noted that the IFP on the day had circulated a document entitled *"Schematic Summary of Report on Blocks 1 - 4"*. Mr. Ramaphosa ruled that the meeting would not discuss the document, but rather focus on the original Theme Committee report included in the documentation. He cited two reasons for this ruling:
  - i. Although the document purported to be from Theme Committee 5, the IFP had not submitted it to the Core Group or Theme Committee for discussion and possible adoption.
  - ii. The Management Committee had been alerted to the IFP's dissatisfaction with the Theme Committee report and had decided that discussion of the report would proceed and that the IFP would be given the opportunity during the discussion to raise any problems and concerns it had about the report.
- 4.2 Mr. Schutte briefly introduced the document entitled *"Theme Committee 5 Report on Blocks 1 - 4,"* included in the documentation. He then spoke to the *"Schematic Summary of Report"* included on pages 1 - 12.

4.2 The ANC expressed concern that the "Remarks" column of the "Schematic Summary" did not contain sufficient detail to guide discussions in the Constitutional Committee and suggested that future Theme Committee reports include more detail on suggested approaches to contentious matters and the support base for different views, e.g whether a particular view was a general view, a majority view or a minority view.

**4.3 Regarding Item 1 on page 1, which reads:**

***"Legal system":***

4.3.1 It was agreed that there was overwhelming support from political parties and civil society for one single national legal system, with only the IFP in opposition. The IFP stated that it was in favour of a "dual track" system in which "provincial courts would have the final say on matters within provincial competence."

4.3.2 However, in view of the overwhelming support for a single national legal system, and because the matter was a fundamental one, it was agreed this was a "special case" and one draft should be prepared on the basis of one single national legal system. It was noted that should two drafts be prepared this would result in two chapters being drafted, and not just two draft provisions.

4.3.3 It was agreed the matter would be forwarded with the draft to the CA for further debate where the IFP would have a further opportunity to state its concerns and objections. It would be put to the CA that there are indeed two views but the overwhelming support from the Constitutional Committee and from submissions from civil society were in favour of a single national legal system.

4.3.4 The IFP objected that this amounted to a ruling of "sufficient consensus" and that as a contentious matter, two drafts should be prepared. This objection from the IFP was noted.

**4.4 Regarding Item 2 on page 2, which reads:**

***Highest Constitutional Court:***

4.4.1 The meeting agreed to remove point 2, which reads "After the present term of CC, a 'two chamber' highest court should be created," from the "Contentious Aspects".

4.4.2 This amendment rendered the issue non-contentious and is forwarded for drafting as such.

**4.5 Regarding Item 3 on page 3, which reads:**

***"Constitutional Powers of Supreme Court"***

4.5.1 The meeting agreed that this was a non-contentious item and would be forwarded to drafting.

4.5.2 The IFP expressed concern that the continuity of the Constitutional Court still needed to be addressed and was reminded that the terms and tenure of judges would be dealt with later in the report and that matter could also be raised in the Work Programme Block on "Transitional Mechanisms."

4.5.3 It was also agreed that account would be taken of the fact that:

- i. The large number of Acts that may contain unconstitutional provisions; and
- ii. Some proposals distinguish between pre- and post-27 April 1994 legislation.

4.5.4 Regarding the two queries, which read:

*"Should the constitution and legislation be able to create exceptions to 'suspension' rule in point (b)?"*

and

*"Should provincial courts have the power to test bills in provincial legislatures and declare provincial" [sic]*

it was agreed to leave these matters to the drafters for their consideration.

#### **4.6 Regarding Item 4 on page 4, which reads:**

##### ***"Constitutional Powers of AD":***

4.6.1 The meeting agreed to move the item from the non-contentious to contentious column, given that:

- i. The IFP disagrees with the view set out in the document that the *"AD (or successor court) should have same powers as SC subject to appeal to CC"*, and believes that the Appellate Division should not have the power of adjudication over constitutional matters. And
- ii. The disagreement occurred also in the Theme Committee report on pages 36 - 38.

4.6.2 The meeting agreed to forward both options to drafting.

#### **4.7 Regarding Item 5 on page 4, which reads:**

***"Constitutional Powers of Magistrate's Court":***

4.7.1 The meeting agreed that the matter was not contentious and be forwarded to drafting.

4.7.2 The ANC queried, however, whether the new constitution would include this kind of detail. It was agreed that the drafters would consider this aspect.

**4.8 Regarding Item 6 on page 5, which reads:**

***"Procedure for CC Cases":***

the meeting agreed that the item was non-contentious and would be forwarded to drafting.

**4.9 Regarding Item 7 on page 6, which reads:**

***"Provincial Courts":***

4.9.1 It is noted that the IFP expressed its concern that Supreme Court seats should not be moved without reference to the province.

4.9.2 The meeting noted that this matter was currently the subject of inquiry by the Department of Justice and the recommendation of the Theme Committee that it be left over until the inquiry was completed. Concern was expressed when this inquiry would be completed.

4.9.3 The ANC, however, queried whether the new constitution would include this kind of detail. The meeting agreed to refer the matter to the Technical Advisers and CA Law Advisers for clarification.

**4.10 Regarding Item 8 on page 6, which reads:**

***"Intermediate Courts":***

4.10.1 The meeting agreed that this was a non-contentious item;

4.10.2 However, there was disagreement as to whether the item should be included in the constitution or would better be an item for legislation.

4.10.3 The meeting agreed to forward the item to the Technical Experts, who would advise the Constitutional Committee during the process of drafting.

**4.11 Regarding Item 9 on page 7, which reads:**

***"Split Judiciary":***

4.11.1 The meeting agreed that the item was not contentious and would be forwarded to drafting.

4.11.2 The NP expressed concern at the phrase in the remarks column which reads: *"and should not mention the magistrate's court expressly."* It was agreed that this matter would be discussed when examining the draft.

**4.12 Regarding Item 10 on page 7, which reads:**

***"Community Courts":***

4.12.1 There was general support for an enabling clause and it would be forwarded to drafting. It was noted that there was a great deal of support from civil society for the existence of community courts.

4.12.2 It was noted that it was not intended that the constitution should provide great detail on the matter and it was agreed the drafters would be asked to consider this aspect.

4.12.3 It was agreed that if further detail were to be provided in the constitution, the matter would become contentious in the light of the IFP view that these courts should fall under provincial structures rather than national structures.

4.12.4 In the same vein, concerns expressed by the DP and PAC were noted on the definition and location of these courts within the hierarchy of courts.

**4.13 Regarding Item 11 on page 11, which reads:**

***"Special Courts":***

the meeting agreed that the item was non-contentious and would be forwarded to drafting.

**4.14 Regarding Item 12 on page 8, which reads:**

***"Appointment of CC Judges":***

noting that whilst political parties hold a wide range of views on the matter it was nevertheless not a fundamental disagreement, the meeting agreed that the Administration would facilitate the appointment of a sub-committee which would discuss the item and report back to the Constitutional Committee.

**4.15 Regarding Item 13 on page 8, which reads:**

***"Appointment of SC Judges":***

the meeting agreed that the matter was non-contentious and would be forwarded to

drafting.

**4.16 Regarding Item 14 on page 9, which reads:**

***"Composition of JSC":***

the meeting agreed to refer this item to the sub-committee to be facilitated by the Administration.

**4.17 Regarding Item 15 on page 9, which reads:**

***"Appointment of Magistrates":***

4.17.1 The meeting agreed that the matter was non-contentious.

4.17.2 The ANC, however, queried whether detail like this would be included in the new constitution. The meeting agreed to refer the item to the drafters for their advise, and should they conclude that it would be included in the new constitution, the matter would be forwarded to drafting.

**4.18 Regarding Item 16 on page 9, which reads:**

***"Qualifications of a Judge":***

the meeting agreed to refer the item to the sub-committee to be facilitated by the Administration.

**4.19 Regarding Item 17 on page 10, which reads:**

***"Accountability of Judges":***

the meeting agreed that this was a non-contentious issue and it would be forwarded to drafting.

**4.20 Regarding Item 18 on page 10, which reads:**

***"Tenure of Judges - Supreme Court":***

the meeting agreed that the item was non-contentious and would be forwarded to drafting.

**4.21 Regarding Item 19 on page 11, which reads:**

***"Tenure of Constitutional Court Judges":***

the meeting agreed to to refer the item to the sub-committee to be facilitated by the Administration.



**4.22 Regarding Item 20 on page 11, which reads:**

***"Access to Justice":***

4.22.1 The meeting agreed that the item was non-contentious.

4.22.2 However, the ANC queried whether detail of this kind would be included in the new constitution. The meeting agreed to refer the item to the drafters for their advice on this matter, and should they conclude that the issue should be included in the new constitution, the item would be forwarded to drafting.

**4.23 Regarding Item 21 on page 12, which reads:**

***"Lay Participation":***

4.23.1 The meeting agreed that the item was non-contentious.

4.23.2 The ANC, however, queried whether details of this kind would be included in the new constitution. The meeting agreed to refer the query to the Technical Experts for their consideration, and should they conclude that it would, the item would be forwarded to drafting.

**ADJOURNMENT**

5.1 The meeting agreed to adjourn at 18h04.

5.2 The meeting agreed to reconvene on Friday, 7 April from 09h00 to 12h00, to discuss the drafts of Theme Committee 6.4.

**(Constitutional Committee - 7 April 1995)**

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