

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE FORTY THIRD(43RD) MEETING OF THE CONSTITUTIONAL COMMITTEE

FRIDAY 3 MAY 1996

Present

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

Ackermann, C
Andrew, K (Alt)
Beyers, A S (Alt)
Camerer S
De Beer, S J (Alt)
De Lille, P (Alt)
Du Toit, D C
Gibson, D H M
Gordhan, P J
Kekana, N N
Lamani, N E
Lebona, H J
Lockey, D
Love, J
Mahlangu, N J
Marais, P G
Matthee, P A
Mdladlana, S (Alt)
Moosa M V
Mulder, C P
Manzini, YL
Nzimande, B E
Pahad E G
Phillips, I (Alt)
Schreiner, J (Alt)
Selfe, J (Alt)
Skweyiya, Z (Alt)
Steenkamp, P J (Alt)
Van Breda A
Van Heerden F J (Alt)
Verwoerd, M (Alt)
Viljoen C L

Alant, T G
Asmal, K
Bhabha, M
Chabane, O C
De Lange, J H
De Ville, J R (Alt)
Eglin, C W
Ginwala F
Hofmeyr, W
King, T J
Landers, L (Alt)
Ligege M G
Louw, L (Alt)
Mahlangu, M J
Malebo, S M A (Alt)
Maree, J W (Alt)
Mbetse-Kgositsile, B
Meyer, R P
Moosa M W (Alt)
Myakayaka-

Ngcuka, B T
Niehaus, C G (Alt)
Omar, D (Alt)
Pandor, G N M
Radue, R (Alt)
Schutte, D P A
Sizani, R K
Smuts, D (Alt)
Surty, M E (Alt)
Van Deventer, F J

Apologies: No apologies.

Absent: NJ Gogotya, BS Mabandla, D W Makhanya, LPHM Mtshali, S Mzimela, R Rabinowitz, P Smith, RS Suttner.

In attendance: Directorate: H Ebrahim, M Sparg, L Zondo **Minutes:** S Rabinowitz, **Law Adviser:** G Grové; **Panel of Experts:** G Erasmus, J Kruger, C Murray, P Sedibe-Ncholo, I Semanya, J Van

Der Westhuizen, Z Yacoob. **Technical Advisers:** H Cheadle, S Liebenberg.

1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 21h35 and apologised for the late start of the meeting. He welcomed to the meeting speakers of the provincial legislative assemblies who were attending a conference in Cape Town.
- 1.2 Mr Ramaphosa said that negotiations had been taking place between the parties who were ready to report on a number of outstanding matters.

2. Section 29: Education

- 2.1 Dr Nzimande reported that the ANC had tried to meet everybody in the negotiations but had been unable to come to an understanding and no agreement had been reached. On behalf of the ANC he tabled a proposed clause entitled "*Education*" - 3 May 1996 8.30 pm" for inclusion in the Bill. He spoke to the proposal, stating that the ANC felt that this clause showed the extent to which it wished to build a united country but that it recognised the linguistic diversity of our people and would ensure that every language was given equal treatment in the context of education.
- 2.2 Mr Meyer confirmed that the NP and the ANC could not reach agreement on the wording of the whole clause but reported that there was agreement on sub-clauses (1) and (3) and on the first sentence of sub-clause (2). He emphasised that parties had engaged in intensive discussions on this issue. The point of difference, he stated, was in the second sentence of sub-clause (2). The NP believed that in considering the alternatives regarding the institutions through which education should be provided, this should also allow for alternatives such as single medium institutions and that this should be provided for as a right in the Constitution. The ANC, on the other hand, was of the view that this should not be provided for as a right. He stated that no agreement had been reached and that the NP wished to give further consideration to the wording of Section 29(2) and would continue to consult on this matter.
- 2.3 Ms Smuts said that the DP regretted that the parties had not reached agreement and urged parties to take into account the Constitutional Principle relating to culture. The DP supported the view that one of the crucial ways that culture was promoted was through education, specifically mother-tongue education. The DP regretted that the parties had agreed to subsection (3) which indicated that independent schools would have to function at their own expense. Ms Smuts said that these schools were an enormous asset to the country and should continue to be subsidised. She reiterated the DP position that every child deserved a minimum tranche of funding which that child's parents ought to be able to exercise at independent or other schools and hoped the parties would take that into consideration.
- 2.4 General Viljoen of the FF stated that they were disappointed that this matter of national interest had not been resolved and hoped that agreement could be reached. The FF was concerned with self-determination and single-medium institutions where practicable was a principle which it wished to have included in the Constitution.
- 2.5 Mr Sizani of the PAC said that the question of education was a most serious matter. He said that the PAC was negotiating in good faith and in that spirit felt that the ANC had gone a long way in meeting the concerns of those parties who wanted education in their own language and therefore welcomed and supported the proposed clause.
- 2.6 Mr Ramaphosa expressed regret that the parties were not able to reach agreement but stated that this was not the end of the matter. He ruled that the amendment proposed by the ANC would go into the Bill as it stands.

3. Section 30A: Cultural, religious and linguistic communities

3.1 Mrs Pandor reported that the ANC had tried to negotiate with the parties as to which of the options proposed by the Panel of Experts contained in their memorandum "*Collective Rights and Self-Determination*" should be considered. She stated that Option 4 closely reflected Article 27 of the conventions that are internationally recognised as dealing effectively with cultural, religious and linguistic rights and the ANC thus supported Option 4. The FF and the NP had stated that their preferred option was Option 3 and, given that there was no agreement, the ANC proposed that Option 4 be included in the Constitution. Option 4 reads as follows:

"(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to -

(a) enjoy their culture, practice their religion and use their language; and

(b) form, join and maintain linguistic, cultural and religious associations and other organs of civil society.

(2) These rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

3.2 The FF stated that it supported Option 3 and had moved an official amendment in favour of this option which was phrased in a positive way, and not in the negative as in Option 4. The FF urged parties to find agreement on this matter.

3.3 The NP stated that it noted the ANC's proposal in this regard but supported Option 3.

3.4 The PAC stated that Option 4 did not do anything other than restate universally accepted principles of human rights and supported that option.

3.5 The DP said they had no objection in principle to the negative formulation of Option 4 but drew attention to Constitutional Principle XI which was phrased in a positive way and stated that it would prefer a positive formulation.

3.6 The Chairperson welcomed the progress that had been made on this issue.

3.7 It was agreed to include Option 4 as proposed by the ANC in the Bill.

4. Section 25: Property

4.1 Ms Kgositsile of the ANC tabled as an amendment a proposed clause, "*Property - 1 May 1996*" for inclusion in the Bill. She spoke to the document, stating that it was the preference of the ANC not to have property protected by a provision in the Constitution. The constituency that the ANC represented were those who did not have property and the goal was to ensure that the poverty and landlessness of the majority of South Africans would be addressed through a new constitutional dispensation. The ANC had agreed to this clause but had said that there should not be an absolute right of property. The clause also dealt with the issue of land reform in order to redress past imbalances. The ANC believed that it had done everything possible to address the concerns of all stakeholders in this matter and submitted this clause for inclusion in the Bill.

4.2 Mrs Camerer of the NP stated that there had been agreement previously between the parties on the principles that should govern the clause, that is that land reform should be addressed

and that security of tenure should be guaranteed to an extent that is acceptable to those who have property in this country and also to open the way to those who do not have property to have similar security of tenure in the future. There was agreement in principle and political agreement. She said that the ANC had gone out of its way to meet the concerns of the NP constituency and other constituencies represented and the NP appreciated the patience, spirit and positive approach of their fellow-negotiators. The only disagreement, she stated, was with some of the wording of sub-clause (8) and what the NP wished to guard against was "unintended consequences" in this sub-clause. The NP stated that it would support the proposed clause tabled by the ANC, subject to keeping the door open on the words in subsection (8) on which there was not complete agreement.

- 4.3 The DP stated that the property clause ought to have been a clear entrenchment of a universally enjoyed right. The DP said that it would move as an amendment the October clause that had emanated from this process and did not support the proposal tabled by the ANC.
- 4.4 The PAC reiterated their position that there should be no property clause but said that it would like to consult on the implications of the proposal which had been tabled.
- 4.5 The FF stated that it had not been part of the latest discussions on this issue and wished to take further legal advice and therefore reserved its position.
- 4.6 The meeting agreed that the clause as proposed by the ANC would be included in the Bill as it stands and noted that the NP supported the proposal but would like to have the door open for further discussion on Section 25(8). Mr Ramaphosa clarified that keeping the door open meant that although, in terms of the rules there could be no further amendments beyond the committee stage, the MC would have to discuss this matter and as it had tended to use a flexible approach, would consider the merits of each case. The chairpersons could then make a ruling in this regard in order to take account of the views and proposals of all the parties.

5. Section 23(3)(c): Lock-out

- 5.1 Mr Omar of the ANC tabled a proposal for inclusion under the Interpretations clause as a new subsection 38(4) and proposed that Section 23(2)(c) be deleted. The ANC proposal reads as follows:

"Notwithstanding the provisions of the Constitution, a provision of the Labour Relations Act 66 of 1995 will remain valid until such provision is amended or repealed by national legislation after consultation with representatives of national federations of employer and employee organisations."

- 5.2 Mr Omar stated that the President had given an undertaking to the country that there would be no lock-out clause entrenched in the Constitution. The effect of the ANC proposal was to deliver on this undertaking. At the same time a concern was expressed with regard to the constitutionality of the provisions of the Labour Relations Act of 1995 that the provision relating to "lock-out" may be rendered unconstitutional. The effect of the proposed Section 38(4) was to ensure that this concern was addressed. The ANC view was that there should have been no such fear and that there was no threat to the Labour Relations Act or any of its provisions but because it are mindful of that fear, the ANC proposed inclusion of this subsection. Mr Omar said this proposal would not entirely satisfy business or the union movement but that the ANC had tried to come up with a proposal that would find acceptance. It was important to ensure that stability in the country was maintained at all times and that industrial peace was not threatened. The ANC wanted to ensure that the relationship between employers and employees was properly regulated by law and it was through the process of collective bargaining that problems and disputes would be resolved.

- 5.4 Mr Radue stated that the NP supported that there should be a provision in the Constitution for the rights of employers along the lines of the Labour Relations Act to secure an equitable balance between the interests of employers and workers. The NP welcomed the suggested amendment of Section 38(4) in the Interpretation clause as being a step in the right direction although the exact wording would require further consideration. The NP stated that its supported the idea of further consultation and therefore reserved its position.
- 5.5 Mr Leon of the DP stated that the Labour Relations Act was predicated on a balance in part between the right of workers to strike and the recourse, under very limited and restricted circumstances, of employers to lock-out and was the result of a tripartite agreement between business, trade unions and the government. He stated that, far from providing for industrial peace or investment potential, the proposed Section 38(4) would make every provision in the Act which purports to give employers protection, vulnerable to simple legislative amendment, would destroy the balance between employers and employees and would not make South Africa an investor-friendly country.
- 5.6 Mr Gordhan referred to Nedlac which he said was a forum where business, government and labour had an institutionalised process whereby they could discuss and negotiate legislation and amendments to legislation. He stated that the way the Labour Relations Act was processed through this institution bore testimony to the fact that neither labour nor government had the will to force anything on business and that business in South Africa knew that government was responsible and would protect their interests to the extent that it was possible in the new context within which we exist.
- 5.7 Ms De Lille of the PAC said it had always maintained that there was no need to include the lock-out clause in the Constitution because it was not the opposite to the right to strike. The PAC therefore would have no objection to the proposal as it clearly retained the status quo agreed to at Nedlac and allowed for labour federations who were against the lock-out clause to campaign for its removal from the Act.
- 5.8 The FF reserved its position to take the matter under advisement.
- 5.9 The Chairperson ruled that the amendment proposed by the ANC as tabled by Mr Omar would be included in the Interpretations section of the Constitution and that the provision in Section 23(3)(c) would be deleted but noted that the NP reserved its position to consult further and that the DP was opposed to this amendment.

6. Transitional Arrangements

- 6.1 Mr De Beer spoke to a document entitled "*Schedule 6: Transitional Arrangements*" and stated that a report had already been given on the agreements which had been reached among the parties and he would merely report on those additional matters which had been agreed to by all the parties. He reported as follows:
- i On Page 9 a new item 15 had been added dealing with existing legislative powers and had been agreed to.
 - ii On page 10 a new item 18 dealing with the Prosecuting Authority had been added and agreed to.
 - ii On Page 12 A new item 21 on National Unity and Reconciliation had added and had been agreed to by all the parties.

- iii On Page 13 A new item 23 on Public Administration and Security Services had been added and had been agreed to.

- iv On Page 14 Item 25 on Local government had been added and agreed to by all the parties.
- 6.2 Mr De Beer further reported that one matter which the sub-committee had dealt with and on which there had been no agreement was Section 247 of the Interim Constitution dealing with educational matters.
- 6.3 Mr Mathee of the NP tabled an amendment entitled "*New Clause - Transitional Arrangements: Schedule 6*" based on Section 247 of the Interim constitution. The NP strongly believed that this clause should be retained as the process which had been set in motion dealing with the rights, powers and functions of governing structures of schools, universities and technicons was not yet complete. He stated that to argue as far as the schools were concerned that the process was in place and the constitutional provision for it did not have to remain was not correct. With regard to universities and technicons, the government was not yet in a position to indicate to them what changes it proposed to their existing rights, powers and functions and a complex process of discussion needed to take place. The NP believed that the non-retention of this provision would represent a dramatic break of faith with the institutions concerned. The NP therefore strongly supported the retention of this provision which, he stated, provided for an obligation to negotiate and was the foundation for the negotiation process in education at school and tertiary level.
- 6.4 Dr Mulder said that the process which had been put into motion had not been completed and that the inclusion of Section 247 as a transitional provision could do no harm. The FF said it supported the NP proposal for the inclusion of this provision.
- 6.5 Mr Ngcuka said that the ANC was opposed to the inclusion of this section in the Constitution as there was already a process in motion endorsed by the Cabinet and the Minister had been given the mandate by the Cabinet to negotiate a new schooling system. The ANC saw no need for the continuation of this provision in the Constitution. The ANC felt that the issue was not that there is no consultation in the education field but that the real issue was about the entrenchment of Model C schools and that the intention was to engage the Minister in never-ending consultations. The ANC did not support the inclusion of Section 247.
- 6.6 Mr Selfe of the DP stated that he believed discussions should continue on this issue as the matter had been raised in the sub-committee but had not been fully explored.
- 6.7 The PAC did not support the inclusion of this clause as it was the intention that Model C schools should not continue.
- 6.8 Mr De Beer said that the NP wished to register for the record their position in this regard.
- 6.9 The Deputy Chairperson ruled that the meeting noted the proposal by the NP and the positions of the parties on this matter but that this would not be included as part of the Schedule dealing with Transitional Arrangements.
- 6.10 Regarding the Annexures to Schedule 6, Mr De Beer reported that there was general agreement amongst the parties on the following:
 - i On Page 18 of Annexure A, a new item under the heading of Vacancies had been inserted.
 - ii On Page 18 of Annexure A, a new item under the heading of Additional grounds for loss of membership of legislatures had been inserted.

- ii A new Annexure D had been added which addressed Clauses 236, 236, 238, 239 224 and 219 of the Interim Constitution.

7. Section 189(5)(b), "Appointments"

- 7.1 Ms Kgositsile stated that the ANC proposed "*a majority*".
- 7.2 Mr De Beer said that the NP maintained its proposal that there should be a two thirds decision in the National Assembly.
- 7.3 Dr Mulder stated that the FF supported the proposal for a two thirds majority.
- 7.4 The DP stated that in addition to a two thirds majority, there should be a three quarters majority in the committee which did the recommendations to the National Assembly.
- 7.5 It was agreed that "*a majority*" as proposed by the ANC would be included in the Bill.

8. Section 72(2)

It was agreed that Section 72(2), would remain as it stands in the draft.

- 9. Regarding the question of the free mandate (Section 43(b) of the Interim Constitution), it was reported that this had been agreed and would form part of the Transitional Arrangements.

10. Section 170 "Appointment of judicial officers"

- 10.1 Mr Schutte reported that there was still no complete agreement on Sections 170(4) and 170(7) and on Section 174(6).
- 10.2 The NP proposed the following amendments to Section 170:
 - i Regarding Section 170(4), the NP proposed that in the appointment of the Constitutional Court judges, five of the judges apart from the President and Deputy President, should be appointed as now provided for in the Act and four should be appointed in line with the German model which is by a committee of the National Assembly with an increased majority.
 - ii Regarding Section 170(7), the NP proposed that the other judicial officers should be appointed by an independent body established by an Act of Parliament which must ensure that the appointment, promotion, transfer, dismissal or disciplinary steps against such judicial officers take place without favour or prejudice.
- 10.2 The ANC stated that there was no agreement on the amendments proposed by the NP and that Chapter 8 should remain as it stands for inclusion in the Bill.
- 10.3 Mr Wessels ruled that the amendments proposed by the NP were noted for the record but as there was no agreement on this matter the Chapter would remain as it stands.
- 10.4 Regarding Section 175(5)(d), Adv Yacoob raised a concern regarding the use of the term "*affected parties*". The meeting agreed that this was a matter for technical refinement and would be attended to.

11. PROCESS

11.1 The meeting agreed that:

- i Representatives of the political parties would meet with the Technical Refinement Team on Saturday 4 April at 11h00 at 10th Floor Regis House to consider technical refinement issues and to ensure legal consistency of the language so that a complete Bill could be tabled on Monday 6 April.
- ii The CA would meet as scheduled at 16h00 on Monday 6 April.
- iii The CA photograph would be taken at 16h00 on Tuesday 7 April.
- iv The Management Committee would meet on Monday 6 April at 08h00.

12. CLOSURE

12.1 The meeting closed at 00h30.