

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE THIRTY FOURTH (34th) OF THE CONSTITUTIONAL COMMITTEE

THURSDAY 4 APRIL 1996

Present

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

Alant, T	Marais, P G
Andrew, K	Maree, J W
Asmal, K	Mbete-Kgositsile, B
Bhabha, M	Mdladlana, S
Chabane, O C	Meshoe, K R
Davies, R	Meyer, R P
De Beer, S J	Moosa, M
De Lange, J H	Moosa, V
De Lille, P	Mulder, C P
Du Toit, D C	Myakayaka-Manzini, Y L
Fourie, A	Ngcuka, B
Gordhan, P J	Nzimande, B
Green, L M	Pahad, E G
Hofmeyr, W	Phillips, I
King, T	Rabie, J A
Ligege, M G	Radue, R
Love, J	Ripinga, S S
Mahlangu M J	Schreiner, J
Mahlangu, N J	Schutte, D P A
Malatsi, D M	Sifora, TV
	Sizani, R K
	Smuts, D
	Surty, M E
	Van Breda, A
	Viljoen, C L

Absent: C Ackermann, C Eglin, G Fraser-Moleketi, S P Holomisa, J L Kgoali, D Lockey, BS Mabandla, D W Makhanya, LPHM Mtshali, S Mzimela, R Rabinowitz, P Smith, and RS Suttner.

In attendance: Directorate: H Ebrahim, M Sparg; **Minutes:** M Keegan, T Smit; **Panel of Experts:** C Murray, P Sedibe-Ncholo, J Van Der Westhuizen, and Z Yacoob.

1. OPENING

Mr. Ramaphosa opened the meeting at 09h50.

2. REPORT FROM MULTILATERAL OF 1 - 3 APRIL 1995

2.1 Mr. Ramaphosa introduced the document entitled, "*Report on Multilateral, Waenhuiskrans, 1 - 3 April 1996.*" He said that the report was evidence of significant progress, which left the Constitutional Assembly "well poised" for completion on 8 May 1996. In addition, he said that the IFP was still welcome to come back to the process.

2.2 Regarding "*Chapter 1: Founding Provisions:*"

2.2.1 The Chairperson ruled that political parties would meet as soon as possible to discuss the Preamble and forward a proposal to the Constitutional Committee by 16 April 1996.

2.2.2 The Chairperson reported that the Technical Refinement Team was currently attending to the provisions on national symbols and the supremacy clause.

2.2.3 The ANC reported that progress had been made in bilateral discussions on section 6, "*Languages.*" and parties were close to agreement.

2.3. Mr. Hofmeyr said that political parties discussed the revised "*Chapter 2: Bill of Rights,*" included in the documentation pack for the multilateral at Waenhuiskrans on 1 - 3 April. He reported that the following progress had been made:

2.3.1 Parties were getting close to agreement on section 8, "*Equality.*"

2.3.2 The parties agreed to delete options 2 and 3 of section 10, "*Life,*" but a footnote would be added stating that the NP, FF and ACDP wanted a provision on the death penalty included in the constitution, while the PAC wanted a provision on the abolition of the death penalty.

2.3.3 Parties, with the NP reserving its position, agreed to include a new draft formulation on section 11, "*Freedom and Security of the Person,*" that is included in the minutes of the multilateral on 2 April 1996.

2.3.4 The parties agreed to the draft formulation for section 13, "*Privacy,*" after the ANC withdrew its proposal to insert either "*reasonable:*" or "*arbitrarily.*"

2.3.5 Parties agreed to use the term "*the appropriate public authorities*" in section 14(2)(a), and with this amendment, the section as a whole was agreed to. The ACDP, however, expressed concern that the section needed to express the right to proselytise and evangelise.

2.3.6 Regarding section 15, "*Freedom of Expression,*" the parties agreed to:

- i. To remove the brackets from around section 15(2)(c); and
- ii. To move options 1 and 2 to chapter 7, and with this amendment agreed to the section as a whole.

2.3.7 Regarding section 16, "*Assembly, Demonstration and Petition*," the parties agreed to remove the brackets from "*to picket*," although the NP would take this back to its principals.

2.3.8 Political parties agreed to section 17, "*Freedom of Association*," section 18, "*Political Rights*," and section 19, "*Citizenship*."

2.3.9 For section 20, "*Freedom of Movement and Residence*," the parties agreed to move the term "*anywhere in the Republic*" from subsection (1) to (3), and agreed to the section with this amendment.

2.3.10 The meeting agreed to section 21, "*Freedom of Occupation*," following the deletion of the brackets, to read:

"Every citizen has the right to choose freely their trade, occupation or profession. The practice of this right may be regulated by law."

2.3.11 Political parties were still discussing section 22, and particularly subsection 22(2)(c) on the right to strike, and the COSATU proposal regarding trade union security arrangements. Some progress had been made but there were still marked differences on the section as a whole.

2.3.12 Political parties were approaching agreement on section 23, "*Environment*," with the insertion of a new subsection (3)(b), that reads:

"to have their environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

- i. prevent pollution and ecological degradation;*
- ii. promote conservation; and*
- iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

The NP, however, was taking back to its principals the phrase, "*[and quality of life.]*"

2.3.13 Political parties agreed to use the new formulation entitled, "*Working Draft of Property Clause*" as the basis for further discussions on section 24, "*Property*." This formulation would be inserted into the 5th Edition.

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2.3.14 Political parties agreed that section 25(3) required refinement. The ANC suggested that it should be divided into two sections.

2.3.15 The multilateral discussion noted the DP proposal for sections 25(2) and 26(2), but the ANC and NP supported the wording as given in the document.

2.3.16 Regarding section 27, political parties agreed to add, after submissions from the public, under (f) that provision was needed for legal representation of children in civil matters; and (g) that children should not be used or abused in situations of war or conflict.

2.3.17 Political parties were still discussing section 28, "*Education*," although progress had been made. Parties had agreed to drop option 2, but were seeking ways of incorporating its sentiments into the remaining subsections.

2.3.18 Political parties were close to agreement on section 30, "*Language and culture*," but the NP was considering the following new wording: "*but, no one exercising these rights may violate the constitutional rights of anyone.*"

2.3.19 Regarding section 31, "*Access to information*;"

i. Option 1 stands;

ii. A new subsection (2) would be inserted, that reads:

"the state must give effect to this right by way of national legislation."

iii. In addition, parties had agreed to insert a transitional clause, that would give the government three years to pass legislation, during which time the rights contained in the Interim Constitution would apply. If no legislation was passed in that three years, the rights spelled out in the section would become direct rights.

iv. However, parties had not yet agreed about whether the phrase "*[and that is required for the exercise or protection of any rights]*" would apply to both (a) and (b) or just to (b).

2.3.20 Regarding section 32, "*Just administrative action*:"

i. Parties were currently considering a new formulation, based on Option 1, which deleted the word, "*justifiable*."

ii. Parties, however, queried whether the term "*and is of general*

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application," should be inserted in order to make it procedurally fair. The ANC supported this insertion.

- iii. In addition, political parties were considering the ANC proposal to retain the term, "*whose rights have been adversely affected by,*" in subsection (2).
- iv. In addition a new subsection (3) would be inserted to read:

"The state must give effect to this right within three years by way of national legislation."

2.3.21 The meeting agreed to section 33, "*Access to courts.*"

2.3.22 Regarding section 34, "*Arrested, detained and accused persons,*"

- i. Drawing from a public submission, parties agreed to insert a new subsection 34(2)(e) of the right to exercise.
- ii. Political parties had agreed to amend section 34(4), to read:

"Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if it would render the trial unfair and otherwise be detrimental to the administration of justice."

2.3.23 Political parties were getting closer to each on section 35, "*Limitations,*" and were considering a proposal made by the ANC at the meeting.

2.3.24 Regarding section 36, "*States of Emergency:*"

- i. Other parties did not support the ANC proposal to move sections 36(1) and (2) to the power of the president, and the ANC would take the matter back to its principals.
- ii. Concern was expressed that subsection (2) might need amendment, because if in recess the National Assembly would not meet before the 21 days had expired.
- iii. In addition, parties were still discussing whether to accept a two-thirds or simple majority for extending a state of emergency in section (2). A compromise was being considered: to allow a simple majority to approve the first extension, but to require a two-third majority for a second extension.
- iv. Some parties were concerned about retrospective crimes in section 36(4).

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- v. In addition, parties agreed to shorten the list of non-derogable rights in section 36(4)(c) to: human dignity, life, equality in regards to race and sex, freedom from cruel and inhuman treatment, slavery and servitude, fair trial, and children's rights not to be maltreated or abused.
- vi. Finally, political parties agreed that section 34(7) would be reformulated to exclude international conflicts, in which case South Africa should at least comply with the appropriate international conventions.

2.3.25 Political parties agreed to section 37, "*Enforcement of Rights.*"

2.3.26 There were no significant disputes regarding section 38, "*Application.*"
However:

- i. Parties were still awaiting technical advice on whether to use the term "*applicable*" or "*appropriate*" in section 38(2);
- ii. Political parties were considering the joint Panel/Technical Committee 4 recommendation to insert a new section 38(3) that would try to allow the courts to build up common law remedies and limitations where rights are horizontally applicable. Otherwise, 38(3) needed refinement.

2.4 Regarding "*Chapter 6, Courts and the Administration of Justice:*"

2.4.1 Mr. Schutte reported that political parties had reached the following agreements regarding the Attorney General:

- i. There would be one prosecutorial authority: consisting of the national Attorney General and other attorneys generals;
- ii. The Attorneys General would in principle be responsible for prosecutions, with the national Attorney General being responsible for laying down policy guidelines and ordering in specific cases a prosecution where the guidelines have not been met, or where an attorney general has not met the guidelines and has refused to prosecute.
- iii. The Attorney General should be impartial and employed in terms of legislation to ensure that.
- iv. The National Attorney General would be appointed by the President, and the appointment of the other attorneys general would be provided for by law.

2.4.2 With regard to section 101, "*Acting Judges,*" parties agreed to retain the

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situation as it was, and thus would delete the words *"on the advice of"* in 101(2) and deleting 101(3).

2.4.3 Parties had still to agree on whether the tenure of Constitutional Court judges would be for 10 years, as proposed by the NP or 11 years as proposed by the ANC, DP and FF. The Chairperson ruled that this would be indicated in the text as *"[10/11 years]."*

2.4.4 Parties reached the following agreements on section 104, the *"Judicial Service Commission"*:

i. In terms of Section 104(1)(i), the President would appoint the four members after effective consultation with leaders of the opposition.

ii. The word *"professor"* would be deleted from section 104(1)(g) and the following phrase inserted: *"at South African Universities under 104(1)(g)."*

iii. Parties agreed that the following would be added to section 104(1)(e):

"in the event of an unresolved dispute within the advocate profession during the appointment process, the President shall appoint after consultation with the relevant profession one of the practising advocates to be so designated."

iv. The same provision, adapted, would be made to section 104(1)(f).

v. Section 104(1)(h) would be amended by replacing *"senators"* with *"members of the National Council of Provinces;"* and

vi. The words *"two or whom are practising attorneys or advocates"* would be deleted from 104(1)(i).

2.4.5 Regarding the appointment of Constitutional Court judges, 6 people would be elected from the National Assembly, at least three from opposition parties. The President would appoint judges after a group has been forwarded to him by the JSC and after effective consultation with the leaders of the opposition.

2.5 Regarding *"Chapter 12, Public Administration:"*

2.5.1 The meeting noted a typographical error and the following correction to the text: *"171(5)"* should replace *"171(1)"* on page 54 of the report.

2.5.2 Ms. Love reported that political parties had agreed to the draft formulations on this chapter with minor amendments:

- i. A common phrase for government funds and other sources of public money would be: *"government financial support."*
- ii. The name of the *"Public Administration Commission"* would change to the *"Public Service Commission."*
- iii. The Public Service Commission would only deal with matters that relate to the public service;
- iv. A new section 171(5) had been added emphasising the different nature and functions of different sectors of the public service as relevant factors to be taken into account in legislation regulating Public Administration.

2.5.3 The DP reserved its position on these formulations, as it had not been able to participate in the multilateral discussions.

2.6 Regarding *"Chapter 14, Finance,"*

2.6.1 Mr. Davies reported that the multilateral discussions worked to integrate local government into and to refine the draft formulations. He said there were two outstanding matters:

- i. The passage of money bills which related to the issue of competencies and s188 on Treasury Control; and
- ii. Advice was needed from the Department of Finance on transitional arrangements.

2.6.2 The DP said it had small reservations regarding three issues:

- i. The appointment procedure of the Auditor-General;
- ii. That in section 196(1) the President would act in consultation with the Cabinet; and
- iii. The need to state overtly that members of the Financial and Fiscal Commission cannot hold office in a political party. The DP suggested that this matter could be resolved by including a definition of "independent and impartial" in an interpretation or definition clause.

2.6.3 The NP said it would like to review this chapter once an overall draft was available including chapters on Local Government and the National Council of Provinces.

2.6.4 The FF queried 196(3). The meeting agreed that this would be reformulated.

2.7 Regarding "*Chapter 13, Security Services:*"

- i. Mr. Alant reported that the NP had forwarded new proposals on the police to other political parties for discussion. A meeting had been set for 12h00 on the same day to discuss these matters.
- ii. The meeting agreed that the existing formulations would be published as is in the 5th Edition, but that a side bar note would be added stating that further proposals from the NP were being discussed.

2.8 Regarding "*Chapter 3, Parliament,*" "*Chapter 5, The National Executive,*" "*Chapter 8, Provinces,*" and "*Chapter 11, Traditional Authorities:*"

2.8.1 Mr. Chabane spoke to the report entitled "*Annexure 3, Self Determination, Traditional Authorities, National Assembly, National Executive, Provinces.*" In regards to Traditional Authorities and the National Assembly, he highlighted the following points:

- i. Parties had agreed to a new draft on "*Traditional Leadership,*" contained on page 31 of the "*Annexure;*" except the ANC held the view that subsection (2) should be moved to the section on transitional arrangements. The PAC reserved its position on Chapter 11.
- ii. Parties adopted a new clause on the "*Powers of the National Assembly,*" included on page 32 of the "*Annexure;*"
- iii. Parties were discussing how many members the National Assembly should have. It was however agreed that the figure of 350 in brackets, would be inserted into the 5th Edition, with a note indicating this matter was still under discussion.
- iv. The Panel had been instructed to investigate whether further provisions were needed on multi-party democracy.
- v. The NP proposal had forwarded a proposal on "*Constitutional Amendments,*" and
- vi. A new clause would need to be inserted on public access.

2.8.2 The NP said that section 41(b) on page 33 of the report should be amended to read:

"elects members to the National Assembly from preferential national lists, of preferential provincial lists, or from both preferential national and provincial lists in such a manner as to ensure that the membership of the National Assembly [accurately] reflects the proportions of the voted recorded for each party in the election."

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- 2.8.3 The Chairperson queried what "*preferential*" meant. The NP responded that it meant "*the candidate lists are published in order of the party preference.*" The Chairperson said that this might need to be refined into plain English.
- 2.8.4 Mr. Moosa reported that further discussions had led to the following agreements:
- i. Regarding section 41:
 - * The term "[*accurately*]" would be deleted, although the NP reserved its position.
 - * The number of members of the National Assembly would be specified as "[*350*]"
 - ii. Conceptually, section 45(3) would be dealt in much the same way as in section 46 of the interim constitution. The precise formulation, however, may need to be reworked.
 - iii. Regarding section 53 "*Constitutional Amendments:*"
 - * The constitutional principles specified how amendments that impact on provinces would have to be done. These procedures would be taken on board;
 - * For the purposes of the 5th Edition, a provision would be drafted that captures the fundamentals of the constitution, and this provision would require a majority above two-thirds for amendment; the rest could be amended by a two-thirds majority.
- 2.8.5 The DP stated that it reserved its position on these agreements, because for much of the discussion, it was not able to be present.
- 2.8.6 Mr. Chabane reported that political parties had agreed to the entire "*Chapter 5, National Executive,*" with a few exceptions, listed in "*Annexure 3.*" He highlighted the following points:
- i. Reference to the Speaker would be deleted in section 83, and
 - ii. "*Deputy President*" would replace "*Prime Minister*" in section 85.
 - iii. Finally, discussions on multi-party participation in the national executive were still underway.
- 2.8.7 Regarding "*Chapter 8, Provinces,*" Mr. Chabane reported that various agreement had been reached, and highlighted the following areas that are still under discussion:

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- i. Regarding section 120:
 - * Parties agreed that the minimum and maximum number of members of provincial legislatures, should be set out; however,
 - * Parties had not agreed on what those numbers would be.
 - * In addition, this provision would be redrafted to bring it into line with similar provisions on the National Assembly with regard to the electoral system.
- ii. Regarding section 125, "*Elections and Duration of Provincial Legislatures:*"
 - * Parties agreed to delete "*Premier*" section 125(2).
 - * Parties also agreed to delete the last part of section 125(3) to bring it into line with similar provisions on the National Assembly.
- iii. Regarding section 125A, "*Dissolution of Provincial Legislatures Before Expiry of Term,*" parties were still discussing the majorities required.
- iv. Regarding section 126, "*Speakers and Deputy Speakers,*" it was agreed that Speakers and Deputy Speakers would be handled in the same way as in the National Assembly, and that the speaker would be deleted in relation to the Acting Premier, similar to amendments made to provisions on the National Assembly.
- v. Regarding section 130 "*Application by Members to Constitutional Court,*" parties were still discussing the NP proposal that the support of 19 members be required to apply, or 90% of the minority parties, and the proposal that the parties would pay the costs should the application fail.
- vi. Parties agreed to reformulate section 131, "*Promulgation,*" to ensure the Bill completes its process, until it is promulgated by the President.

2.8.8 Mr. Moosa added that:

- i. Political parties had agreed in further discussions that, for the purposes of the fifth draft, the figure [80] be inserted in section 120; and
- ii. Section 170 in "*Annexure 3*" would need to be corrected, because only the first sentence was a draft formulation. The second sentence was an explanation.

2.8.9 The PAC reserved its position on these draft formulations, because it was not able to participate in all the discussions.

2.8.10 Political parties agreed that the issue of "*Self Determination*" required further discussion. The ANC would forward a submission on this question for those discussions.

2.9 Mr. Gordhan spoke to the document entitled "*Chapter 4, National Council of Provinces*," tabled at the meeting.

2.9.1 He reported that political parties had agreed that the National Council of Provinces would fall under the definition of Parliament.

2.9.2 Mr. Gordhan reported wide agreement on the chapter with the following exceptions:

- i. In section 58A, "*Permanent delegates*,"
 - * The word "*obtains*" would be inserted in section 58A(2) to read:
"Any party which obtains at least 10 per cent"
 - * Also, the question of 10 per cent was still under discussion.
- ii. In section 63(1)(a), the following phrase would very likely be removed and spelled out in legislation: "*[in accordance with a mandate given by the provincial legislature].*"
- iii. In section 64(1), another word would probably replace "*summon*."
- iv. In the heading of section 67A, "*Permanent*" would replace "*Full-time*," to read:

Permanent delegates' participation in provincial legislatures"

2.10 Mr. Gordhan spoke to the document entitled, "*Chapter 4A, National Legislative Process*," tabled at the meeting. He reported wide agreement on the document with the following exceptions:

2.10.1 The details of section 68(2) would need to be resolved in the rules of the National Council of Provinces and the National Assembly.

2.10.11 The time frames set out in section 70(1)(c) would probably be dealt with in the rules of the National Council of Provinces and the National Assembly.

2.10.12 Section 72, "*Money Bills*," would need to be discussed together with

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the finance sub-committee, once the definition of "Money Bills" is clear.

2.10.13 The multilateral discussions did not consider section 75, "*Application by members of the National Assembly*," section 75A, "*Promulgation*," and section 75B "*Safekeeping of Acts of Parliament*."

2.10.14 The DP expressed concern that permanent members would be unworkable, because they would be fully involved in provincial legislatures and in the National Council of Provinces. The meeting agreed that the sub-committee dealing with this matter would consider the practicalities of all this, to ensure that a smooth functioning machinery existed.

2.11 On the issue of competencies, Mr. de Lange spoke to the document on competencies, entitled "*Draft - 3*," tabled at the meeting and . He reported overall agreement on the chapter, with the following exceptions:

2.11.1 The legislative authority of the National Council of Provinces would need to be dealt with in section 1, "*Legislative authority of the Republic*," although this was a matter of drafting; and

2.11.2 Further work was needed on "delegated powers," from a national and provincial level down.

2.11.3 The numbering would be corrected in section 3, "*Conflicts between national and provincial legislation*."

2.11.4 In addition, the DP would like to see 3(3) a "rebuttal presumption," and insert the words "*unless proved to the contrary*."

2.11.5 The schedule was still outstanding.

2.11.6 There was broad agreement on the formulations entitled, "*Chapter 2A, Principles of Co-operative Government*," although these provisions would be refined.

2.11.7 A new draft was being prepared on provincial constitutions, and political parties would consider the matter further.

2.11.8 Transitional arrangements had still to be considered.

2.9 Mr. Gordhan spoke to the document entitled, "*Chapter 10, Local Government*," tabled at the meeting, but noted that another draft would be needed to take account of the additional discussions that had occurred. In all likelihood, this would be finished in time to insert into the fifth draft. The following amendments had been agreed to:

2.9.1 Regarding section 164, "*Establishment of local government structures*:"

- i. Parties would further consider section 164(2); and
- ii. A new section 164(3) would be inserted.

2.9.2 The heading for section 165 would be amended to read, "*Developmental duties of municipalities*," and the section would be refined.

2.9.3 Technical experts were redrafting section 166, "*Municipal legislative and executive authority*," and section 165, "*Conflicts between municipal and other legislation*," to further develop the concept that local government was its own sphere of government, on one hand, but it occurred within the overarching framework of provincial and national government on the other, which entailed a particular grid of authority and responsibilities.

2.9.4 Parties had asked the technical experts whether section 168B, "*Elections*," was needed in this chapter.

2.9.5 Parties were still discussing whether people who pay levies or rates in an area but are not residents of the area, should have the right to vote in this area.

2.9.6 Section 168C, "*Internal Autonomy*," would be amended to provide for some guidelines; and

2.9.7 Political parties had asked the technical experts to examine whether section 168D, "*Privilege*," was needed in terms of local government.

2.10 Mr. de Lange reported that there was broad agreement on the question of executive competencies, but that draft formulations were still being produced on the matter.

2.11 Ms. Mbete-Kgositsile reported on multilateral discussions around "*Chapter 7, State Institutions Supporting Constitutional Democracy*."

2.11.1 On the whole there was agreement on this chapter, except with regards to provincial public protectors and the appointment mechanism.

2.11.2 The ANC withdrew its proposal to delete section 109(3).

3. CLOSURE

The Chairperson said the 5th Edition would be available to parties on the 15th of April 1996, when the penultimate debate would commence leading to adoption on the 8th of May 1996. He thanked everyone for all their hard work and closed the meeting 12h20.