

# CONSTITUTIONAL ASSEMBLY

## MINUTES OF THE 23rd MEETING OF THE CONSTITUTIONAL COMMITTEE

FRIDAY 4 AUGUST 1995

Present

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

Asmal, K  
Bhabha, M  
Camerer, S (Alt)  
Chabane, O C  
Davies, R  
De Lange, J H  
De Lille, P (Alt)  
Du Toit, D C  
Eglin, C W  
Fourie, A  
Ginwala, F N  
Gogotya, N J  
Green, L M (Alt)  
Hofmeyr, W A (Alt)  
Holomisa, S P  
Jacobsz, F  
Kgoali, J L  
King, T J  
Ligege, M G  
Lockey, D

Mahlangu, M J  
Mahlangu, N J  
Malatsi, D M (Alt)  
Malan JT (Alt)  
Marais, P G  
Maree, J W (Alt)  
Mbetse-Kgositsile, B  
Meshoe, K R  
Mulder, C P  
Myakayaka-Manzini, YL  
Pahad, E G  
Pandor, G N M (Alt)  
Rabie, J A  
Ripinga, S S  
Sifora, T V  
Sizani, R K  
Skweyiya, Z (Alt)  
Van Breda, A  
Van Heerden F (Alt)

**Alternates for this meeting:** NP: S Camerer, P Marais, J Radue, and F van Heerden for C Ackermann, D Makhanya, R Meyer and D Schutte.

**Apologies:** C Ackermann, G J Fraser-Moleketi, P J Gordhan, P J Groenewald, B S Mabandla, D W Makhanya, R P Meyer, B E Nzimande, D P A Schutte, and C L Viljoen.

**Absent:** P Gordhan, Z Kota, M Lekgoro, E Mchunu, V Moosa, L Mtshali, S Mzimela, B Ngcuka, L Ngwane, R Rabinowitz, P Smith, F van Deventer.

**In Attendance:**

**Staff :** H Ebrahim, M Sparg, L Zondo, G Grové, N Msizi, M Ndziba, M Keegan and K McKenzie

**Technical Advisers :** D Basson (TC3)

## 1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 09h10.
- 1.2 The meeting adopted the revised *Agenda*, tabled at the meeting, noting a query from Mr Sizani with regard to item 9 on the revised agenda, which had been added to the original agenda.

## 2. MINUTES

The Minutes of the 22nd Meeting of the Constitutional Committee on 23 June 1995 were adopted with the following corrections:

- i. The word "*reflect*" would replace "*reflected*" in paragraph 4.2.i.
- ii. The word "*the*" would be inserted in paragraph 4.2.v., to read "*The Chair ruled the matter would be moved...*".
- iii. In paragraph 5.1.1, "*May*" would replace "*June*".
- iv. The word "*that*" would replace "*than*" in paragraph 5.2.9, to read "*in a manner that ensures independence...*".
- v. In paragraph 5.4, "*Access to Information*" would replace "*Freedom of Expression*."
- vi. In paragraph 6.2.1.iv, the word "*which*" would be inserted, to read "*the framework within which the work...*".

## 3. MATTERS ARISING

### 3.1 THE ACDP AND THE ISSUE OF A SECULAR STATE

Mr. Wessels reported that the Management Committee had decided not to embark on an investigation. Rather, it decided to take the matter off the agenda and to ensure that the substance of the issue was properly debated as and when the relevant Theme Committee reports came before the Constitutional Committee. The meeting agreed.

### 3.2 THEME COMMITTEE 6.2 AND ISSUE OF RESERVE BANK

Mr. Davies reported that the Theme Committee had resolved the matter and had resumed its work on the Reserve Bank.

### 3.3 THEME COMMITTEE 4: AMENDED FORMULATIONS.

Mr. Ramaphosa reported that the Constitutional Committee Sub-Committee had dealt with this matter and would forward its report to the next meeting of the Constitutional Committee.

## 4. DISCUSSION OF ACDP DRAFT FORMULATION ON "THE NATURE AND APPLICATION OF BILL OF RIGHTS"

4.1 The ACDP tabled a document entitled, "*Amended Draft Formulation on: 'The Nature and Application of the Bill of Rights'.*"

4.2 It was agreed that the amended formulation would be distributed and discussed when the Constitutional Committee considered the full report on the Bill of Rights.

## 5. THEME COMMITTEE 6.2: DISCUSSION OF REPORT ON AUDITOR GENERAL

5.1 Mr. Davies spoke to the document entitled, "*Theme Committee 6.2, Draft Formulation on the Auditor General,*" included in the documentation.

5.2 The meeting agreed that

- i. Refinement of this draft formulation would be left for a later stage when the complete draft text of the new constitution was being constructed.
- ii. The meeting, however, would discuss the draft formulation to identify problem areas that needed further attention and to recommend possible changes.

5.3 The meeting accepted draft formulations 1(1), 1(2), 1(3) and 1(5), which read:

### ***Establishment, independence and impartiality***

1. (1) *There shall be an Auditor General for the Republic.*
- (2) *The Auditor-General should be independent.*
- (3) *The Auditor General shall discharge his or her powers and functions impartially and without fear, favour or prejudice subject only to this Constitution and the law.*
- (5) *No person and no organ of state shall interfere with the Auditor General in the discharge of his or her powers and functions.*

5.4 Regarding paragraph 1(4) which reads:

1. (4) *Organs of state shall through legislative and other measures accord the Auditor General and his or her assignee the*

*necessary assistance and protection to ensure the independence, impartiality, dignity and effectiveness of the Auditor General, including all such immunities and privileges as are necessary for this purpose.*

5.4.1 The ANC expressed concerns with the inclusion of provisions on "*his or her assignee*", arguing that:

- i. Mention of assignees here might imply that a similar assignment of power was not happening elsewhere in the constitution, and
- ii. Delegation and assignment of power would best be dealt with in legislation.

5.4.2 Regarding "*immunities and privileges*":

- i. The ANC queried whether the Theme Committee was not mixing up "*immunities and privileges*" with liabilities in law.
- ii. The NP requested further information from the Auditor General on what kinds of constitutional protection might be needed.
- iii. The ANC said that this formulation needed to be considered more generally. Other institutions established by the constitution would need similar protection, and it was possible that a general formulation could be used for all of them.
- iv. The NP agreed that such matters should not be looked at in isolation, but assessed in terms of their impact on other similar provisions elsewhere in the constitution.

5.5 The meeting accepted paragraph 2(1), which reads:

*Powers and functions*

2. (1) *The Auditor General shall audit and report on the accounts and financial statements of all national and provincial state departments and administrations and of all local governments, and also all such other accounts and financial statements as may be required by law to be audited by the Auditor General.*

5.6 Regarding paragraph 2(2) which reads:

2. (2) *The Auditor General may in the public interest audit and report on the accounts and financial statements of any institution in control of public funds.*

- 5.6.1 The ANC queried whether the Theme Committee meant "*in control of public funds*" or the more common, "*in receipt of public funds*".
- 5.6.2 The ANC expressed concern that the formulation could require the Auditor General to audit a great number of institutions and organisation which, in some cases, received only small sums of money from government.
- 5.6.3 The NP agreed that the clause should effect only those institutions which received a majority of their funding from government. Moreover, while the clause should require such institutions to make their books and audit reports available to the Auditor General, it should not make the Auditor General responsible for actually auditing them.
- 5.6.4 The Chairperson asked the Law Advisors to consider whether this clause could be omitted and dealt with in legislation.

5.7 Regarding paragraph 2(3) which reads

*2 (3) When the Auditor General performs an audit he or she shall have access to all information relevant to the audit and all persons in possession of such information shall be obliged to give their co-operation.*

- 5.7.1 The ANC said that this was covered in principle in paragraph 1(4) and the detail contained in paragraph 2(3) would be better dealt with in legislation.
- 5.7.2 In light of the discussion, the Chair ruled that the Law Advisors would review whether this clause could be shortened and incorporated into paragraph 1(4) or dispensed with altogether .
- 5.7.3 The DP expressed concern that this not be a final, definitive decision.

5.8 Regarding paragraph 3, which reads:

*Reports*

- 3. (1) The Auditor General shall submit all reports on audits conducted by him or her-*
- (a) in the case of national and provincial state departments and administrations and local governments, to the relevant level of government; and*
  - (b) in the case of any other institutions, to the persons prescribed by law;*

*Provided that, whenever the Auditor General deems it to be in the public interest, or in special circumstances as prescribed by law, to any*

*other level of government, institution or person.*

*(2) All reports of the Auditor General shall be made public.*

It was agreed that this paragraph would be omitted. The overarching principle was established in paragraph 2(1), and this kind of detail was best dealt with in legislation.

5.9 Regarding paragraph 4(1), which reads:

*Appointment, qualifications, tenure and dismissal*

*4. (1) The President shall appoint as Auditor General a person -*

- (a) nominated by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and*
- (b) approved by Parliament by a resolution adopted, without debate, by a majority of at least two-thirds of the members present and voting.*

5.9.1 The ANC expressed concern that the constitution would establish a number of office bearers, like the Auditor General, who would have to be appointed in particular ways. A myriad of different appointment procedures could emerge. It proposed that the matter be deferred until a comparative analysis was completed of procedures for other independent structures in the constitution. This might allow for rationalisation of appointment procedures and the identification of a uniform mechanism, two or three models for appointment, or general underlying principles.

5.9.2 The NP agreed, but expressed its concern that, the Auditor General was unique to the extent to which it required independence and impartiality. This needed to be considered when formulating draft text.

5.9.3 The meeting agreed that the method of appointment set out in paragraphs 4(1)(a) and (b) would be left in abeyance, until the Law Advisors had completed a comparative analysis of other independent structures in the constitution.

5.10 Regarding paragraph 4(2), which reads:

*4 (2) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office, has specialised knowledge of or experience in auditing, state finances and public administration, and does not hold office in any political party or organisation.*

5.10.1 The ANC expressed the following concerns:

- i. The mention of "*experience in auditing, state finances and public administration*", would limit candidates to civil servants and disallow many excellent candidates who had not served in the apartheid state; and
- ii. "*Specialised knowledge*" might not be as essential as courage and tenacity.
- iii. It proposed either:
  - a. The use of the term "fit and proper person", or
  - b. A reconsideration of the IFP formulation contained in footnote 14 of the draft formulation, which reads: "*The Auditor General shall be a person of appropriate character and expertise.*"

5.10.2 The NP expressed its concern that the Auditor General would have to have a high level of technical knowledge to ensure a good standard of auditing.

5.10.3 The Chairperson ruled that the Law Advisors would look into the matter and draft a few options for further consideration.

5.10.4 It was agreed that a final decision on the matter would be deferred until a comparative analysis was completed, as agreed in 5.9.3 above.

5.11 Regarding paragraphs 4(3), 4(4) , 4(5) and 4(6) it was agreed to hold these matters in abeyance until a comparative analysis was completed as agreed in 5.9.3 above.

5.12 It was agreed that paragraphs 5(1) and 5(2) could also be omitted from the draft text during the process of refinement. This would be under review.

5.13 The meeting agreed to refer the report to the sub-committee of the Constitutional Committee for further consideration.

## **6. CONSTITUTIONAL COMMITTEE SUB-COMMITTEES.**

### **6.1 PUBLIC PROTECTOR**

6.1.1 Mrs. Mbete-Kgositsile spoke to the document entitled, "*Matters Regarding the Public Protector Draft Formulations,*" contained in the documentation.

6.1.2 Mr. Ebrahim reported that s4 and s5 of paragraph 8 of the *Memorandum* were incorrect and should be struck out. He referred members to the correct footnote 8 in the sixth draft .

6.1.3 Regarding paragraphs 1(1), 1(2), 1(3), 1(4) and 1(5), which read:

*Establishment*

1 (1) *There shall be a Public Protector for the Republic.*

(2) *The Public Protector shall be independent, impartial and subject only to the Constitution and the law. The Public Protector shall discharge his or her powers and functions without fear, favour or prejudice.*

(3) *Organs of state shall through legislative and other measures accord the Public Protector the necessary assistance and protection to ensure his or her independence, dignity and effectiveness.*

(4) *No person and no organ of state shall interfere with the Public Protector in the discharge of his or her powers and functions.*

(5) *The Public Protector shall be accessible to all persons and communities.*

- i. The meeting accepted these paragraphs;
- ii. The DP proposed that these paragraphs be noted for comparison with similar provisions on other offices, with a view to composing a general or "omnibus clause" for all of them. The meeting agreed to this proposal.
- iii. The Chairperson ruled that the Law Advisors would be asked to prepare such a clause.
- iv. The ANC requested that the Independent Panel of Experts be requested to advise whether such a clause were possible.
- v. The ANC suggested that one chapter of the constitution might deal with independent structures, and the introduction to that chapter could spell out these principles. If necessary, further adaption could be made when dealing with individual organs.
- vi. The ANC expressed concern that members of the Independent Panel of Experts should attend Constitutional Committee meetings to provide advice when necessary. The Chairperson ruled that he and the Deputy Chairperson would discuss this matter with the Panel.

6.1.4 Regarding paragraph 2(1), which reads:

*Powers and functions*

2.(1) ...

- i. The meeting agreed to instruct the Law Advisors to reformulate *Option 2* so that it encompassed all the vital aspects of *Option 3*, including principles that would cover matters such as "undue delay," "gross incompetence," "financial abuse" and "misuse of public funds."
- ii. In addition, the ANC asked that the phrase in *Option 2* "***[by a body or person performing a public function]***" be clearly defined, so that the Public Protector not be asked to intervene in matters that were beyond his or her competence.
- iii. The PAC:
  - a) Expressed concern that the clause did not seem to allow the Public Protector to initiate investigations on his or her own volition; and
  - b) Expressed preference for the use of the term "maladministration" in this clause, but expressed concern that this should cover financial abuse and the misuse of public funds.
- iv. The Chairperson ruled that the Law Advisors would be asked to amend this formulation; whereafter the matter would be referred to the sub-committee for further consideration.

6.1.5 Regarding paragraph 2(2), which reads:

2 (2) *The Public Protector shall not have the power to investigate the performance of judicial functions by the courts of the Republic.*

The meeting agreed to defer the matter until the Constitutional Committee received Theme Committee 5's report on the judiciary, to compare this provision with the provisions on dealing with complaints set out there. It was noted that the ANC expressed concern at the inclusion of a negative provision in the constitution.

6.1.6 Regarding paragraph 2(3), which reads:

2. (3) *Reports issued by the Public Protector in connection with the discharge of his or her powers and functions shall in principle be open to the public.*

The meeting agreed that the paragraph would be "flagged" for later consideration and possible deletion, particularly if the concerns raised would be covered in other parts of the constitution or in legislation. It was noted that the ANC expressed concern at the inclusion of the term "*in principle*".

6.1.7 The meeting accepted paragraph 2(4) which reads:

2. (4) *The Public Protector shall be accountable to Parliament for his or her activities, and shall report to Parliament on such activities at least once a year.*

6.1.8 Regarding paragraphs 3(1), 3(2), 3(3), 3(4), 3(5) and 3(6) it was agreed these would be left in abeyance until the Law Advisors had completed the comparative analysis as agreed in 5.9.3 above.

6.1.9 Regarding paragraph 4, which reads:

***Provincial public protectors/Deputy Public Protectors***

4. ....

There was some debate on the issue but the meeting agreed to leave the matter in abeyance until a comparative analysis of other institutions was completed as agreed in 5.9.3 above.

6.1.10 The meeting agreed to forward the whole draft formulation on the Public Protector to the sub-committee of the Constitutional Committee.

## **6.2 COURTS AND SYSTEM OF JUSTICE**

Mr Hofmeyr reported that the sub-committee on "*Courts and the System of Justice*" had made substantial progress and hoped to forward its report to the next meeting of the Constitutional Committee.

## **7 TABLING AND DISCUSSION: THEME COMMITTEE 6.3: HUMAN RIGHTS COMMISSION**

7.1 Ms. Mbete-Kgositsile spoke to the document entitled, "*Third Draft - Human Rights Commission*", included in the documentation.

7.2 The meeting agreed that *sections 1(1)-(5)* and *section 3* of the draft

formulations should be looked at again at a later stage from "a bird's eye point of view" of the establishment and governing principles of other similar structures created in terms of the constitution.

- 7.3 The meeting agreed that under *section 2*, dealing with *Powers and Functions, option 2* was the preferred option subject to adjustments which would include the principles set out in *option 1*.

## **8. TABLING AND DISCUSSION: THEME COMMITTEE 3: NATIONAL AND PROVINCIAL LEGISLATIVE AND EXECUTIVE COMPETENCIES**

- 8.1 Mr. du Toit spoke to the document entitled, "*National and provincial legislative and executive competencies*", included in the documentation.
- 8.2 He highlighted the need to pay separate attention to the submission made by the Commission on Provincial Government.
- 8.3 The meeting agreed that the report could not be dealt with in the Constitutional Committee at this stage and should be referred to the sub-committee of the Constitutional Committee.

## **9. TABLING AND DISCUSSION: THEME COMMITTEE 1: REPRESENTATIVE GOVERNMENT, CITIZENSHIP AND FRANCHISE**

- 9.1 Mr Mahlangu spoke to the document entitled, "*Report on Block 6: Representative Government, Citizenship, Suffrage*", included in the documentation.
- 9.2 The meeting agreed to defer the matter until Theme Committee 2's report on representative government and Theme Committee 4's report on citizenship had been forwarded to the Constitutional Committee for its consideration.
- 9.3 The meeting agreed to amend the draft formulation entitled, "*The Franchise*," to read:

"Every South African citizen shall be entitled to vote in elections for the legislatures at all levels of government and in referenda contemplated in this Constitution, in accordance with the laws regulating such elections and referenda."

## **10. TABLING FOR NOTING: COMMISSION ON PROVINCIAL GOVERNMENT SUBMISSIONS**

The meeting noted the document entitled, "*Commission on Provincial Government*," included in the documentation.

## **11. ANY OTHER BUSINESS**

There was no further business.

**12. CLOSURE**

The meeting closed at 15h15.