

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE TWENTY NINTH MEETING OF THE CONSTITUTIONAL COMMITTEE

FRIDAY 15 SEPTEMBER 1995

Present

Ramaphosa MC (Chairperson)
Wessels L (Deputy Chairperson)

Ackermann, C	Mchunu, E S
Alant, T G	Mdladlana, S (Alt)
Asmal, K	Meshoe, K R
Beyers, A S	Meyer, R P
Bhabha, M	Moosa, M V
Camerer, S (Alt)	Mthintso, T E
Chabane, O C	Myakayaka-Manzini, Y L M
De Beer, S J (Alt)	Ngcuka, B T
De Lange, J H	Omar, D (Alt)
De Lille, P (Alt)	Pahad, E G
Du Toit, D C	Pandor, G N M (Alt)
Ebrahim, A. G. (Alt)	Rabie, J A
Eglin, C W	Radue, R
Ginwala, F N	Ripinga, S
Gordhan, P J	Schreiner, J
Green, L M (Alt)	Selfe, J (Alt)
Hofmeyr, W A (Alt)	Sifora, T V
King, T J	Sizani, R K
Ligege, M G	Smuts, D
Lockey, D	Steenkamp, P J (Alt)
Majola-Pikoli, N T (Alt)	Turok, B
Malan, T J	Van Breda, A
Marais, P G	Van Zyl, I D
Mbete-Kgositsile, B	Viljoen, C L

Alternates for this meeting: **NP:** S de Beer and R Radue; **PAC:** A Ebrahim

Apologies: **ANC:** G Fraser-Moleketi, Z Kota, B Mabandla, N J Mahlangu; Z Skweyiya **NP:** D Makhanya and D Schutte; **PAC:** R Sizani

Absent: A Fourie, S P Holomisa, J L B Kgoali, L P H M Mtshali, C Mulder, S Mzimela, B Nzimande, R Rabinowitz, and P F Smith.

In attendance:

Staff: H Ebrahim, M Sparg, L Zondo, G Grové, N Msizi, and M Keegan.

Panel: G. Erasmus, J Kruger, C Murray, M Sedibe-Ncholo, I Semanya, J van der Westhuizen, and Z Yacoob.

Technical Advisors: J Heunis (TC1), N Steytler (TC2), F Njobe, A Claasens, and A Gildenhys (TC 6.3); A Seeger and A Cachalia (TC 6.4).

1. OPENING

The Chairperson opened the meeting at 09h45. The meeting adopted the "Revised Agenda", distributed with the documentation.

2. MINUTES

The meeting adopted the Minutes of the Twenty Eighth Meeting of the Constitutional Committee on 15 September 1995.

3. MATTERS ARISING

There were no matters arising.

4. DISCUSSION: FOURTH DRAFT CHAPTER ON SECURITY

4.1 Mr. Ramaphosa introduced the document entitled, "*Matters relating to the fourth draft chapter on security*," included in the formulation.

4.2 The ANC tabled a document entitled, "*Chapter on the Security Services, ANC Submissions*" for the meeting's consideration.

4.3 Regarding the Statement of principle:

- i. The meeting agreed to the first paragraph of "*The Statement*";
- ii. The meeting agreed to amend the second paragraph to read:

"that national security should be pursued in strict compliance with this Constitution, the law and all applicable international conventions and norms, subject to the authority of Parliament and the executive."

- iii. The meeting, however, noted the ACDP objection to this amendment.

4.4 Regarding subsection 1(1), the meeting agreed to remove the brackets and the footnote, to read:

1 (1) The security services of the Republic consist of a single defence force, the police service and such intelligence services as may be established in terms of this Constitution.

4.5 The meeting accepted subsection 1(2).

4.6 The meeting agreed to amend subsection 1(3) to read:

"(3) The security services and its members shall act and train its members to act in accordance with and within the confines of this Constitution and the law, including the norms of international customary

law and treaties binding on the Republic and no member shall obey a manifestly illegal order.

- 4.7 Regarding subsection 1(4), the meeting agreed to insert the words, "or its members to perform their duties or functions so as", to read:

(4) The security services shall discharge their powers and functions in the national interest. It shall, therefore, be unlawful for the security services or its members to perform their duties or functions so as to further or prejudice party political interests.

- 4.8 The meeting accepted subsection 1(5) and agreed to remove the footnote.

- 4.9 The meeting agreed to insert the following as subsection 1(6):

(6) Mechanisms and procedures for dealing with labour relations and for the accommodation of the specific needs of the security services may be established.

- 4.10 The meeting accepted subsection 2(1) and 2(2). However, it was noted that a transitional provision would be required to provide for the continuation of the SANDF, which is currently established and structured in terms of the Interim Constitution.

- 4.11 Regarding subsection 3(1) that reads:

3. (1) A member of the Cabinet shall be charged with [ministerial] responsibility for defence and [shall be accountable to Parliament].

i. The ANC said that it would prefer that this matter was dealt with elsewhere in the constitution, in a general clause on cabinet ministers. However, it supported the retention of the clause in this Chapter, until it had been dealt with elsewhere in the constitution.

ii. The meeting agreed to retain the subsection, but amended it to read:

"3. (1) A member of Cabinet shall be responsible for defence."

- 4.12 Regarding subsection 3(2) that reads:

(2) A (joint)¹¹ multi-party committee of Parliament shall oversee all defence matters.¹² [In particular the committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of and draft legislation on the defence force, and to perform such other functions relating to parliamentary supervision of the defence force as prescribed by law.]³

- i. The first sentence was accepted.
- ii. It was agreed the second sentence contained too much detail and would be placed in a footnote, until the powers and functions of parliamentary committees had been dealt with elsewhere in the constitution.

4.13 The meeting accepted subsections 4(1) and 4(2) and section 5.

4.14 Regarding section 6 that reads:

6 The defence force may be employed only in the national interest and as authorised by law.

- i. The ANC suggested that section 224(3) of the Interim Constitution be examined, improved, and incorporated into the section on the defence force, to prohibit the proliferation of private militia.
- ii. It was agreed the technical committee would take this matter forward.

4.15 The meeting agreed that section 7 would be reformulated to read:

7 (1) There shall be one national police service structured to function at national and provincial levels as set out in national legislation.

(2) National legislation shall set out the powers and functions of the police service and shall enable the police service to discharge its responsibilities effectively.

(3) The objective of the police service shall be to prevent and investigate crime, to maintain public order and to protect and secure the safety and security of the Republic and its inhabitants, including the protection of their lives and property.

4.16 The meeting agreed, however, to retain footnote 17, that reads:

"This clause is referred to the Sub-committee of the CC as it deals with matters related to national and provincial competencies."

4.17 Regarding section 8, the meeting agreed that:

- i. The matter should be dealt with elsewhere in the constitution, in general clauses on the cabinet and on parliamentary committees;
- ii. The clause would be deleted, but its substance retained in a footnote until there was certainty that the matter would be dealt with elsewhere in the constitution.

4.18 The meeting agreed to delete the existing section 9 and replace it with the following:

9 (1) *The President shall appoint and may dismiss the National Commissioner who shall exercise command of the police service in accordance with the directions of the member of the Cabinet responsible for police.*

(2) *The National Commissioner shall appoint provincial commissioners for each province and may dismiss such commissioners in accordance with the national law.*

(3) *Subject to the directions of the National Commissioner, the Provincial Commissioner shall be responsible for such policing functions in the province as prescribed by national law.*

(4) *The provincial government shall be responsible for monitoring and oversight of the conduct and efficiency of the police service and may establish such measures as are necessary to accomplish this function.*

(5) *Provincial government shall be responsible for and may establish mechanisms in regard to the promotion of police community relations at a local level.*

(6) *A civilian secretariat functioning under the direction and control of the member of Cabinet responsible for police, shall exercise such powers and functions in connection with police as may be entrusted to it by law or that member of Cabinet.*

4.19 The meeting agreed to insert a footnote, however, to indicate that the matter of national and provincial competencies was still being finalised.

4.20 The meeting agreed to delete sections 10 and 11.

4.21 The meeting agreed to delete sections 12 - 17 and replace these with the following:

12 (1) *The President may establish an intelligence service or services apart from those in the Defence Force and Police Services.*

(2) *The President may himself/herself assume political responsibility for the control and direction of the intelligence service or designate a member of his/her Cabinet to be responsible therefore.*

(3) *The President shall appoint the Head of the Intelligence Service or services.*

13 *The objectives, powers and functions of any intelligence service or services established in terms of section 12(1) shall be set out and*

regulated by national law which shall make provision for

- (1) *the co-ordination of the intelligence services and, where they exist, the intelligence divisions of the Defence Force and the Police Service.*
- (2) *a parliamentary oversight committee which shall have oversight over the budget of the Intelligence Services.*
- (3) *civilian inspector or inspectors appointed by the President with the approval of two-thirds of the members of the National Assembly to monitor the activities of the Intelligence Service.*

4.22 The meeting agreed to delete sections 18 - 20.

4.23 It is noted that the NP said that it provisionally accepted these amendments, but reserved its position until the Sub-committee had dealt with the issue of competencies.

5. TABLING AND DISCUSSION: THEME COMMITTEE 1 REPORT ON FOREIGN RELATIONS

5.1 Mr. Marais spoke to the document entitled, "*Theme Committee One, Report on Block 8,*" included in the documentation.

5.2 The meeting referred the Report to the Sub-committee and agreed that discussion of it would be postponed to allow political parties more time to consider it.

6. TABLING AND DISCUSSION: THEME COMMITTEE 6.3 REPORT ON LAND

6.1 Mrs. Mbete-Kgositsile introduced the document entitled, "*Theme Committee 6.3 Report on Blocks 9 - 10, Land Rights,*" included in the documentation. She said that the National Party had expressed reservations with the Report.

6.2 The meeting agreed that this report would be referred to the Constitutional Committee Sub-committee, which would deal with it together with the Chapter on Fundamental Rights at its meeting on 9 and 10 October 1995. It was also agreed that technical advisors from Theme Committees 4 and 6.3 would meet to study the reports and, if necessary, prepare a supplementary report for the consideration of the Sub-committee.

7. TABLING AND DISCUSSION: THEME COMMITTEE 6.3 REPORT ON GENDER

7.1 Mrs. Mbete-Kgositsile introduced the document entitled, "*Theme Committee 6.3 Report on Blocks 7 - 8, Commission for Gender Equality,*" contained in the documentation.

- 7.2 It was agreed that the name of the commission had not yet been finalised and that footnote 1 would be retained.
- 7.3 The meeting noted that the ACDP still has to indicate whether or not it wants the commission to be included in the constitution.
- 7.4 The meeting accepted subsection 1(1), subject to the finalisation of the name of the structure.
- 7.5 The meeting accepted subsection 1(2). It was noted that the DP proposed the inclusion of a "sunset" clause which would allow for the commission to be eventually absorbed by the Human Rights Commission once its objectives were realised.
- 7.6 The meeting agreed to insert the word "*Parliament*" in subsection 1(3) to read:

(3) The Commission shall be accountable to Parliament for its activities and shall report to Parliament on such activities.

- 7.7 Regarding subsection 2(1), under [*Powers and functions*], that reads:

2 (1) ...⁷

The meeting agreed:

- i. To lift the formulations in footnote 7 into the text and to insert the word "*investigate*" into subsection 2(2). The new formulations would read:

2 (1) *The role of the Commission shall be to advance gender equality and all its powers and functions shall be prescribed by national law.*

(2) *The Commission shall promote the development, protection, attainment of, and respect for gender equality. It shall for this purpose have the necessary powers accorded to it by national law, including powers to investigate, monitor, research, educate and advise on issues relating to gender equality.*

- ii. The remainder of footnote 7 would remain, indicating the differences between the parties.
- iii. The matter would be referred to the Constitutional Committee Sub-committee for its consideration.
- iv. The Sub-committee would take account of the report from the Beijing Conference and the draft Bill on the Gender Commission.

7.8 On subsection 2(2) that reads:

(2)⁸

- i. It was agreed that the draft formulations in footnote 8 would be lifted into the text. However, (b) would be inserted on the understanding that:
 - a. The commission would report to Parliament and the Executive; and
 - b. The formulation needed to be revised.
- ii. The meeting noted the suggestion that this text would be more appropriately named "*National Machinery*."
- iii. It was agreed that a footnote would remain to indicate that the matter was not finalised and there was disagreement about whether a range of structures needed to be established, of which this commission was but one.
- iv. The meeting agreed that this matter would be referred to the Constitutional Committee Sub-committee, whose discussion would be informed by the report from the Beijing Conference and by the draft Bill on the Gender Commission.

7.8 The meeting agreed to postpone discussion of the section dealing with "*Appointment of members*".

7.9 It was agreed that this Report would be referred to the Sub-committee who would take account of the report from the Beijing Conference and the draft Bill on the Gender Commission.

8. **TABLING AND DISCUSSION: THEME COMMITTEE 2 REPORT ON PROVINCIAL STRUCTURES**

8.1 Mr. Ramaphosa introduced the document entitled, "*Theme Committee 2, Structure of Government at Provincial Level,*" included in the documentation.

8.2 The ANC expressed concern that mechanisms might be required to deal with provincial boundaries and boundary disputes, if boundaries were not finalised by the time the new constitution was adopted. The Chairperson ruled that this matter required serious attention. It would be noted and considered at a more appropriate moment.

8.3 The meeting accepted subsections 1(1) - 2(4).

8.4 Regarding subsection 3(2) that reads:

Legislative competence of provinces

3. ...²

The meeting agreed to postpone discussion on this matter and to deal with it when the matter of national and provincial competencies had been finalised.

8.5 Regarding subsection 4(1) that reads:

(1) A provincial legislature shall consist of not fewer than...and not more than...members elected in accordance with an electoral system which shall be based on a common voters' roll and, in general, proportional representation as provided for by national law.

i. The meeting accepted the subsection:

ii. The DP however expressed its reservations about the inclusion of the words "*as provided for by national law*".

iii. It was agreed that the outstanding matters would be referred to the Constitutional Committee Sub-committee.

8.6 The meeting accepted subsection 4(2) , and referred outstanding matters to the Constitutional Committee Sub-committee.

8.7 The meeting accepted subsection 5(1), but noted that the DP held that provincial legislatures should have a four and not a five-year term of office.

8.8 The meeting accepted subsection 5(2), but noted that finalisation of this matter depended on finalisation of related provisions on the National Assembly.

- 8.9 The meeting accepted subsections 5(3) and 5(4).
- 8.10 The ANC expressed concern that provisions were needed to cover a situation where a provincial parliament, for whatever reason, was unable, or refused, to function. The Chairperson ruled that the technical advisors would look into the matter and, if need be, prepare draft formulations for consideration by the Sub-committee.
- 8.11 The meeting accepted subsection 6(1).
- 8.12 Regarding subsection 6(2) that reads:

(2) A judge designated by the Chief Justice shall preside over the election of a Speaker, and the Speaker shall preside over the election of a Deputy Speaker.

The meeting noted that:

- i. This was an unresolved matter and depended on the finalisation of provisions on the National Assembly; and
 - ii. One judge should preside over the selection of the Speaker of the National Assembly and speakers of provincial legislatures.
- 8.13 The meeting agreed to subsections 6(3) - 8(2). Regarding section 8, however, the meeting noted that the Sub-committee was still discussing the consequences of crossing the floor in the National Assembly.
- 8.14 Regarding subsection 9(1) that reads:

(1) Every member of a provincial legislature before taking his or her seat in a legislature, shall make and sign an oath or solemn affirmation in the terms set out in Schedule...before a judge designated by the Chief Justice.

It was agreed that one judge should oversee the swearing in of national and provincial legislators. It was agreed this matter would be noted and discussed further.

- 8.15 The meeting accepted subsection 9(2) - 12(1), but noted that the issue of the Chief Justice still needed to be finalised in subsection 9(2).
- 8.16 The ANC suggested that the word "*national*" be inserted in subsection 12(2), to read:

(2) The salaries, allowances and benefits of members of a provincial legislature shall be as provided by national law.

- i. However, the NP expressed concern that the Remuneration Commission would be making recommendations on this and there

was still no clarity whether national or provincial legislatures would process those recommendations.

- ii. The Chairperson ruled that the matter would be held over for later discussion.

8.17 The meeting accepted subsection 13(1) and 13(2).

8.18 With regard to subsection 13(3), the ANC suggested that the word "*national*" be inserted to read:

(3) Other privileges, immunities and powers of a provincial legislature shall be as prescribed by national law.

The Chairperson ruled that the matter would be held over for later discussion.

8.19 The meeting accepted subsection 14(1) - 14(3).

8.20 Regarding section 15, on the "*Safe keeping of provincial acts*," the ANC suggested that provisions were needed for the promulgation of provincial Acts in the Government Gazette, to make provincial legislation available to government departments and the public. The Chairperson ruled that the technical advisors would consider the matter and draft text. The issue was noted for further discussion.

8.21 The meeting accepted subsection 15(1) - 16(1).

8.22 Regarding subsection 16(2) that reads:

(2) A province shall have executive authority over all matters in respect of which such province has exercised its legislative competence, matters assigned to it by the State President, or any law, and matters delegated to it by or under any law.

It was agreed that this matter would be referred to the Constitutional Committee Sub-committee to be considered together with the broader issue of competencies.

8.23 The meeting accepted subsection 17(1) - 19(1).

8.24 Regarding subsection 19(2) that reads:

(2) No person may hold office as a Premier for more than two full terms.

- i. It is noted that this matter required further discussion; and
- ii. It is noted that the ANC suggested that the phrase "*two full terms*" was problematic because it might allow members to serve

additional, partial terms and thus needed to be reformulated.

8.25 The meeting accepted subsections 20(1) - 22(1).

8.26 Regarding subsection 22(2) that reads:

(2) A Premier shall appoint the members of the Executive Council from amongst the members of the provincial legislature to administer the various portfolios for which the provincial government is responsible.

The meeting accepted the subsection, but noted the concern expressed by the ANC that it be consistent with similar provisions for the National Executive.

8.27 The meeting accepted subsections 22(3) - 33(2).

8.28 On subsection 33(3) that reads:

(3) A provincial constitution shall not be inconsistent with a provision of this Constitution, and shall be subject to the constitutional principles set out in Schedule... . Provided that a provincial constitution may provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province.

- i. The ANC queried the use of the term "*constitutional principles*," as there were at present no plans to include any such principles in the new constitution; and
- ii. The ANC also asked whether the last sentence was explicitly in line with the Constitutional Principles.
- iii. The Chairperson ruled that the matter would be discussed at a later stage.

8.29 The meeting accepted subsections 33(4) and 33(5).

8.30 The meeting agreed to refer this matter to the Constitutional Committee Sub-committee.

9. TABLING AND DISCUSSION: THEME COMMITTEE 2 REPORT ON SENATE

9.1 The meeting noted the document entitled, "*Theme Committee 2, Senate/Council of Provinces*," included in the documentation.

9.2 The meeting agreed that this matter would impact on national and provincial competencies and that it would be deferred to give political parties the opportunity to discuss it further.

- 9.3 The meeting also agreed that the technical committees working on provincial competencies and on the Senate needed to talk to each other to see if there was any common ground and a need to integrate their work.

10. TABLING: THEME COMMITTEE 3 REPORT ON LOCAL GOVERNMENT

- 10.1 The meeting noted the document entitled, "*Theme Committee 3, Local Government Report*," included in the documentation.
- 10.2 The meeting agreed that drafting would commence on this matter, and discussion of it would be deferred until draft texts were available.

11. TABLING: THEME COMMITTEE 3 REPORT ON FINANCIAL AND FISCAL RELATIONS

- 11.1 The meeting noted the document entitled, "*Theme Committee 3, Financial and Fiscal Relations, Report*," included in the documentation.
- 11.2 The meeting agreed to defer the matter to give political parties the opportunity to discuss it, possibly at the same time that they discussed the issue of competencies.

12. TABLING: THEME COMMITTEE 3 REPORT ON INTER-GOVERNMENTAL RELATIONS

- 12.1 The meeting noted the document entitled, "*Theme Committee 3: Inter-Governmental Relations, Report*," included in the documentation.
- 12.2 The meeting agreed to defer this matter to give political parties the opportunity to discuss it further, possibly at the same time that they discussed the issue of competencies.

13. ANY OTHER BUSINESS

13.1 MANAGEMENT COMMITTEE PROPOSAL ON PROCESS

- 13.1.1 Mr. Ebrahim introduced the document entitled, "*Management Committee Proposal on Process*," distributed with the documentation.
- 13.1.2 The meeting accepted the "*Recommendations*" included on pages 4 - 6 of the document, with the following qualifications.
- 13.1.3 The ANC expressed concern that the resources of the Constitutional Committee, Management Committee and Sub-committee should focus on a finely tuned process of negotiation and not on public participation programmes. The Chairperson responded that:

- a. The Constitutional Assembly, and the ANC in particular, had consistently demanded that public participation is a central part of the constitution-making process; and that
- b. A balance therefore had to be found between negotiations and public participation in the next phase.

13.1.4 The ANC said that not every contentious point should be recorded in the Working Draft, but only those with at least a minimum amount of support, for example, 15%.

13.1.5 The Constitutional Committee would be convened on 19 and 20 October 1995 to consider and approve the Working Draft for publication.

13.1.4 The Chairperson ruled that the process document would be endorsed to provide a broad mandate to the Administration for work in the next phase.

14. CLOSURE

The Chairperson closed the meeting at 13h15.