

**CONSTITUTIONAL ASSEMBLY**

**MINUTES OF THE THIRTY SIXTH (36TH) MEETING OF THE  
CONSTITUTIONAL COMMITTEE**

**TUESDAY 16 APRIL 1996**

**Present**

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

Ackermann C	Mdladlana, S (Alt)
Andrew, K (Alt)	Meshoe K R
Camerer S	Meyer R P
De Beer, S J (Alt)	Moosa M V
De Lange, J H	Moosa M W (Alt)
Du Toit, D C	Mulder, C P
Eglin, C W	Myakayaka-Manzini, Y L M
Ginwala F	Ngcuka, B T
Gordhan, P J	Nzimande, B E
Green, L M (Alt)	Pahad E G
Hofmeyr, W	Radue, R (Alt)
King, T J	Ripinga, S S
Ligege M G	Schutte, D P A
Lockey D	Sifora, T V
Love, J	Sizani, R K
Mahlangu N J	Smuts, D (Alt)
Marais, P G	Surty, M E (Alt)
Mbete-Kgositsile, B	Van Breda A

**Apologies:** O C Chabane, GNM Pandor, J Schreiner,

**Absent:** K Asmal, M Bhaba, G Fraser-Moleketi, NJ Gogotya, S P Holomisa, J L Kgoali, BS Mabandla, M J Mahlangu, D W Makhanya, LPHM Mtshali, S Mzimela, J A Rabie, R Rabinowitz, P Smith, RS Suttner, F J Van Deventer, C L Viljoen.

**In attendance: Directorate:** H Ebrahim, M Sparg, **Minutes:** M Keegan, S Rabinowitz  
**Law Adviser:** G Grové; **Panel of Experts:** G Erasmus, J Kruger, C Murray, J Van Der Westhuizen, and Z Yacoob. **Technical Advisers:** H Cheadle, S Liebenberg, I Rautenbach

**1. OPENING**

- 1.1 Mr. Ramaphosa opened the meeting at 10h30.
- 1.2 The meeting agreed to the proposal that the Constitutional Committee would discuss the chapters on the Bill of Rights and State Institutions supporting Constitutional Democracy and that there would be a parallel process of sub-committees in which the following issues would be discussed: Founding Provisions, Co-operative Government, Parliament, President and the National Executive, Provinces, Local Government, Transitional Arrangements and Competences and Security.
- 1.3 The meeting noted that Finance would be discussed in a sub-committee meeting at 16h00.
- 1.4 With regard to the Judiciary, it was agreed that Mr Ngcuka and Mr Schutte would discuss when this meeting would take place.
- 1.5 The meeting agreed that the CC would meet again on Wednesday 17 April to receive reports on the matters discussed in the CC and those referred to the various sub-committees.

**2. CHAPTER 2: BILL OF RIGHTS**

- 2.1 Regarding Section 9, "*Rights*"
  - i The meeting agreed that the Technical Refinement Team should reformulate the first sentence of Section 9(1). The ANC proposed wording along the lines of: "*This Bill of Rights sets out the fundamental rights enjoyed by the people of South Africa and affirms the democratic values of human dignity, equality and freedom.*"
  - ii The meeting agreed that the Technical Refinement Team should reformulate the second sentence of Section 9(1) to refer to the fact that these rights are subject to the limitations referred to in the limitations clause.
  - iii The meeting agreed to Section 9(2).
- 2.2 Regarding Section 10, "*Application*"
  - i The meeting agreed to Section 10(1) but agreed that Section 10(2) would be discussed together with section 11(3) of the equality clause and could only be finalised when the equality clause was completed.
  - ii The meeting agreed to Section 10(3) but noted the DP concern regarding the use of the word "*required*" and that it preferred a more generous term such as "*allowed*".

- 2.3 Regarding Section 11, "*Equality*"
- i The meeting agreed to Section 11(1).
  - ii With regard to Section 11(2), the meeting agreed that this section was still under consideration by the parties. The DP stated that it objected to the inclusion of this provision, but it did not oppose the new grammatical formulation proposed by the Technical Refinement Team. The ANC stated that it did not prefer to wording proposed in the side-bar but preferred to retain the wording in the draft.
  - iii Regarding Section 11(3), the meeting agreed to inclusion of "*pregnancy*" as a ground and the brackets could therefore be removed but parties would give further consideration to the options proposed by the Panel and Technical Committee 4 and agreed that this section would be revisited.
- 2.4 The meeting agreed to Section 12, "*Human dignity*".
- 2.5 The meeting agreed that to defer discussion of Section 13, "*Life*".
- 2.6 Regarding Section 14, "*Freedom and security of the person*", the meeting agreed to this section but noted the NP reservation regarding Section 14(2)(b).
- 2.7 The meeting agreed to Section 15, "*Slavery, servitude and forced labour*" and Section 16, "*Privacy*".
- 2.8 Regarding Section 17, "*Freedom of religion, belief and opinion*", the meeting agreed to this section and noted the following:
- i The ACDP concern regarding the wording in Section 17(3)(b) "*must be consistent with the provisions of this Constitution*". The ACDP expressed the view that the Bible is the supreme law and if an institution was in conflict with this, they would prefer to follow the Bible.
  - ii The words "*state or state-aided*" institutions in Section 17(2) awaited resolution of the education clause. The ANC proposed the use of the word "*public*" institutions.
- 2.9 Regarding Section 18, "*Freedom of Expression*", the meeting agreed to this section but agreed to note in a side-bar the NP reservation concerning their proposal for the inclusion of subsection (3) dealing with impartiality of state or state-aided media.
- 2.10 The meeting confirmed that Section 19, "*Assembly, Demonstration and Petition*" and Section 20 "*Freedom of Association*" had been agreed to.
- 2.11 The meeting agreed to Section 21, "*Political rights*" and agreed that, with regard

to the question of voting age, the onus was on members to check where this issue was dealt with.

- 2.12 The meeting confirmed that Section 22, "*Citizenship*" and Section 23, "*Freedom of movement and residence*" had been agreed to.
- 2.13 The meeting agreed to Section 24, "*Freedom of occupation*" with the following amendments:
- i To replace "*a*" with "*their*" in the first sentence.
  - ii To insert "*a trade or profession*" in the second sentence.
- 2.14 The meeting agreed to defer discussion of Section 25, "*Labour relations*".
- 2.15 Regarding Section 26, "*Environment*":
- i The NP stated that it still supported inclusion of the phrase "*and quality of life*" and requested that the brackets be removed.
  - ii The meeting agreed to allow this matter to stand over for further discussion by parties and to revisit this section.
  - iii The meeting further agreed to the replacement in Section 26(b) of "*their environment*" with "*the environment*".
- 2.16 Regarding Section 27, "*Property*",
- i The meeting agreed to defer discussion of this section to allow parties to continue their discussions.
  - ii The meeting agreed that the second sentence of Section 27(1) reading "*This provision does not preclude reasonable measures to regulate property*" did not form part of the draft tabled at Waenhuiskrans and should be deleted.
  - iii The meeting noted the PAC concern that its option should be included in a side-bar. The ANC stated that it had thought that all parties were giving consideration to the formulation which had been drafted at Waenhuiskrans and were taking this back to their parties.
- 2.17 Regarding Section 28, "*Housing*", the meeting agreed to this section as it stands.
- 2.18 The meeting agreed to Section 29, "*Health care, food, water and social security*" and noted the ACDP concern that diseases caused by poor socio-economic conditions should be highlighted and not only reproductive health care.

2.19 Regarding Section 30, "*Children*":

- i The meeting agreed to the two additional provisions, Section 31(1)(h) and (i), which parties had requested the Technical Refinement Team to insert in the Section. However, the meeting agreed that the Technical Refinement Team should refine the wording of Section 30(1)(h) to ensure consistency with the wording of Sections 36(2)(c) and 36(3)(g) along the lines of "*assigned by the state at state expense*".
- ii The ACDP expressed concern with regard to Section 31(1)(h) that Supreme Court has always been the highest custodian of minor children and if this provision could be used to enable children to take their parents to court, this would not be biblically correct.
- iii The ANC stated that the emphasis in this provision was on the state's obligation to provide legal assistance whereas the concern raised by the ACDP was a separate issue which was noted. The ANC stressed that the clause should be read as a whole.

2.20 The meeting agreed that Section 31, "*Education*" was deferred for further discussion amongst the parties in multi-laterals.

2.21 Regarding Section 32, "*Language and culture*":

- i The NP tabled a formulation reading as follows:  
  

*"Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with the Bill of Rights."*
- ii The meeting noted the NP proposal and agreed that this would be distributed for consideration by the parties in further discussions.

2.22 Regarding Section 33, "*Access to information*", the meeting agreed that this section should be deferred to await the memorandum from the Technical Committee 4 advisors.

2.23 Regarding Section 34, "*Just administrative action*":

- i The meeting agreed:
  - (a) to delete the words in brackets in section 34(1)
  - (b) to remove the brackets and include the words "*whose rights have been adversely affected by administrative action*" in section 34(2).
  - (c) that the Technical Refinement Team should reformulate the transitional provisions.

- ii The ANC proposed that the Technical Refinement Team consider combining sections 34(3) and 34(4).
  - iii The PAC queried the legal implications of Section 34(3). The Technical Committee 4 advisors explained that this would be dealt with in the transitional provisions to be contained in the transitional act.
- 2.24 The meeting agreed to Section 25, "*Access to courts*" with the amendment proposed by the Technical Refinement Team in Footnote 17.
- 2.25 Regarding Section 36, "*Arrested, detained and accused persons*":
- i The meeting agreed to section 36(1).
  - ii The meeting agreed that the Technical Refinement Team should harmonise the wording of Sections 36(2)(c), 36(3)(g) and 30(1)(h) along the lines of "*assigned by the state at state expense*".
- 2.26 Regarding Section 37, "*Limitation of rights*":
- i The Technical Committee 4 advisors tabled a memorandum "*Resolution of differences of opinion on Limitations Clause (Bill of Rights)*" contained in the documentation which attempted to reconcile the different positions of the parties.
  - ii The DP stated that this proposal was unacceptable and still supported the provision in the "*Blue Book*".
  - iii The NP favoured the first formulation in the current draft but would look at the Technical Committee 4 proposal and might suggest additions to it.
  - iv The ANC stated that the second option in the draft was not the ANC position but essentially an earlier draft put forward by the experts. The ANC said that it was prepared to look at the proposal of the Technical Committee 4 advisors.
  - v The meeting agreed to defer discussion of this section to allow parties to consider this matter in bilateral and multi-lateral discussions.
- 2.27 Regarding Section 38, "*States of emergency*":
- i Regarding to Section 38(2)(b), the meeting agreed :
    - (a) that the question of the majority required was still under consideration by parties. The ANC stated that it had raised the matter with its principals but had not managed to persuade them to support the compromise proposed in Footnote 20. The ANC

position was that there should be a simple majority and that it had not found a precedent for the idea of special majorities.

(b) the question of the days was still under discussion.

ii Regarding Section 38(3),

The meeting agreed that the Technical Refinement Team should consider whether the reference to the "*High*" court was correct and ensure that this is consistent with the chapter on the courts.

iii Regarding Section 38(5),

(a) the meeting agreed to include sections 30(g)(i) and (ii) in the list of non-derogable rights.

(b) the ANC queried how the list of non-derogable rights and the right to life would apply in a state of war. The ANC said it was unsure how the interaction would work between non-derogation and the limitations clause. The Technical Committee 4 advisors explained that the normal limitations accepted on the rights would still be applicable during states of emergency and that the Defence Act would regulate the taking of life under a state of war. They stated further that the right to life was one of the core rights in international law that is regarded as non-derogable.

iv The meeting agreed that to defer discussion of this section to allow parties to consult their principals and to give further consideration to the section.

2.28 The meeting confirmed that Section 39, "*Enforcement of Rights*" was agreed to.

2.29 Regarding Section 40, "*Interpretation of the Bill of Rights*"

The meeting agreed to this section and agreed to remove the footnote and that if any parties had objections these could be raised in a formal amendment.

### **3. CHAPTER 9: STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY**

3.1 The meeting agreed to note the valid concerns of the NP that their proposals for a *Cultural Commission* and an *Environmental Commissioner* were not included in the draft and to include reference to these proposals in a side-bar note. The meeting noted the minutes of Waenhuiskrans which stated that "*the matter of the constitutionalisation of an Environmental Commissioner still needs to be dealt with.*"

- 3.2 The NP stated that the matter of the *Cultural Commission* was being dealt with in bi-lateral discussions.
- 3.3 The meeting agreed that these issues should be placed on the CC agenda for discussion this week.
- 3.4 With regard to the NP proposal for an *Environmental Commissioner*, the ANC stated that this was adequately covered under Section 26(b) which protects the environment through reasonable legislative and other measures which would include, if necessary, such a body.
- 3.5 The DP did not support the NP proposal for an *Environmental Commissioner*.
- 3.6 The NP proposed that a reference to Section 180 did not fall easily into the list of institutions in Section 171(1) and suggested that this section should be adjusted accordingly. The meeting agreed that this was a refinement issue and that the Technical Refinement Team would give consideration to the matter but agreed that the intention was not to constitutionalise the name of the IBA but rather the obligation on the state to establish an independent authority to regulate broadcasting.
- 3.7 The ANC stated that the agreement was that this clause would be accommodated in this chapter without disturbing the rest of the chapter.
- 3.8 Regarding section 172 dealing with the *Public Protector*, the NP stated that their proposal for provincial public protectors had not been included in the side-bar notes. The NP had proposed "*Provincial constitutions may provide for provincial public protectors.*" The NP suggested the possible addition of the words "*in terms of national legislation.*"
- 3.9 The ANC stated that it did not support the NP proposal. Its position was that there should not be provincial public protectors but that there should be a single national office and that this did not prevent the Public Protector from having offices and staff in all the provinces in order to make the office more accessible.
- 3.10 The DP stated that it supported the NP proposal.
- 3.11 The meeting agreed to this section and noted the objections of the DP and NP on this matter.
- 3.12 Regarding Section 173, the meeting agreed that the period of tenure should not be renewable.
- 3.13 The meeting agreed to Section 174, "*Human Rights Commission*". The ANC stated that it had withdrawn its proposal for the deletion of subsection (3) and supported the section as it stands in the draft.
- 3.14 The meeting agreed that the numbering of section 174(5) should be amended to



read 174(4).

- 3.15 Regarding Section 175, *Commission for Gender Equality*, the meeting noted the NP proposal that a provision similar to section 174(3) should be included in this section.
- 3.16 The meeting agreed not to include this proposal as this concern was covered by section 175 and by section 171(3).
- 3.17 The meeting agreed to Section 176 on the *Auditor-General*.
- 3.18 With regard to Section 177 "*Tenure*", the meeting noted that the ANC proposed that the term should be 7 years so as to be in line with the provision on the Public Protector.
- 3.19 The meeting agreed that Section 178(1)(c) dealing with the *Electoral Commission* should be amended to replace "*and as*" with "*and which is as*".

The section would read: "*declare the results of those elections within a period that must be prescribed by national legislation and which is as short as reasonably possible.*"

- 3.20 The meeting agreed to Section 179.
- 3.21 The meeting agreed to Section 180.
- 3.22 Regarding section 181, Mr De Beer reported that there was still no finality on Section 181(4) dealing with the composition of the committee but that the NP had a proposal on this issue which it would make available to the Technical Refinement Team.
- 3.23 The meeting agreed that the Technical Refinement Team should redraft this section to incorporate the NP proposal so that it falls in line with the ANC view.
- 3.24 The DP queried the provision regarding members of commissions not holding political office which had been included in a previous draft.
- 3.25 The meeting agreed to defer discussion and that parties should report back on Friday on this matter.

#### **4. CLOSURE**

- 4.1 The meeting closed at 15H10.