

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE CONSTITUTIONAL COMMITTEE MEETING OF 30 APRIL 1996 OLD ASSEMBLY CHAMBER

MC Ramaphosa (Chairperson)
L Wessels (Deputy Chairperson)

Ackermann, C	Andrew, KM (alt)
Asmal, K	Bhabha, M
Camerer, S (Alt)	Chabane, OC
Dalling, D (alt)	De Beer, SJ (alt)
De Lange, JH	De Lille, P (alt)
Du Toit, DC	Eglin, C
Fourie, A	Fraser-Moleketi, GJ
Ginwala, FN	Gogotya, NJ
Gordhan, PJ	Green, LM (alt)
Groenewald, PJ (alt)	Hofmeyr, WA
Holomisa, SP	Kgoali, JL
Kgositsile, B	King, TJ
Landers, L (alt)	Ligege, MG
Lockey, D	Love, J
Mabandla, BS	Maduna, PC (alt)
Maharaj, M(alt)	Mahlangu, MJ
Mahlangu, NJ	Makhanya, DW
Malatsi, DM (alt)	Mapisa-Nqakula, NN (alt)
Marais, PG	Maree, JW (alt)
Mdladlana, S (alt)	Meshoe, KR
Meyer, RP	Moosa, MV
Moosa, MW(alt)	Mti, LM(alt)
Mulder, CP	Mulder, PWA (alt)
Myakayaka-Manzini, YL	Ngcuka, BT
Nzimande, BE	Omar, D (alt)
Pahad, EG	Pandor, GNM
Rabie, JA	Ripinga, SS
Routledge-Madladlala, NN (alt)	Schoeman, S(alt)
Schreiner, J(alt)	Schutte, DPA
Seaton, SA (alt)	Serote, WM (alt)
Sisulu, L(alt)	Sifora, TV
Sizani, RK	Skweyiya, Z(alt)
Steenkamp, PJ (alt)	Surty, ME(alt)
Suttner, RS	Swanepoel, LJ (alt)
Vadi, I(alt)	Van Breda, A
Van Deventer, FJ	Van Heerden, FJ(alt)
Viljoen, CL	

Absent: LPHM Mtshali, S Mzimela, R Rabinowitz, P Smith

1. **OPENING**

The meeting was opened by the Deputy Chairperson, Mr Wessels who presided over the meeting. He called on Mr Gordhan of the ANC to report back on the work of his subcommittee.

2. **CHAPTER 1 - FOUNDING PROVISIONS**

2.1 Mr Gordhan reported that the subcommittee hoped to deal with Chapter 1 during the afternoon and would then report back to the Constitutional Committee.

3. **CHAPTER 3 - PRINCIPLES OF CO-OPERATIVE GOVERNMENT**

3.1 Mr Gordhan said that a new draft of *Chapter 3, Co-operative Government*, had been circulated to the members. Apart from two or three minor editorial changes this Chapter has been approved in the subcommittee.

3.2 Sections 39 and 40 were agreed to.

4. **CHAPTER 4 - PARLIAMENT**

4.1 Mr Gordhan said a new draft of *Chapter 4, Parliament*, which was a compilation of Chapters 4, 5 and 6, had also been distributed to the members. He reported as follows:

4.2 Section 41 was agreed to. One outstanding matter in relation to this clause, he said, was the so-called "free mandate" issue. This was being discussed in bilaterals and he hoped that a report would be available later in the day.

4.3 Sections 42 to 48 were agreed to. In response to a query from the NP he confirmed that agreement had been reached in the presence of their negotiators.

4.4 The clause appearing after Section 43, headed Section 77, was incorrect and should be headed Section 43A.

4.5 Section 49 was agreed to except that the actual percentage required in terms of subsection(3) was still under discussion.

4.6 Section 50 was agreed to. However, a proposal from the ANC for a Speaker of Parliament was still under discussion.

4.7 Sections 51 to 54 were agreed to.

4.8 Section 55 was agreed to, except for a provision which would address the question of financial support for minority parties and the Leader of the Opposition, which was still under discussion.

- 4.9 Sections 56, 57 and 58 were agreed to.
- 4.10 Section 59 was agreed to. However, the question of a possible formula for the allocation of the permanent delegates amongst parties was still under discussion.
- 4.11 Sections 60 to 71 were agreed to.
- 4.12 On Section 72:
- 4.12.1 On Section 72(2), the debate continued as to whether the majority by which a provincial legislature approves the amendment, should be two thirds or 51 per cent.
- 4.12.2 A new provision that Section 1 in Chapter 1 should be amended by 75% was still under discussion. This could be added as a new subsection (5) depending on the outcome of these discussions.
- 4.13 Section 73 was agreed to.
- 4.14 On Section 74, agreement had been reached in principle. An abbreviated version was under discussion and this version could have implications for Section 73.
- 4.15 Section 76 and 78 were agreed to. It was noted that Section 77 had now been moved and had become Section 43A.
- 4.16 Section 79 was agreed to, however bilateral discussions were continuing on the matter of so-called "*frivolous applications*".
- 4.17 On Sections 80 and 81:
- 4.17.1 Mr Gordhan said Sections 80 and 81 were agreed to.
- 4.17.2 However, Mr Fourie of the NP advised that the NP would be introducing technical amendments to both Section 80 and 81 during bilateral discussions.
- 4.18 Sections 82 to 88 were agreed to. It was noted that Section 83 may still require a few drafting changes.
- 4.19 Sections 89 to 92 were agreed to.
- 4.20 Sections 93 to 96 were agreed to.
- 4.21 On Section 97, it was noted that discussions were still taking place on a new draft and a report would be provided later.
- 4.22 Sections 98 to 100 were agreed to.

5. **CHAPTER 6 - PROVINCES**

Mr Gordhan reported as follows :

5.1 Section 101 was agreed to.

5.2 Section 102 was agreed to, subject to the addition relating to the changing of the name. He said the brackets should be removed from subsections (6) and (7).

5.3 On Section 103:

5.3.1 Section 103 was agreed to subject to the possibility that subsection (1)(b) could be revisited in the context of another provision.

5.3.2 Mr Eglin of the DP said the DP's view was that subsection 103(1)(b) should read "... voters roll relevant to that province".

5.3.3 He said that Section 104 had yet to be resolved. As it read at present, it meant that one would have to be on the voters roll for that particular province in order to become a representative of that particular province. The NP and DP were agreed on this matter.

5.4 Mr Gordhan said discussions were still continuing on Section 104.

5.5 Sections 105 to 107 were agreed to.

5.6 Sections 108 to 111 were agreed to.

5.7 Section 112 and 113 were agreed to.

5.8 Section 114 was agreed to, except that discussions were still taking place on a provision which would address the question of financial support for minority parties and the Leader of the Opposition.

5.9 Sections 115 to 117 were agreed to.

5.10 Sections 118 and 119 were agreed to.

5.11 Section 120 was agreed to as it stands, except for two matters still under discussion -

- i whether a 90 per cent majority of minority parties can lodge an application to the Court; and
- ii the 'frivolous application' question.

5.12 Sections 121 and 122 were agreed to.

5.13 Section 123 was agreed to.

5.14 Section 123A would still be redrafted, in accordance with Section 79 and a

report would be tabled to the Constitutional Committee at a later stage.

5.15 Section 124(1) and s124(2) agreed together with the addition of the '*Appointment of Commissions of Enquiry*'. The one outstanding matter in this Section was how to deal with the matter of referendums.

5.16 Sections 125 to 127 were agreed to.

5.17 Sections 128 to 135 were agreed to.

5.18 In answer to a query from the Chairperson with reference to the top of page 54 and Section 135(2), Mr Gordhan advised that -

- i In subsection (c), the brackets and the '/' are removed and the words '*the legislature*' deleted;
- ii In subsection (d), the brackets and the '/' are removed and the word '*legislature*' deleted; and
- iii In subsection (3), the brackets are removed.

5.19 Sections 136 and 137 were agreed to.

5.20 On Section 139, he said parties were still debating the use of the words "*consistent with*" and "*inconsistent with*" in subsection (1).

5.21 Sections 140 and 141 were agreed to.

5.22 Mr Gordhan said that the ANC had today tabled a new proposal on 'exclusive provincial powers' and it was hoped that, once released from the Constitutional Committee, the subcommittee would begin discussions on the new proposal. These discussions would include Sections 142 to 145.

5.23 He said a a new proposal on Chapter 7 would also be included in the discussions.

5.24 Mr Eglin referred back to Section 102(6) and (7), and said it was his understanding that subsection (6) was deleted, and the brackets removed from subsection (7).

5.25 Mr Gordhan advised that the subcommittee would discuss the issue and report back to the Constitutional Committee.

5.26 He further advised that a subgroup of their subcommittee was dealing with Chapter 12 on Traditional Leaders.

5.27 The Constitutional Committee released the subcommittee to continue with its work, and agreed that they would report back again at 20h00.

5.28 The members were advised that dinner would be served at 19h00.

6. **CHAPTER 9 - STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY**

- 6.1 Mr De Beer of the NP reported back on behalf of the subcommittee dealing with this Chapter.
- 6.2 The report back covered the Working Document of 29 April 1996. Mr De Beer reported as follows:
- 6.3 Sections 177 to 180 were agreed to.
- 6.4. On Section 181:
- 6.4.1 It was agreed that subsection (1)(b) would now read: *"To promote and develop peace, friendship, humanity, tolerance and national unity amongst cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association."*
- 6.4.2 It was agreed subsection (1)(c) would now read: *"To recommend the establishment for recognition in accordance with national legislation of a cultural or other council or councils for particular communities in South Africa."*
- 6.4.3 The rest of the section was agreed to and remained the same.
- 6.5 Section 182 to 188 were agreed to.
- 6.6 On Section 189:
- 6.6.1 Section 189(1) was agreed to.
- 6.6.2 In Section 189(2), the new clause had been agreed to.
- 6.6.3 Section 189(3) was agreed to.
- 6.6.4 Section 189(4) had been amended by removing the brackets and deleting the word *'Parliament'*; and subject to the outcome of clause (5), which is still under consideration, the FF and NP would consider adding *"(d) The Cultural Commission"*.
- 6.7 On Section 190:
- 6.7.1 It had been agreed Section 190(5) would read as follows
"The National Assembly must recommend persons -
(a) nominated by a committee of the National Assembly proportionally composed of members of all parties represented in the Assembly";
and
(b) approved by the National Assembly by a resolution adopted by [at least two thirds / a majority] of the members of the Assembly.
It was noted that the adoption procedure was still under discussion.
- 6.7.2 In Section 190(6), it had been agreed to delete *'[and 70(a)]'*.

- 6.7.3 In Section 190(1)(c), it had been agreed to remove the brackets and delete the word '*Parliament*'.
- 6.8 In Section 198(2)(a) and (b), it had been agreed to remove the brackets and delete the word '*Parliament*' in both cases.
- 6.9 It was agreed that the subcommittee would make a further report back to the Constitutional Committee after dinner. The meeting adjourned until 16h15.

7. PREAMBLE

- 7.1 Mr Nzimande of the ANC reported back on behalf of the subcommittee dealing with the Preamble:
- 7.2 He said that the NP and the DP, who would have preferred the inclusion of "*In humble submission to Almighty God*", had accepted the Preamble as it stood.
- 7.3 However the ACDP and the FF still had problems with the present draft.
- 7.4 Gen. Viljoen of the FF said the FF was of the view that the words "*May God protect our people*" should be replaced by "*In this we humbly submit to God Almighty*".
- 7.5 He said he had in earlier discussions with Mr Nzimande suggested a further compromise or alternative by inserting the words: "*In this may God guide our people*".
- 7.6 In response to the FF, Mr Nzimande said that the ANC had consulted again on the proposals by the FF but that the ANC felt the present draft had attained the necessary balance and accommodated both believers and non-believers. They therefore could not agree to further changes as proposed by the FF.
- 7.7 In response to the ACDP, he said, the ANC believed in the separation of religion and the state. Even those supporters of religion in the ANC, he said, did not agree with the changes proposed by the ACDP and other parties since they felt these proposals would amount to discriminating against non-believers.
- 7.8 In response to the PAC, whom he said, were opposed to the words "*Believe that South Africa belongs to all who live in it ...*", " Mr Nzimande said that the ANC believed that South Africa did indeed belong to all who lived in it, and that the inclusion of these words in the Preamble of the Constitution sent a "powerful message" to the 62% section of the population who had voted for the ANC.
- 7.9 The Chairperson thanked the subcommittee for their work. He invited political parties to state their positions on the Preamble in addition to the report already received.

- 7.10 Mr Sizani of the PAC said his party believed South Africa was an African country, and until the national question was resolved on a democratic basis, there was no point in pretending that South Africa belonged to all who live in it. At the very least, he said, it belonged to the citizens of the country. The property clause and the Preamble indicated that “there has not been a majority shift towards a democratic basis in the Constitution.” The PAC was therefore not able to support either of these sections of the Constitution.
- 7.11 Rev Meshoe of the ACDP regretted that there was not more time to debate the Preamble. Starting the Preamble with *"In humble submission to Almighty God"* was not their first option, he said. It was a compromise with other political parties which cannot be shifted any further. Now that they had been told that changes could not be made, he said, he felt it was a waste of time to try to elaborate on the position of the ACDP.
- 7.12 Rev Meshoe said the ACDP wished to register its unhappiness as to how the discussion on the Preamble had taken place. He said his party had only been given an opportunity to comment on the present draft after it had already been finalised. Their view was therefore that the Preamble as it stood was “an imposition”.
- 7.13 The Chairperson said he took note of the position of the ACDP. However he said that political parties had engaged one another during the Committee Stage and that ample opportunity had been granted to all parties during this stage. He said parties were given a further opportunity during the report-back to the Constitutional Committee to state their positions on various issues.
- 7.14 Gen. Viljoen said the FF’s position was that the Preamble should start with the words: *"In humble submission to Almighty God"*. They did so because they wanted to “link the past to the present”; but having heard the position of the ANC and noting that the first part of this Preamble is “more or less Freedom Charter orientated”, the FF took a second position which proposed that the words, *"May God protect our people"* be replaced with *"In this which we want to achieve, we humbly submit ourselves to Almighty God"*.
- 7.15 The second alternative proposed by the FF, Gen Viljoen said, was thought to be “a bit stronger than the former wording.” While it was appreciated that there is a reference to God in *"May God protect our people"* and in *"Nkosi Sikelel' iAfrika"*, he said the FF was still disappointed that their proposal had not been accepted. If it had been included, Gen. Viljoen said, it would have included part of the Preamble of the interim Constitution and would have symbolised “the new unity of the past and the present.”
- 7.16 However, he said while the FF was disappointed that their proposals had not been accepted, this did not mean they would reject the Constitution as a whole.
- 7.17 Mr Geldenhuys of the NP said that the NP had proposed the addition of the

words: *"In humble submission to Almighty God"*. Extensive discussions had taken place and when no agreement could be reached, another compromise was suggested with the words : *"May God protect our people."* The NP, he said had accepted this compromise , providing that they be given the opportunity to propose a further amendment with the words: *"May God in whom we trust protect our people."* When this further amendment had not been accepted, the NP had agreed to the present draft.

7.18 Although the present draft was not ideal, he said, the NP felt that since the Preamble ended with a double prayer and did acknowledge God, they could "live with it". Given the ANC's position that there should a separation between the state and religion, he said, the NP's objective had been that there should reference to and acknowledgement of God in the Preamble.

7.19 The Chairperson appealed to parties to end the present debate on the Preamble. He said he appreciated that it had been a difficult and emotional matter for all those involved in the discussions thus far. The positions of various parties had been noted he said, and further debate would take place on 6 and 7 May.

7.20 Mr Nzimande, said in closing he wished to express the ANC's appreciation of the manner in which the matter had been handled by members of other parties.

8. CHAPTER 14 - GENERAL PROVISIONS

8.1 The Chairperson asked for clarity as the Chapter had not been made available for debate.

8.2 He was advised that there had been a discussion earlier in the day to address Transitional Arrangements and General Provisions. The document currently being drafted would only reflect changes dealing with Transitional Arrangements. There had been no discussion on General Provisions.

8.3 It was suggested that the Administration assist with the facilitation of a meeting on General Provisions as the members of the subcommittee dealing with Transitional Arrangements indicated that they could not speak on behalf of their parties on that specific chapter.

8.4 The Chairperson advised however that, as soon as the new draft on Chapter 14 was available, the group dealing with Transitional Arrangements would be asked to discuss this Chapter. If the members of the subcommittee felt that other colleagues from their parties should be consulted, then they should do so.

8.5 The Constitutional Committee adjourned until 17h00.

9. CHAPTER 10 - PUBLIC ADMINISTRATION

9.1 Ms Love of the ANC said she would address the committee on how the subcommittee dealing with public administration had discussed the

amendments proposed by the ANC and NP. She reported as follows:

- 9.2 The draft of Chapter 10 which appeared in the Working Document of 29 April, she said, had resolved many of the previous concerns. One of the outstanding matters, however, was that public administration was inadvertently defined as an entity. This had not been intended. What the subcommittee had agreed upon, was that all administration in the public domain should be required, in terms of the Constitution, to adhere to certain basic principles and values. This would allow government to account to the taxpayer.
- 9.3 However, this did not mean that public administration should be defined as an entity. Section 191(2) in the Working Document would now appear as Section 191(1), putting the set of principles at the beginning of the Chapter.
- 9.4 Section 191(1) in the Working Document would now appear as Section 191(2) and had been redrafted. The words, "*Public administration includes -*" were deleted and replaced with "*The above principles must apply to -*". The section then went on to identify those to whom the principles applied.
- 9.5 By making these changes to the Chapter, she said, the subcommittee felt it had met the concerns of political parties and various institutions which had indicated that they did not wish to be included as one entity with structures such as government departments. These institutions accepted that they operated in the public domain, but wished to guard their independence, she said.
- 9.6 On Section 191(2):
 - 9.6.1 It had been agreed, she said that Section 191(2), would now start with the words, "*The above principles must apply to -*":
 - 9.6.2 No changes had been made to subsection (2)(a) .
 - 9.6.3 Subsection (2)(b) now read: "*organs of state*".
 - 9.6.4 Subsection (2)(c) now read: "*public enterprises.*"
- 9.7 The subcommittee had agreed to further technical changes - wherever the word "*the*" preceded "*public administration*" in the Chapter, "*the*" would be deleted. This was to ensure that public administration was not defined as an entity.
- 9.8 Mr De Beer of the NP said that the NP were in full agreement with the report.
- 9.9 Mr Mulder of the FF said that the FF had proposed certain amendments which seem to have been catered for. However, as they had just received the report, they would like to reserve their position until they had considered it in more detail.

9.10 In response to a query from the Chairperson, Mr Mulder said this did not mean the FF was opposed to the present draft of the Chapter.

9.11 In response to a query from the Chairperson, Ms Love said a new draft of Chapter 10 would be available later in the day and handed to the FF for their consideration by 20h00. It was agreed that Prof Kruger of the Panel of Experts would redraft the Chapter.

9.12 The Chairperson advised members that Chapter 10 had now been disposed and the new draft of the Chapter would be tabled later in the day.

10. In response to a query from the Chairperson, Mr De Beer said his subcommittee would be dealing with Chapter 14 as agreed.

11. The Chairperson advised that a report on Chapter 8 would be available by 20h00. The meeting adjourned.

12. The meeting reconvened at 20h00 and was advised that a report on Chapter 13 would be ready by 20h30.

13. CHAPTER 10 - PUBLIC ADMINISTRATION

13.1 Ms Love advised that a new draft of the Chapter had been circulated.

13.2 The FF agreed to the document as tabled.

13.3 Mr Selfe of the DP said that, although the latest draft was a great improvement on its predecessors, the DP wanted to withhold "final judgement" until the discussion on General Provisions has been finalised, so as to determine what the definition of 'organ of state' is. The position of the DP was noted.

14. CHAPTER 13 - FINANCE

14.1 Ms Love said agreement had been reached on Section 213 and a new draft of the Chapter which would also incorporate other technical amendments, was being produced and would be available shortly.

14.2 Mr Alant of the NP said he would unfortunately not be present later, but on behalf of the NP confirmed that a new draft was being prepared and had been agreed to, including agreement on Section 213.

15. TRANSITIONAL ARRANGEMENTS

Mr De Beer announced that the discussions on the Transitional Arrangements would take place immediately in the lounge.

16. CHAPTER 8 - COURTS

16.1 Sen. Moosa of the ANC reported as follows :

16.1.1 The chapter as a whole has been agreed to by the NP and the ANC . However the NP still had concerns about Section 170 and the appointment mechanism; and Section 174 and the Judicial Services Commission.

16.1.2 The ANC had indicated in the subcommittee that the matter could not be dealt with because the clause had already been agreed to in the subcommittee some time ago. The parties then agreed that the matter would be referred to discussions at a more senior level between the parties.

16.1.3 Mr Moosa said that it was his understanding that discussions at a higher level had taken place. Indications were that the proposals that have been made by the NP regarding those issues could be accommodated by the ANC.

16.1.4 He said there was no further report on the Chapter, except that the ANC had now agreed to Section 169, after reserving its position on the previous day.

16.2 Mr Van Heerden of the NP agreed with the report by Sen. Moosa and proposed that further discussions take place at a senior level between the ANC and the NP.

17. FURTHER REPORTS

17.1 The Chairperson confirmed that Mr Gordhan would report back at 22h00.

17.2 An opportunity would also be made for the subcommittee on Chapter 8 to report again.

17.3 He asked the subcommittee on Chapter 9 to prepare to report at the same time.

17.4 Ms Kgositsile of the ANC advised that apart from one small item which would be referred to the higher level discussions, Chapter 9 had been agreed.

17.5 The meeting adjourned until 22h00.

18. The meeting reconvened at 22h00 but was advised that Mr Gordhan's subcommittee needed more time to complete its discussions and could report at 14h00 the next day. He said the subcommittee itself would reconvene at 09h30 in G26.

19. Mr Ngcuka of the ANC said that the subcommittee dealing with Chapter 14 and Transitional Arrangements had also not completed its discussions and would reconvene at 10h30. They hoped to report by 14h00 to the Constitutional Committee.

20. On the matter of languages in Chapter 1, Founding Provisions:
- 20.1 Ms Kgositsile, said the ANC and NP had reached agreement. A new draft would be provided to all parties to consider overnight.
- 20.2 Mr Meyer of the NP confirmed that agreement had been reached. He thought it important to state, that since this was recorded as being one of the outstanding issues which was, *inter alia*, discussed last Sunday, it had, according to Mr P Marais, been canvassed with a wide spectrum of interested parties and stakeholders and had received their support.
21. The Chairperson said it was clear from reports received, that the Constitutional Committee was unable to conclude its discussions as planned. He said the committee would therefore reconvene at 14h00 to allow subcommittees to continue with their work, and for parties to hold the necessary bilateral and multilateral discussions. Apart from concluding political discussions, he said, there was still a lot of work to be done on the Constitution as whole to ensure legal and language consistency. This was expected to take place from Thursday until Saturday, when printing of the Constitution would begin. In order to make this possible, it was necessary for the Constitutional Committee to conclude its business by 18h00 the next day.
22. The meeting agreed with this proposal from the Chairperson and adjourned.
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