

**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL
COMMITTEE**

**FRIDAY
2 DECEMBER 1994
(10h00)**

**159 UNION BUILDINGS
PRETORIA**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE

Please note that a meeting of the above committee will be held as indicated below :

Date : Friday 2 December 1994
Time : 10h00 - 17h00
Venue : 159 Union Buildings, Pretoria

AGENDA

1. Opening
 2. Minutes: Pages 2 - 5
 3. Matters Arising: See Agenda Items Below
 4. Independent Panel of Constitutional Experts: Pages 6 - 21
 5. Work Programme
 - 5.1 Report on the Work Programme:
 - 5.1.1 Directorate Report: See Separately Bound Document
 - 5.1.2 Freedom Front Submission: Pages 22 - 23
 - 5.2 Technical Committees: Pages 24 - 27
 6. Any Other Business
 7. Closure
-

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

Enquiries : Ms MM Sparg, Room CS205, Tel 403 2274, Page 468 5316

CONSTITUTIONAL ASSEMBLY
MINUTES OF THE NINTH MEETING OF THE CONSTITUTIONAL
COMMITTEE

MONDAY 14 NOVEMBER 1994

Present

Ramaphosa, M C (Chairperson)

Ackermann, C
Asmal, K
Bhabha, M
Chabane, O C
De Beer, S J (Alt)
De Lange, J H
De Lille, P (Alt)
Du Toit, D C
Eglin, C
Felgate, W S
Green, L M (Alt)
Kgositsile, B
King, T J
Ligege, M G
Lockey, D
Mabandla, B S
Makhanya, D W

Malatsi, D M (Alt)
Marais, P G (Alt)
Meshoe, K R
Meyer, R P
Moosa, M V
Mulder, C P
Ngcuka, B T
Rabie, J A
Rabinowitz, R
Sifora, R K
Sizani, R K
Smith, P F
Van Breda, A
Van Deventer, F J (Alt)
Van Heerden, FJ (Alt)
Viljoen, C L

Apologies were received from:

S. S. Ripinga

1. OPENING

1.1 The meeting opened at 12h06 and the agenda was adopted.

1.2 The meeting congratulated Mr. Ramaphosa on his upcoming birthday.

2. MINUTES

The Minutes of the Eighth Constitutional Committee meeting on 7 November 1994 were adopted.

3. MATTERS ARISING

Matters arising were included in agenda items below.

4. INDEPENDENT PANEL OF EXPERTS

4.1 The meeting accepted the report entitled "*Panel of Constitutional Experts,*" included in the documentation, and endorsed it for forwarding to the Constitutional Assembly.

4.2 The meeting agreed to the following decisions:

- i. That the Independent Panel be increased from five to seven constitutional experts;
- ii. That a draft resolution to suspend the application of Standing Rules 54, 60, 63, 65, 66, 67, 70 and 71 be proposed to the Constitutional Committee meeting on 14 November 1994; and
- iii. That a Bill amending Section 72(2) of the Constitution so as to increase the independent Panel be introduced and passed at the Constitutional Committee meeting on 14 November 1994.

5. CONSTITUTIONAL ASSEMBLY

5.1 AGENDA

The meeting accepted the document "*Constitutional Assembly: Agenda of Proceedings,*" included in the documentation.

5.2 REPORT

5.2.1 The Directorate tabled a document entitled "*Constitutional*

Assembly: Submissions, Research and Opinions."

5.2.2 The meeting adopted the report entitled "*Constitutional Assembly: Announcements, Tablings and Committee Reports,*" included in the documentation.

6. DIRECTORATE REPORT

6.1 WORK PROGRAMME

6.1.1 Mr. Ebrahim introduced the document entitled "*Directorate Report,*" included in the documentation.

6.1.2 It was agreed that a Management Committee meeting would be scheduled for 28 November 1994 and a Constitutional Committee meeting for 2 December 1994. The meetings would be held in Johannesburg or Pretoria, and the Directorate would inform members of the time and venue in good time.

6.1.3 It is noted that the Management Committee meeting of 28 November will clash with a meeting of the Commission for Local Government. The Administration will try to resolve the clash.

6.1.3 Mrs. Mabandla requested the re-wording of the paragraph beginning "the re-arrangement" in "*Work Programme: Background,*" to better indicate that Theme Committees would not be assigned work by the Constitutional Committee, but would forward reports to it.

6.1.4 It was agreed that the following concerns would be discussed when considering the Work Programme:

- i. The relationship between Theme Committees and the Constitutional Committee;
- ii. Terms of reference for the Commissions and Technical Committees; and,
- iii. Criteria used to judge which issues would be forwarded to Technical Committees.

6.1.5 The meeting agreed that Theme Committees would make recommendations for establishing Commissions and submit these to the Constitutional Committee for consideration. If

accepted, the Constitutional Committee would forward the recommendations to the Constitutional Assembly for discussion and ratification.

6.2 BUDGET

The meeting noted section 3 of the "*Directorate Report*," entitled "*Budget*."

6.3 ALTERNATES TO THE MANAGEMENT COMMITTEE

The meeting approved section 4 of the report, entitled "*Alternates for the Management Committee*" and agreed that the following paragraph would be added to subrule (6) of Rule 19(a) of the Rules:

"(e) Whenever a member of the Management Committee is absent or for any reason unable to perform his or her functions as a member of the committee for a period of at least one week, the political party to which that member belongs may designate another member of that party who is either a full member or an alternate member of the Constitutional Committee as an acting member of the Management Committee for the period of absence or inability of the said member, subject to the understanding that all parties give due consideration to the need for consistent representation in the Management Committee to ensure its proper functioning.:

7. AOB

7.1 Mr. Ramaphosa introduced draft CA Resolution 1, included in the document "*Constitutional Assembly: Resolutions: Monday, 14th November 1995*."

7.2 It is noted that Theme Committees may make recommendations to the Constitutional Committee of 2 December on the appointment of technical experts, but that decisions will be taken by the Constitutional Committee. On that basis, the meeting agreed to endorse the draft resolution for consideration by the Constitutional Assembly on 14 November 1994.

8. CLOSURE

The meeting closed at 12h30.

CONSTITUTIONAL ASSEMBLY

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PO Box 15
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REPUBLIC OF SOUTH AFRICA

REF No:

MEMORANDUM

TO: Constitutional Committee
FROM: Hassen Ebrahim
DATE: 29 November 1994
RE: Independent Panel of Experts

DECISION REQUIRED:

- * Consideration of the terms and conditions of employment of the Independent Panel of Experts; and
- * Consideration of the role and the place of the Independent Panel and its relationship to the Constitutional Assembly and its structures.

BACKGROUND:

Enclosed for your consideration are:

- The Law Advisors Opinion on the Role of the Panel of Experts;
- Minutes of the Meeting Held Between the Executive Director of the Constitutional Assembly Administration and Members of the Independent Panel on 22 November 1994;
- A Memorandum submitted by the Independent Panel of Constitutional Experts; and
- Minutes of the Management Committee Meeting of 28 November 1994.

ROLE OF PANEL OF EXPERTS**1.**

We have been requested to express a view on how we see the role and functions of the panel of constitutional experts contemplated in section 72(2) of the Interim Constitution.

2.

Section 72(2) requires the Constitutional Assembly to establish an independent panel of seven South African citizens who are recognised constitutional experts, not members of Parliament or any other legislative assembly and not holding office in any political party -

- (a) to advise the Constitutional Assembly or its Chairperson on matters pertaining to the functions of the Constitutional Assembly; and
- (b) to perform such other tasks as are provided for in the Constitution.

3.

We understand the reference in section 72(2) to "other tasks" (paragraph 2(b) above) as referring to section 73(3) which confers a particular task on the panel. This section provides that should the Constitutional Assembly fail to pass a draft of the new constitutional text by at least a two-thirds majority as required by section 73(2), but such draft is supported by a majority in the Constitutional Assembly, such draft must be referred to the panel of experts for its advice. The panel is then required to propose such amendments to the draft as might in its opinion secure the two-thirds majority in the Constitutional Assembly. The panel must submit its proposals within 30 days to the Constitutional Assembly. If the Constitutional Assembly adopts the draft as proposed by the panel with the requisite majority, such draft shall then become the final Constitution. If it is not adopted a draft text approved by a majority in the Constitutional Assembly and certified by the Constitutional Court must then be referred to the electorate for a decision by way of national referendum.

4.

In determining the place and role of the panel of experts in the constitution-making process the rationale for the concept of a constitutional assembly is very relevant. The rationale is found in the Preamble to the Interim Constitution where it is stated that the "elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles" and that an elected Constitutional Assembly must draw up a final Constitution.

5.

The intention is clear that the elected representatives should be actively involved in the actual development, drafting and adoption of the final Constitution. To this end they need the assistance of constitutional, technical and other experts which is provided for in section 72(1) and (2), but that does not mean that the experts should be the dominant factor in the writing of the Constitution or that the role of the elected representatives should be confined to endorsing or rubberstamping the ideas of the experts or involving themselves only superficially in the constitution-making process. To give effect to the spirit, purport and object of the Interim Constitution, the Constitutional Assembly and its structures composed of the elected representatives should at all times remain in active control of the constitution-making process.

6.

The panel of experts is not an internal substructure of the Constitutional Assembly. Section 72(2) requires it to be an "independent" body. In context we understand this to mean that the panel should be independent not only from outside political and other influence, but also in its relationship with the Constitutional Assembly.

7.

The panel of experts was undoubtedly intended to play a vital role in conflict-resolution and to assist the process with its wisdom and expertise should a deadlock in the Constitutional Assembly arise. And the likelihood of that happening cannot be ruled out as none of the parties has a two-thirds majority in the Constitutional Assembly. For this reason it is, in our view, imperative that the panel of experts should at all times uphold, and be seen to be upholding, its constitutional position as an independent "arbiter" to resolve any deadlocks that may arise in the Constitutional Assembly.

8.

In addition to its primary role as a conflict-resolution mechanism, the panel is also empowered to perform an advisory function. In this regard the panel can play a very useful role in its capacity as an advisory and consultative body for the Constitutional Assembly, its structures and the Chairperson, particularly as far as contentious matters having the potential to end in deadlock are concerned. We must, however, point out that section 72(2) does not authorise the panel to give advice *mero motu*. We cannot read the section as implying a "watchdog" function for the panel to intervene in the process whenever in the panel's opinion there is a need for its advice. The panel should therefore refrain from becoming involved in the daily business of the Constitutional Assembly otherwise than to the extent required of it. The panel should, in our view, at all cost protect its integrity and preserve its position as an objective and uncompromised arbiter.

9.

On the other hand, there may be a real danger that the panel might not be able to fulfil its obligation as a constitutional broker in the case of serious deadlocks if, for the sake of the preservation of its objectivity, the panel operates too isolated from the process. For this reason it is imperative that the panel should at all times be in a position to keep abreast of developments.

10.

A role which the panel can play without any danger of compromising itself on conflicting political positions, is to give authoritative legal opinions on conflicts within the process as far as the Constitutional Principles are concerned. There are going to be many disputes whether or not particular proposals are compatible with the Constitutional Principles and in our view the panel can play a particularly meaningful role here.

11.

In view of the above we are of the opinion that the way in which the panel is to be engaged as an advisory or consultative body, should be regulated by the Constitutional or Management Committee. Matters on which the panel's advice is sought, should be channelled through these Committees to the panel. The Chairperson, however, is in terms of section 72(2) entitled to seek the advice of the panel directly.

G H Grové SC
M Ndziba

Law Advisers: Constitutional Assembly
18 November 1994

CONSTITUTIONAL ASSEMBLY

MEETING BETWEEN MEMBERS OF THE CONSTITUTIONAL ASSEMBLY ADMINISTRATION AND MEMBERS OF THE INDEPENDENT PANEL OF CONSTITUTIONAL EXPERTS

22 November 1994, Johannesburg (20:15)

MINUTES

Present

Independent Panel:

Prof M G Erasmus
Prof J Kruger
Prof C Murray
Adv I Semanya
Prof J van der Westhuizen
Adv Z Yacoob

CA Administration:

Mr H Ebrahim
Mr G Grove
Ms K McKenzie

1 WELCOME AND OPENING

Mr Ebrahim opened the meeting and congratulated the members of the Panel on their appointment.

2 STRUCTURE OF THE CONSTITUTIONAL ASSEMBLY

Mr Ebrahim outlined the structure of the Constitutional Assembly as:

- 2.1 *The Constitutional Assembly* (490 members) composed of the National Assembly and the Senate.
- 2.2 *The Constitutional Committee* (44 members + 2 Chairpersons): a substructure of the Constitutional Assembly facilitating the work of the CA between meetings.
- 2.3 *The Management Committee* (10 members + 2 Chairpersons): dealing with process.
- 2.4 *The Six Theme Committees* (30 members each): receiving and collecting submissions and tabling reports before the Constitutional Committee itemising contentious and non-contentious issues and

suggested approaches. Theme Committees are not negotiating fora.

The six Theme Committees as defined by the 5 September 1994 resolution of the CA are:

- Theme Committee 1 - Character of the Democratic State
- Theme Committee 2 - Structure of Government
- Theme Committee 3 - Relationship between Levels of Government
- Theme Committee 4 - Fundamental Rights
- Theme Committee 5 - Judiciary and Legal Systems
- Theme Committee 6 - Specialised Structures of Government

2.5 *Core Groups* (seven or eight members): Theme Committees are directed by Core Groups of seven or eight members and three Chairpersons who rotate.

2.6 *Technical Experts*: Each Theme Committee is entitled to utilise up to three technical experts to provide advice and legal expertise. Technical experts will play no role in drafting constitutional text.

No technical experts have been appointed as yet.

3 PROGRAMME FOR THE DRAFTING OF THE CONSTITUTION

Mr Ebrahim outlined the time framework for the drafting of the Constitution as set out in the CA resolution of 31 October 1994:

- 3.1 30 June 1995: Theme Committees complete their reports.
- 3.2 14 July 1995: Reports approved by the Constitutional Committee and Constitutional Assembly and text drafted.
- 3.3 31 October 1995: Full text placed before the public for scrutiny.
- 3.4 May 1996: Full text debated and adopted by the Constitutional Assembly.

4 ROLE AND OPERATION OF THE INDEPENDENT PANEL

Views on the role of the Panel were exchanged and the following was highlighted:

- 4.1 The Management Committee would table a legal opinion on the role of the Panel.
- 4.2 A decision on the full or part time nature of the Panel would have to be taken.

- 4.3 The Panel should solve deadlocks.
- 4.4 The Panel should be available in order for the CA to seek advice on any particular matter.
- 4.5 The Panel should ensure that the draft constitution does not conflict with the constitutional principles.
- 4.6 All documentation emanating from the CA and its structures should be availed to members of the Panel.
- 4.7 The Panel should be integral to the ongoing work of the CA in order to anticipate contentious areas.
- 4.8 Before text is placed before the Constitutional Court it should be tabled with the Panel.
- 4.9 In terms of section 72 of the interim constitution the Panels' duty is to advise on all matters pertaining to the CA. The Panel has a duty to advise when required to and when it felt that it was its duty to do so. The CA is not obliged to follow the advice of the Panel.
- 4.10 Protocol in the event of the Panel not reaching consensus on an issue should be agreed on amongst members of the Panel.
- 4.11 The Management Committee would consider the role and work of the Panel and its forthcoming meeting.
- 4.12 *It was agreed that the Panel would meet on 23 November to discuss its role further and a report would be submitted to Mr Ebrahim. Proposals regarding remuneration should also be submitted to the CA Administration.*

MEMORANDUM

1. The following sums up our discussions. However, we would sincerely appreciate an opportunity to discuss these suggestions and to explain them more fully to the Management Committee. Our suggestion is that a meeting is set up on Monday, 28 November 1994 with two members of the Panel (Adv Zac Yacoob and Prof Johan van der Westhuizen).

Although we are fully aware of the busy schedule of MC members, we regard a short meeting as not only very necessary, but also really urgent in view of the need of some Panel members to make the necessary and timeous professional and personal arrangements which their membership of the Panel now requires. These arrangements are necessary also to accommodate employers and the interest of, for example, students and clients.

2. ROLE AND FUNCTION OF THE PANEL

- 2.1 The Panel derives its status from The Constitution which sets out its duties. The Panel, accordingly, has the responsibility to see these duties fulfilled.
- 2.2 In terms of Section 72(2), the primary role of the Panel is to advise the Constitutional Assembly or its chairperson on matters pertaining to the Constitutional Assembly's functions. The nature of the circumstances in which advice will be given and the extent of such advice may be varied and will be determined by the dynamics of the process as it unfolds. In addition, the Panel must "perform such other tasks as are provided for in this Constitution".
- 2.3 In terms of Section 73(3) the Panel must fulfil another function in the event of the Constitutional Assembly failing to pass a proposed draft of the new constitutional text by a majority of two thirds of its members. For present purposes, that function of the Panel is left aside.
- 2.4 The following list provides suggestions of the kind of issues on which the Panel may be able to offer advice to the Constitutional Assembly in terms of section 72(2).
 - 2.4.1 Whether particular parts of or the whole proposed constitution are/is compatible with the Constitutional Principles;
 - 2.4.2 Whether the technical formulations in the text truly and clearly reflect the prior agreements reached in the Constitutional Assembly;
 - 2.4.3 The consistency, appropriateness and accessibility of the proposed constitutional text;

2.4.4 The compatibility of constitutional proposals with international legal norms, and in particular, international human rights law.

2.4.5 The solutions offered by other jurisdictions on particular constitutional problems;

2.4.6 Problems raised in various Theme Committees may be the subject of Panel advice.

2.5 Acting in its advisory capacity, the Panel may also be able to offer advice on available and acceptable compromises in specific areas.

2.6 Again acting in an advisory capacity, the Panel may also be able to assist in resolving conflicts by suggesting procedures which may be appropriate from time to time.

3. PREREQUISITES FOR THE PROPER PERFORMANCE OF THE ADVICE-GIVING FUNCTION

3.1 Advice given to the CA must be informed advice. Accordingly mechanisms must be set up to ensure panellists are kept abreast of developments in the process. In particular, relevant documentation must be supplied to every Panel member on a regular and structured basis.

3.2 LIAISON WITH THE CA

3.2.1 Structured and regular liaison with the Chairperson of the CA or his delegate must be arranged;

3.2.2 Panellists must be able to attend meetings of any structure within the Constitution making process on a continuous basis for the purpose of gaining information;

3.2.3 Mechanisms should perhaps be developed to enable Theme Committees to approach the Panel for advice when required;

3.2.4 Advice from the Panel should probably not be available to individual members of the CA;

3.2.5 Panellists should be able to attend meetings and conferences where matters relating to their work are discussed and debated.

4. PREREQUISITES FOR THE PROPER FUNCTIONING OF THE PANEL IN REGARD TO ITS ROLE IN TERMS OF SECTION 73(3)

The success of the procedure envisaged in Section 73(3) will depend on the active involvement of panellists from the beginning of the constitution making process. Accordingly the prerequisites for the proper functioning of the Panel listed under 3 above are even more necessary if its role under Section 73(3) is to be successful.

5. PROTOCOL WITH REGARD TO THE MEDIA

Panellists agreed that they may make no statements to the media in relation to matters concerning the constitution making process without the express permission of the entire Panel.

6. PROTOCOL WITH REGARD TO COMMUNICATION BETWEEN THE PANEL AND THE CA

6.1 As a general rule the Panel proposes that it should work through the Director or Chairperson of the CA.

6.2 The Panel is of the opinion that it may be helpful to establish mechanisms whereby the Panellists can be consulted directly by Theme Committees. It suggests that such mechanisms should be set up by the Management Committee in consultation with the Panel.

6.3 The Panel will report on its work from time to time.

7. TERMS AND CONDITIONS OF EMPLOYMENT

7.1 All members recognise that their work as Panellists should and must take priority over all other professional commitments.

7.2 In the context of 7.1 it is recognised that it is impossible for those members of the Panel who are academics to be involved in normal academic work in a meaningful way during the life of the Panel. This is because University timetables, commitments to students and teaching replacements must be organised. Moreover, changes in lecturing arrangements have financial implications for Universities. Therefore, the availability of academic staff must be known to the University in an exact way by the end of November 1994. For this reason we believe that academic members of the Panel should be appointed on a full time basis.

If the Management Committee can suggest a practical way for part time involvement by academics, we would like to discuss this.

- 7.3 The Panel also recognises that professional activities of other Panellists will be severely restricted by the activities of the Panel. Nevertheless, it appears that, initially at least, Panel members who are not academics need not be involved on a full time basis. To ensure that such professionals can give priority to Panel work, an equitable arrangement concerning their remuneration will have to be reached. See 8.2 below.

8. REMUNERATION

- 8.1 If an academic is engaged on a full time basis we assume that the budgeted rate for experts will apply.
- 8.2 As far as Panel members who are not academics are concerned, we suggest that representations should be made to the Director and Chairperson of the CA to enable remuneration to take account of their professional circumstances.
- 8.3 Reasonable travel and subsistence should be covered by the CA.

9. ADMINISTRATION AND BUDGET

- 9.1 The Panel envisages that meetings and travel will have to be arranged and that minute-taking, general secretarial back-up arrangements for communication between Panellists and suitable office facilities in Cape Town will be necessary.

9.2 BUDGET

- 9.2.1 The Panel envisages that there may be conferences, both in South Africa and elsewhere, which the CA would like members of the Panel to attend. Provision should be made in the budget for this.
- 9.2.2 Occasionally the Panel will require research materials not available in South African libraries. We suggest that a reasonable sum be set aside for this.

CONSTITUTIONAL ASSEMBLY

MINUTES OF MANAGEMENT COMMITTEE MEETING MONDAY 28 NOVEMBER 1994 (AT 11H00)

PRESENT

RAMAPHOSA MC (CHAIRPERSON)

Chabane OC
Eglin CW
Mabandla BS
Meshoe KR
Moosa MV

Meyer R
Sizani R K
Van Breda A
Viljoen C
Wessels L

Apologies: W. Felgate

In attendance:

Ebrahim H, Zondo L, Sparg M, Grové G, Ndziba M, Powell D, Shalala E, Sithole E, and Keegan M.

1. OPENING

Mr. Ramaphosa opened the meeting at 11h10. The Agenda was adopted.

2. MINUTES

The Minutes of the meeting held on Monday 7 November 1994 were adopted with the following amendments:

- i. Mr. Sizani had offered his apologies to the meeting; and
- ii. "The matter would be referred" would replace "The matter was referred" in 5.3.ii.

3. MATTERS ARISING

None - included in the Agenda Items below.

4. WORK PROGRAMME

- 4.1 Mr. Ebrahim spoke to the separately bound document entitled "*Directorate Report: Work Programme.*"

- 4.2 Mr. Ebrahim noted that a report in *Business Day* on the Work Programme broke an agreement between the Constitutional Assembly and the journalist in question. He is currently investigating the matter. The meeting agreed that henceforth all documentation would be marked "Embargoed until time of the meeting."
- 4.3 Regarding Technical Committees, the meeting agreed to forward the following proposals to the Constitutional Committee:
- i. That the sub-committee on the Panel of Experts would be reconvened to facilitate the selection and appointment of Technical Committees.
 - ii. That similar criteria be used in the selection of Technical Committees as was used for the Independent Panel of Experts.
- 4.4 Mr. Ebrahim reported that a panel had been formed to consider proposals received from advertising agencies. It consisted of three members of the Administration, one member of Parliamentary Staff and the South African Communication Services. The meeting endorsed the creation of the panel and requested that it submit a short-list of agencies, including the selection criteria used and a proposed budget, for consideration by Management Committee members on Friday, 2 December.
- 4.5 The meeting requested that the Directorate submit to the Management Committee a more detailed proposal on the National Constitutional Educational Programme, including which organisations would contribute and how.
- 4.5 The meeting noted several concerns that themes outlined in Theme Committee reports were not always reflected in the Recommended Work Programme on page 120. The meeting recommended the following amendments:
- i. "Character of State" would replace "Form of State";
 - ii. "Structure of Government" would replace "Form of Government";
 - iii. A full list of themes to be dealt with by the four sub-committees of Theme Committee 6 would be included;
 - iv. Clarity was needed to explain why "Separation of Powers" was included under Theme Committee 1 and 2;
 - v. "Allocation of Power" or "Distribution of Power" should be discussed by Theme Committee 3.

4.6 It was agreed that further concerns would be fully addressed in the Constitutional Committee meeting of 2 December 1994.

4.7 It was agreed that the Constitutional Committee would consider the following:

1. The Catalogue of Constitutional Issues;
2. The List of Outstanding Issues;
3. The Organisation of Constitutional Issues per Theme Committee;
4. A Position on Commissions and Subcommittees; and
5. The Principle of Agency with Regard to the Public Participation Programme.

5. INTERNATIONAL MEDIATION

5.1 Mr. Ramaphosa introduced the Legal Advisor's "*Opinion: International Mediation*," included in the documentation. The meeting expressed its regret at the absence of Mr. Felgate. It was agreed that it would not be possible to pursue the matter properly without Mr. Felgate's participation.

5.2 The meeting agreed that the Management Committee would consider the issue when those parties which signed the agreement report back on their discussions as requested.

6. PANEL OF CONSTITUTIONAL EXPERTS

6.1 Mr. Ebrahim spoke to the document, "*Minutes: Meeting Between Members of the Constitutional Assembly and Members of the Independent Panel of Constitutional Experts*," included in the documentation, and Prof. J. van der Westhuizen spoke to the document, "*Memorandum*," included in the documentation. Prof. van der Westhuizen explained that the four university-based experts would need full-time appointments to sufficiently free them to perform their duties as Panelists. Their universities needed clarification on the terms of their appointments by the end of November.

6.2 The meeting considered what roles the Panel could play in the constitution-making process.

- i. There was consensus that the Panelists could play a critical role in breaking deadlocks.
- ii. The meeting could not agree on how the Panelists might advise the Constitutional Assembly on an ongoing basis. The suggestion that they advise Theme Committees, for example,

was seen as problematic.

- iii. Finally, a view was expressed that the Panelists might help draft the earliest texts of the new constitution. However, concern was expressed that this would compromise their ability to independently assess the completed text.

The meeting agreed to forward the matter to the Constitutional Committee for its consideration.

6.3 The meeting considered whether the Panelists should be appointed on a full-time basis. This would meet the Panelists' needs. It would allow them to observe discussions in the Constitutional Assembly on an ongoing basis and enhance their ability to break deadlocks. However, there was a question as to whether the Panelists would have sufficient work to justify their full-time employment. A suggested compromise was that they be taken on full-time from March, after Theme Committees have begun to submit reports. The meeting agreed to forward the question to the Constitutional Committee for its consideration.

6.4 The meeting agreed that the Directorate would report back the decisions of the Constitutional Committee to the Panelists immediately after the 2 December 1994 meeting.

6.5 The meeting also agreed that there was a need for a further meeting between the Chairperson, the Executive Director and the Panel of Constitutional Experts shortly thereafter.

7. ANY OTHER BUSINESS

7.1 Mr. Wessels reported that the Council of Venice requested that the Constitutional Assembly join it in organising a conference. He noted that numerous organisations would be forwarding similar requests, and the Constitutional Assembly needs clarity on how to respond.

7.2 Various views were expressed regarding what relationship the Constitutional Assembly should establish with outside organisations offering help. Certain members advised detachment, while other advised engagement even to the point of co-option, where outside organisations would be drawn in to assist with the public participation programme or with the collection of submissions for Theme Committees.

7.3 Although the meeting agreed that the process of constitution-making must be South African in orientation, different views were expressed regarding what role international experts might play. Views ranged

from limiting the role of international experts, out of concern that they undermine the process, to drawing them into the process, for example to train parliamentarians or communities in the process of constitution - making.

7.4 The meeting agreed that it will not consider the request by Council of Venice until a formal approach with written documentation was made.

8. CLOSURE

The meeting closed at 14h37.



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MEMORANDUM

THE PRIORITY OF NEGOTIATIONS WITHIN THE C.A. ON ISSUES CONNECTED WITH LOCAL GOVERNMENT

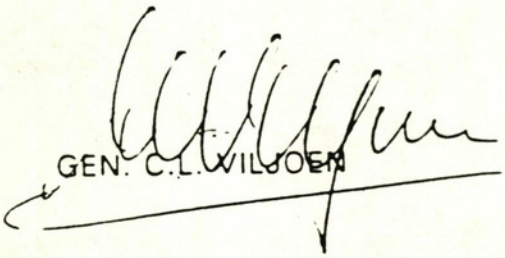
28 November 1994

- I. We refer to particularly sections 160, 161, 163, 164(2f), 174, 175, 182 and 184B of the Constitution. Constitutional principles XXIV and XXXIV are also relevant.
- II.
 - (i) Whereas local government from the relevant constitutional references seems to fall within the functions and competences of provincial government and
 - (ii) Whereas the commission on provincial government has not yet submitted its reports in this respect to the C.A. and
 - (iii) Whereas the Volkstaatcouncil has not yet submitted its report which may contain suggestions on structures of local government and
 - (iv) Whereas therefore local government institutions, functions and competences have as yet not been finalized and indeed may be substantially influenced by negotiations on Provincial level as well as on the level of the C.A. and
 - (v) Whereas the complexities within the area of local government comprising of metropolitan areas, towns, villages, rural communities, areas of tribal jurisdiction etc., constitute considerable problems for satisfactory general constitutional regulation and
 - (vi) Whereas cultural, linguistic and attitudinal differences within the historical S.A. context will at the level of government most acutely manifest themselves to constitute the most severe test for the transitional process and

- (vii) Whereas reports already indicate the rise of tension of a serious nature and
- (viii) Whereas the planned elections on local government are but months away, and
- (ix) Whereas the structures, powers and competences for local government as agreed upon will surely be serious issues of debate within the election campaign and
- (x) Whereas the cost involved in these elections for the public will be substantial enough to warrant proper planning and finalization of outstanding negotiations before the actual election of local authorities in an agreed way, therefore:

III. The Freedom Front proposes at this point in time:

- i. that the C.A. recognises the foremost priority of negotiations on the much neglected issue of local government and
- ii. that for this purpose the Constitutional Committee appoints a special theme committee on local government and
- iii. that the Constitutional Committee consider ways and means within the parameters of the constitution to establish a coordinating committee to expedite in conjunction with the Provincial Governments, the Commission on Provincial government, the Volkstaat-raad and all relevant institutions of government and of the Constitutional Assembly, the process of public consultation and of constitutional deliberations at all levels on this specific issue of the establishment of meaningful and acceptable structures of local government in time for the elections in October 1995.


GEN. C.L. WILJOEN

CONSTITUTIONAL ASSEMBLY

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PO Box 15
CAPE TOWN 8000
REPUBLIC OF SOUTH AFRICA

REF NO:

MEMORANDUM

TO: Constitutional Committee
FROM: Administration
RE: Management Committee Recommendations on the Appointment of Technical Committees
DATE: 29 November 1994

The Management Committee considered the process of appointing Technical Committees at its meeting of 28 November 1994.

Recommendations:

The following recommendations are made to the Constitutional Committee:

1. a) The sub-committee which dealt with the selection of the Independent Panel of Constitutional Experts should be mandated to consider the lists of experts nominated by Theme Committees and recommend to the Constitutional Committee, the experts to be appointed to Technical Committees of each Theme Committee.
- b) The sub-committee should report on 23 January 1995 to the Constitutional Committee.
2. The Chairperson and Deputy Chairperson should finalise the terms and conditions of employment for Technical Committee members.

REPORT ON THE AVAILABILITY OF TECHNICAL COMMITTEE NOMINEES

DATE: 29.11.94

THEME COMMITTEE ONE:

1. The IFP submitted 29 nominations, the NP one nomination and the PAC two nominations. 20 Nominees confirmed their availability.
2. John-Kane Berman - Institute of Race Relations - Will phone back on Monday.
3. Adv Jeremy Gauntlett confirmed his availability, but would prefer to serve on Theme Committee Four: Fundamental Rights, and/or Theme Committee Five: Judiciary and Legal systems.
4. Prof J Kruger has been appointed on the Independent Panel of Experts.
5. Prof André Faure - No reply when contacted.
6. Prof André Louw - No reply.
7. Prof Dion Basson - Also nominated to serve on a Ministry of Justice committee and is not sure if he should accept the nomination to the Technical committee.
8. Adv Mthiyane initially indicated he would be available. He phoned to say that he would not be available because of his involvement in the Judicial Commission into hospital problems in Kwazulu Natal.
9. Adv Shane Mathews - No contact numbers.
10. Prof B Erirvin - does not work at the University of Natal, Pietermaritzburg, there is however, a Prof D. Irvine.
11. Prof William Johnson - is not at Natal University - spoke to Dr. **Dad** Wayne Johnson who said that he will avail himself.
12. Prof Keirin O'Maley - No reply.
13. Prof Colin Vale - No reply.
14. Prof S Hugh High - Assistant will fax response (Prof High is presently in America).

THEME COMMITTEE TWO

1. 25 Nominations were received by Theme Committee Two. 17 nominees confirmed their availability.
2. Prof D van Wyk - is not contactable until the end of December this year.
3. Prof S C Nolutshungu is not available - will be in the United states for some the period.
4. Prof F Cloete - No contact numbers.
5. Prof M Faure - No contact numbers.
6. Ms P Tlaluka will only be available from 1 February 1995.
7. Prof Dion Basson - Also nominated to serve on a Ministry of Justice committee and is not sure if he should accept his nomination to the Technical committee.
8. Adv A M Motemele - Could not be contacted in chambers.
9. Prof David Welsh does not wish to serve on any of the Technical Committee.

THEME COMMITTEE THREE

1. 19 Nominations were submitted to Theme Committee Three. 11 Nominees confirmed their availability to serve on the Technical Committee.
2. Prof Dion Basson - Also nominated to serve on a Ministry of Justice committee and is not sure if he should accept his nomination to the Technical committee.
3. Prof M G Erasmus has been appointed on the Independent Panel of Experts.
4. Prof C Murray has been appointed on the Independent Panel of Experts.
5. Prof J van der Westhuizen has been appointed on the Independent Panel of Experts.
6. Prof David Welsh does not wish to serve on any of the Technical Committee.
7. A R Donaldson - not contactable.
8. Mr P Van Ryneveld confirmed his availability, but is also interested to serve

on the Technical Committee for Theme Committee Six.

9. A Boraine - could not be contacted, will be back at the office by next Wednesday.
10. Richard Mdakane - no contact number.

THEME COMMITTEE FOUR:

1. 14 Nominees from the ACDP, ANC, DP, IFP, NP, PAC and FF respectively were contacted and confirmed their availability.
2. Prof T Madonsela - could not be contacted, CALS closed until 2/12/94.
3. Prof D van Wyk can only be contacted by the end of Dec this year.
4. Adv R B Desai - no contact numbers.

THEME COMMITTEE FIVE

1. 8 Nominations were received from the ANC. Three nominees were contacted and their availability confirmed.
2. Andrew Breitenbach - are not contactable at UCT.
3. Mandla Mchunu - on vacation - not contactable.
4. Zunaid Husain(Attorney) - no contact numbers.

THEME COMMITTEE SIX

A report on the nominations from Theme Committee Six will be submitted at the Constitutional Committee meeting on 2 December 1994.

CONSTITUTIONAL ASSEMBLY

MINUTES OF MANAGEMENT COMMITTEE MEETING THURSDAY 17 NOVEMBER 1994 (AT 08H00)

PRESENT

RAMAPHOSA MC (CHAIRPERSON)

Chabane OC
Eglin CW
Felgate W
Meshoe KR
Meyer R

Moosa MV
Van Breda A
Viljoen C
Wessels L

Apologies: None.

In attendance:

De Beer, S, Ebrahim H, Lilienfeld P, Meyer A, Matyolo L, Zondo L, Meyer L, Mngadi-Kgosidintsi T, Grové G, Powell D and Keegan M.

1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 08h13. The Agenda was adopted.
- 1.2 Mr. Wessels extended the meeting's birthday greetings to Mr. Ramaphosa.

2. MINUTES

The Minutes of the meeting held on Thursday 10 November 1994 were adopted.

3. MATTERS ARISING

None - included in the Agenda Items below.

4. INDEPENDENT PANEL OF EXPERTS

- 4.1 Mr. Ebrahim spoke to the document entitled "*Independent Panel of Experts*," included in the documentation. Mr. Ebrahim noted that there was some urgency to the issue as there were budgetary implications that had to be dealt with in the immediate future and the

selected members of the panel were keen to learn whether their positions would be full- or part-time.

4.2 The meeting agreed that specific information would be gathered to guide Management Committee discussions on the matter:

- i. The Directorate would contact panelists to ascertain what each of their circumstances are and their views on terms of employment and report back to the Management Committee;
- ii. The Legal Advisors would provide the Management Committee a legal opinion on what the Constitution says about the panelists' role and function, including a definition of what "independent" means and their role in breaking deadlocks will be;
- iii. The political parties would prepare and submit to the Management Committee documents indicating their party's views on whether the panelists should be full- or part-time; and
- iv. The Directorate would examine the issue of how all the various experts would function, to avoid possible tensions arising.

The meeting agreed that these reports would be compiled and included in the Management Committee documentation pack to facilitate further discussion of the matter.

5. IFP PROPOSAL ON INTERNATIONAL MEDIATION

5.1 Mr. Felgate apologised for the misunderstanding which led to his late arrival. He then spoke to the document entitled "*Position Paper on International Mediation.*"

5.2 It is noted that the title format is misleading, as it gives the impression that the proposal is a Management Committee document, which is not the case.

5.3 After debating whether or not the proposal should be considered by the Constitutional Assembly, the meeting agreed to the following:

- i. The Legal Advisors would provide legal opinion as to whether this agreement was a matter which the Constitutional Assembly should deal with; and at the same time,
- ii. The matter was referred back to the three political parties involved in the agreement, with a request that they report back to the Management Committee.

6. THEME COMMITTEES - WORK PROGRAMMES

- 5.1 Mr. Ebrahim introduced the document entitled "*Theme Committee Work Programme,*" included in the documentation, explaining that it was noting.
- 5.2 Gen. Viljoen suggested that a separate Theme Committee should be established on local government. The meeting agreed that this would be discussed when considering Theme Committee Work Programmes as a whole.

7. AOB

- 7.1 Mr. Ebrahim noted that he had received correspondence enquiring into the Constitutional Assembly's view on the Freedom of Information Act. The meeting agreed that his reply would be that the matter has not yet been discussed in the Constitutional Assembly.
- 7.2 It is noted that the Ambassador for the European Union contacted Mr. Wessels regarding assistance in setting up a conference. Mr. Wessels requested the Directorate to inquire into what organisations are organising conferences and to open communications between the groups.
- 7.3 Mr. Ebrahim repeated the meeting's birthday wishes to Mr. Ramaphosa.

8. CLOSURE

The meeting closed at 09h50.

