

TRANSCRIPTION

MEETING OF THE NEGOTIATING COUNCIL
30 JUNE 1993

Debate on point 5 of the Agenda

Chairman

I will be guided by the house. I have two speakers, Mr de Jager first and then Mr Jacobs.

Mr de Jager

Chairman through you I would like to ask the Committee whether they...

Chairman

Before we get to that I just want to sort out the matter of procedure that Mr Webb raised.
Mr Jacobs.

Mr Jacobs

Mr Chairman I would suggest that it could also be of assistance if we now ask questions only
for clarity sake.

Chairman

That is what I said Mr Jacobs. Can we then agree on that because that, if you were listening
carefully, was in fact what I said, that we need questions for purposes of clarification if
you

wish to make a comment, you are welcome to do so, and that is of course up to you bearing

in mind the recommendation from the Planning Committee and Mr Webb's comments as
well. So, let's go back to what I was saying, we now dealing with matters under section 1.

Mr de Jager.

Mr de Jager

Through you Mr Chairman, this, is it correct that this report was drawn on the assumption
that there was a resolution passed on the 1st of June that gave you certain instructions and
that that was a binding resolution.

Chairman

Yes.

Dr Venter

Mr Chairman if I may require to reply to that. ??? instructions I think were clear. The
resolution, the binding nature of the resolution or the qualification of its binding nature
is
something that had been discussed in the Council more than once, but our instruction was
very clear that we should take into cognisance the context of the resolution, the discussions
and so on and then produce something on these lines.

Mr de Jager

Mr Chairman because we only decided that that resolution wasn't a binding resolution on the
3rd and your reports is already dated the 3rd, so I want to put it to you that you could never
have considered it as a guideline because it only came to light that it was only a guideline

on the 3rd when you have already written your report.

Chairman

Can I respond to that from the Chair? Mr de Jager I think it is not appropriate to discuss the resolution of the first of June now. What we have before us is the Fourth Report of this Committee, that is the item on the agenda, and with respect I am now going to rule you out of order.

Mr Jacobs

Mr Chairman I don't want to ask questions along the lines with Mr de Jager, but I would suggest that that problem be clarified at one or other stage.

Chairman

Can I do that now. The understanding was that the resolution of the 1st of June was a procedural resolution, in that it set out certain instructions to the Technical Committee with a view to elaborating certain aspects mentioned in that resolution which will assist the Negotiating Council in its deliberations. The contents of the reports by virtue of the acceptance of that resolution by sufficient consensus are not binding on any party here, like any other report of any other Technical Committee. The Technical Committee merely presents its report. The views are then open to discussion here and can be amended in any way in accordance with the wishes of this Council. So I trust that with that clarity we can now get on to questions with relation to the Fourth Report.

Mr Jacobs

Mr Chairman to a certain extent my question is actually not a necessary one and it must please not be seen as a reflection on any work of the Commission done, but I want for my sake to be quite sure that I understand ?? correctly. My question, a general question firstly, at the end of the day or the end of the Negotiating Councils' work I take it that the work of the commission no of the Committee and all the reports should be seen as one unit, as one unit. The second one, relating to that, that paragraph 6 of the Seventh Report is also to be seen in the light of the Fourth Report, am I correct.

Dr Venter

If I understand the question correctly Mr Chairman, in the first place, whether our reports form a unit. Indeed it does in the sense, with a single qualification that these reports naturally develop in the contexts of the debates, because we are required to take note of these debates and inconsistencies that may arise in later reports compared with earlier reports should have only a bearing on the influence of the debates on our work. In that sense, as I said when I presented the report, this report couldn't have been drafted in the context of the debates that took place later on, but there are lines to be drawn from this report right through to the Seventh Report, because one build on the other.

Mr Jacobs

Just a follow up question mr Chairman, if you would allow me. According to that I also take it that paragraph 5 of the Fourth Report is then also subject to paragraph 3.9.1.3 of the Third Report. Am I correct and also paragraph 3.9.1.3 and also 3.9.5. The has to do, if I could just read it, 3.9.1.3. reads "In the event of a dispute concerning the legislative powers allocated by the constitution concurrently to the national and SPR constitutions

precedence shall be given to the legislative powers of the national government" and then as far as residual powers is concerned you almost have the same type of formulation, and my question is whether the powers allocated now in paragraph 5 of the fourth Report should be read subject to what has been said in the Third Report as I have indicated.

Dr Venter

Mr Chairman the Third Report concerned constitutional principles binding on the writing of a constitution by a elected constitution making body primarily and the paragraphs referred to Mr Jacobs concern criteria for the allocation of powers to the different levels of government. We said in our Fourth Report in paragraph 5, we started it off by saying "With reference to those criteria we are setting out a number of areas for SPR governments during the transition". The constitutional principles and the criteria therefore had to have an influence on defining a list of possible powers for the SPR governments, but they are not directly related in the sense of the criteria being the only means of determining the possibility of SPRs during the transition having specific powers. There is the qualification in other words that we are speaking of different phases in this process. Everything that will be required in terms of the constitutional principles and the criteria developed there for allocation of powers to the different levels of government in a final constitution cannot be applied to the constitution for a period of transition, because of the differences in these phases.

Mr Jacobs

I would have liked to ask a follow up question but I will reserve my positions.

Chairman

Thank you. Mr Cronje

Mr Cronje

Chairman if I can refer the Committee to paragraph 1.5, page 2 of the Fourth Report, it refers to the need to make provision for a legal framework for SPR governments between the adoption of a constitutional framework by this body and a final constitution making body.

The question is the importance of a legal framework during the transition or to be argued and specified and I ask the question, is there a difference between legal statutory framework and a constitutional framework?

Mr Chaskalson

The legal framework would include the constitutional framework, but the constitution may only come into existence at a later date and there may have to be some preparatory work done, possibly through a Transitional Executive Council, for instance which may be concerned with addressing issues and I think that what is contemplated is that from the time the constitution comes into force, the constitution will govern as it obviously has to do, but there may be other legal instruments which will be relevant as well and one could assume that if there is going to be, along the models that we know have been discussed elsewhere, a sub-council dealing with regional and local government, some of the functions would be relevant to this phase as well. It would depend upon that legislation.

Mr Cronje

If I may follow that up Chairman, the transitional phase, if there is a transitional phase,

surely requires the maximum constitutional arrangements possible to ensure legal certainty and effectiveness. In essence there should be no juristic difference between the completeness of a transitional and a final constitution. We don't know how long it is going to exist, we don't know what crises may be developed. You have to deal with all the organs and functions of a state and of a government in that period whether it is transitional or whether it is final.

Mr Chaskalson

Let me respond to it. The correct, the constitutional instrument will be complete, it has to be complete but the nature of the periods is different. If you are dealing with what is in fact a transitional period at the end of which certain final arrangements will be made during that transitional period you would not want to preempt the decisions which are going to be taken at the end of the period. So you apply a framework but the framework is not necessarily the same as it will exist at the end of the period, particularly as far as regional government, if decisions have got to be taken at the end of the day as to what the precise powers and functions of regional government will be.

within the defined criteria you have to have a much more flexible situation during the transitional period, because you can't as it were for the purposes of the transitional period decide that regional government should have power X, and then when the time comes for it to resolve the final constitution you say no you don't want the regional government to have power X, it's going to have different powers. So you have got to keep that much more fluent during the transitional period and I think if you look at this model you will see that that is what it does.

Dr Venter

Can I add to that Mr Chairman. The month of June was a long month in terms of negotiations and I think the terminology that was used at the beginning of the month may differ slightly to that which is being developed at the moment and therefore I would just suggest that one should not consider specific words such as these and there may be others in an earlier report to be of the nature of predetermining what the rest of the negotiations would bring up. In many of our other reports we have made use of the expression, "a constitution for the period of transition or a constitution for the transitional period and that may be something which could eventually be the term applied to this kind of context. Van I just remind you also, I did so yesterday, that these reports that are being developed are in the nature of resolutions or in the nature of legislation or constitutions. These are discussion documents and frameworks for discussion.

Mr Chaskalson

If I could take it a little bit further perhaps I could ask Mr Cronje during the adjournment to look at paragraph 5.1 of our Fifth Report, where we specifically address this issue that you have raised.

Chairman

Are there any further questions on section 1? Mr Cronje.

Mr Cronje

Section 2, paragraph 2.2. I think an accepted argument has put forward in 2.2 that one assumes that a future SPR will transcend the boundaries of existing structures and that

assumption is being made and then to deal with that, there are two aspects that have to be considered. If it transcends existing structures, there will be different administrations in place in that proposed area, that proposed SPR, and reference is being made in this particular clause, Chairman, to the consolidation of political authority. If I could just ask what is exactly meant by the consolidation of political authority. Does it imply elected or non-elected bodies, to whom must be reported who will be responsible for governmental processes, what will happen to conflicting administrative and other regulations, as it is possible will be existing, how was that envisaged?

Dr Venter

Mr Chairman we not only assume but we know that the development of a new SPR dispensation, if it does not go inside exactly with the boundaries of existing political structures will be a very very complicated one. You may very well have SPRs all over South Africa or let's take a specific SPR where the governmental structures or administrations are for example two provinces, a selfgoverning territory, one of the TBVC states and elements of the current present central government, will have to be coordinated and reorganised and rationalised. That is going to be and that is the basis of that assumption of ours, that will be complicated extremely if the political authorities of the present structures would retain their political authority and control over the different administrations and what we are actually saying there is that if you can't, and you can't overnight rationalise and reorganise those administrations, what you can do, what you can achieve is establishing a single political authority for an SPR to do exactly that immediately after its coming into office of initiating and organising this very complicated task of reorganising the administrations and rationalising them as well as taking care, or beginning to take care of the complexities of conflicting or different regulations and legislation and structures.

Mr Chaskalson

Could I take that a little bit further as well. I think it depends upon the different stages. You may have a stage where you are going to have all of those administrations and governments together and where a TEC would have a role to help in that particular coordination. After you passed that stage you would then have to make the choice between the two models set out in paragraph 3.1 of our report, the one which involved interim regional administration and the other one which involve elected government. If you went for the administration then the administration would be under the control of the CMB which would appoint which will be the ultimate political authority. If you go for transitional regional governments, the transitional regional government would be the political authority and would then take charge, within its own SPR, of all of those other administrative structures which were there but they would now instead of being answerable as they formally were to one of the various administrations, they would be answerable only to the SPR and I think the equilibrium of it suggested that that might be the route.

Mr Cronje

If I may Mr Chairman, how practical is a transitional SPR in the sense that you are now traversing existing boundaries and you must have a restructuring as far as the areas concerned, you need a restructuring as far as the administration thereof is concerned. It is really a massive exercise irrespective of what model is chosen and does it make sense, practical sense to have something for a period of 2 or 3 or whatever years with the possibility that it must all be changed and restructured within a short period of time. It is a massive

exercise.

Dr Venter

It is indeed so, Mr Chairman, it's going to be a massive exercise it's all going to be very complicated and very difficult. The problem is that if we are going into a new constitutional dispensation, which there will be SPR's, it's unavoidable, and the sooner it is done the better. If there is to be a transitional period that would be the earliest date for the commencement of doing this under political direction. If some of this can be initiated as Mr Chaskalson pointed out earlier, even before the elections, that would be a very good thing, because of the complexity of the task. You know after the 1983 constitution, only a year or two ago the last parts of the reorganisation of own and general affairs was undertaken. So, it's going to take some time.

Mr Chaskalson

Also there is a difference between the boundaries and the political authority. If you look at the political authority.

Mr Jacobs

...(Tape 1, Side B)...

Dr Venter

Mr Chairman we try not to draft our reports in the form of court documents, but the reply to this really lies in the introductory paragraph, in paragraph 2.1. Can I read it to you, "Due to the variety of structures at present in existence, various scenarios are possible depending upon the continuation or not of those or some of those structures when a transitional constitution comes into effect". Would be required to draft every possible scenario you would have probably being presented with quite a thick volume as a report. Please also take into consideration the fact that we have usually had not too much time to draft these reports.

Mr Jacobs

(Inaudible)

Chairman

Mr Jacobs if I can intervene, what I would like you to do in view of the fact that we are merely asking questions for clarification at this stage is to hold on with that request. Perhaps after we return from the adjournment, if you still deem it fit to ask for such work to be done by the Technical Committee you could put it to the council.

Mr Jacobs

(Inaudible)

Chairman

That is being attended to, but this as you well know is of a result of some activities by some members of your party.

Mr Jacobs

(Inaudible)

Chairman

Mr Jacobs do you want to say something on this matter. I think you will understand that the context in which I said this was in a moment of 7?7 if that is not acceptable I withdraw my comment, and Mr Langley you are requested please to control yourself in this Council. If you wish to say something please ask your delegate to speak.

Mr Jacobs

Mr Chairman I must also object about the remark you made. I really think it was not a very good remark to be made within the Negotiating Council.

Chairman

I note your comments.

Mr Jacobs

And I would like you to just withdraw the remark.

Chairman

I did already Mr Jacobs. Thank you.

Mr Webb

Chairman.

Chairman

Mr Webb please continue

Mr Webb

I have difficulty continuing when there is no respect for this Council, sir. Could we ask for some attention. Thank you, not that I have anything of great moment to say. Mr Chairman the variety of statements which are made as, assumptions which are made and I wanted to make the point that you did in your summing up. Because of those assumptions I would like to record that I take the liberty of relying on paragraph 6 of the explanatory memorandum with regard to much of what has been said here. In the event of us not coming together I would like to debate it, but I believe that we are in a stage of negotiation and the proposed bilaterals may solve many of the difficulties which have been expressed. I must also point out that the practical problems which I believe that the Technical Committee foresee, may not be as ?? as they see at the moment, it maybe because of what is happening on the ground, possible to achieve their ultimate objective without the painful transitional exercise.

Chairman

I please ask all of us to please restrict ourselves to questions to the Technical Committee .

Mr Rajbansi

Mr Chairman I want to refer to paragraph 2.2, and I am going to ask my question against the background of the various questions posed by Mr CronjÃ© and the reply given especially by Mr Chaskalson where he particularly refer to implementation in stages and also against the background of paragraph 3.2 of the 3rd report, where the Technical committee suggests that there shall be democratic representation at all level. Now, taking into consideration that the Committee admits that there can be no instant rationalisation. Do you not think that it

will take the whole transitional period to undertake this complex task so that we will not have an effective, shall I say completely rationalised government at this level during the transitional period.

Mr Chaskalson

I think you will have effective government but it won't be fully rationalised. The rationalisation is obviously going to be a process, but there is no reason why it shouldn't be effective because you will have a political head responsible for it and the process will be undertaken under the authority of that political head.

Mr Rajbansi

Just a follow up question on that Mr Chairman. Taking the 777 into consideration, does the Technical Committee not think that it will not be possible to have a fully democratic government at this level?

Dr Venter

Mr Chairman I am not sure if I understand the question, we assume that everything happening in constitutional context will have to be democratic.

Chairman

Let's assume that Dr Venter and let's move on ladies and gentlemen. We move on to section 3 of this report. Are there any questions on section 3. We then move on to section 4.

Debate on Resolution

Mr Webb

Mr Chairman we are of the view that it will be very useful to have a draft constitution. You are aware that our view is not the same as many other people present that it will be useful to have a transitional constitution. However in the interest of progress, so not to obstruct the workings of the Committee, the Technical Committee, we are not going to stand in the way of it, but we reserve our position regarding the transitional process which is prescribed. We do of course will become under paragraph 6 of the explanatory memorandum, if need be. Hopefully it won't be necessary.

Chairman

Point noted. We apologise for this handicap which many of you suffer ladies and gentlemen. Please bear with us for a few seconds. Any comments in the meantime?

Mr de Jager

Mr Chairman I also object to the transitional and the word transitional wherever it appears, but subject to that I think it would be a move forward, a constitution that we could discuss and come to details.

Chairman

Thank you for that constructive approach Mr de Jager.

Mr Mathews

Mr Chairman I have listened to the resolution and of course I have had the view for a long time that if we have a draft constitution in front us we will be able to debate issues more of the constitution, and I will then be in a position to assess the position of the IFP in relation to such a constitutional draft. So, I am approving the idea of a draft being prepared by the Technical Committee for our benefit.

Chairman

For the benefit of those of us that are not in your generation. Mr Mathews what is the translation?

Mr Mathews

The exact words of the constitution.

Chairman

Ladies and gentleman you have now a draft reaching you. Mr Cronje.

Mr Cronje

Chairman surely the inclusion of reference at the end of the resolution, reference to clause 6 of the explanatory memorandum is clear, no one is committed.

Chairman

There is no doubt that this is a far reaching step on our part and there might be some hesitancy, but I think we have made provisions, particularly in terms of clause 4 to ensure that there is sufficient flexibility to accommodate all of us. Can I, if there is no comments.

Mr Jacobs

Mr Jacobs

Mr Chairman I must admit that we have very little time of even reading the whole resolution through. At this stage I would like to indicate the following problem. Previously the Council would remind itself that we had a problem concerning that so called resolution on the one phase and the two phased problem, and later it was watered down to a sort of a guideline and not resolution. So, I don't want to find myself in the position where we now instruct the technical Committee to draft the constitution, and having done so we sit of a course one must act on that draft and I don't want to find myself in that position of a resolution guideline type of argument with which we will be confronted. Secondly Mr Chairman, I would like the instructions to the Technical Committee to be far more precise than that which is indicated in the resolution, for instance in relation to entrenchment, entrenchment as far as the SPRs are concerned, their structures, the powers, the boundaries, I don't really read into the resolution unless I haven't had enough time to see whether they are incorporated, but I would like Mr Chairman, to the entrenchment problem to be inserted before I could by any chance say that I could agree with the draft. Let alone voting for or not voting for the resolution.

Chairman

We note your concerns in that regard Mr Jacobs. You will notice that 2.2 does go somewhere to cater for not the entrenchment, but the specification of that aspect. I imagine that entrenchment is a matter of detail that we will need to debate once we have the draft before us. You'll notice that we have avoided detail here in many respects.

Mr Jacobs

Mr Chairman I do concede that, but you must also take into consideration that up to now, if I may say so, we have a constitutional development in one direction without each and every time also owing the choice of various options and to my mind we have the very same problem here at this point in time. It tends to have a constitutional development in a certain direction and not weighing out the various alternatives.

Chairman

Let's note your concerns and see how we can address them as we move on. Can I then have a proposal for this resolution. Mr Meyer and a seconder.

Mr Ramaphosa

Proposed and seconded sir.

Chairman

We need two people to do it. I understand your haste and anxiety Mr Ramaphosa.

Mrs de Lille

Thank you Mr chairman. Mr Chairman as you might be aware that the whole day while discussions, bilateral and multi-laterals took place around this resolution, the PAC was not involved and we therefore then reserve our position for a later stage where we will respond.

Chairman

We will note that Mrs de Lille. Ladies and gentlemen can I then put this motion to you formally?

Mr Jacobs

Question Mr Chairman can you give us some indication of, are we going to discuss are we going to make a decision tonight. What is the position going to be?

Chairman

Well I think it has been formally moved and seconded and we now have to take a decision here, unless there are indications to the contrary.

Mr Jacobs

Sorry Mr Chairman my question is the draft resolution is now being tabled. My question is whether are we going to have an in depth discussion with all the provinces and the commissions and then to make a decision or are we just going to take notice of it and discuss it tomorrow.

Chairman

Mr Jacobs I think all of us will agree that we have spent the better part of today preparing the ground for the tabling of this resolution. Many of the organisations certainly not all as

Mrs de Lille quite accurately points out, have been part of bilateral and other processes during which I would have imagine we have clarified sufficiently the contents of this resolution in order for us to create some platform for us to move on which I understand is the intend here. I think mr CronjÃ© wants to help me in this regard and perhaps I should ask him to speak now.

Mr Cronje

Chairman I want to repeat that this whole resolution is subject to that clause 6 of the memorandum of understanding. Secondly, it is understood by me and by us against the background of the discussions that we have had today, and my understanding of what is written here against the discussions that we have had today.

Chairman

Mr Jacobs in that spirit I would suggest that we note certainly the concerns and reservations that many of you have expressed and at the same time agree to create a platform by the adoption of this resolution, so that we can get on with the detail.

Mr Jacobs

Mr chairman I fully appreciate that if you could just allow me saying the following. I appreciate what Mr Cronje has said but on the other hand what we have now is an entirely different type of resolution that we had previously in our offices to discuss. So, I would like to note my opposition for the discussion now taking place, not having the time to have studied this, to have discussed this, this is a very important juncture in our constitutional discussions and I reserve my right and I oppose the discussion of this resolution and I want this to be minuted.

Chairman

We will do that Mr Jacobs.

Mr Rajbansi

Mr Chairman while you indicated that we are not going to deal with details, I just for the purposes of the Technical Committee want to refer to 2.1, where the transitional phase in respect of the CMB will include a national and a regional component and I just want to place on record that the regional components, shall I say emphasis a regional component can be achieved in two ways and we will be making submissions to the Technical Committee.

Chairman

Now, ladies and gentlemen with your cooperation I want to formally put this resolution to the house. All those in favour please indicate by using your voices. Anybody in opposition apart from Mr Jacobs and the reservation from the PAC. a Reservation from Ciskei.

Chief Gumede

Thank you Mr Chairman I would like to say this that this, although it appears to be a very good document, but I want to say this that I am feeling that unless one has been in a position to see the draft constitution and judge that against the background of what this resolution says and until the definition of the word transition has been ??? so that one understands what it is meant by transitional government, and another thing until and unless this resolution deals with the concept of entrenching powers, duties and functions of regional constitution one

would not be in a position to understand it well.

Chairman

I would like you to address the point whether you are now accepting, proposing or reserving your rights.

Chief Gumedi

No, no, no, I am coming to that, Mr Chairman. Just before, because of that I would tend to reserve my right until I have consulted with my principle on the basis of ...

Chairman

Ladies and gentlemen I declare that this resolution is adopted by sufficient consensus. All the other specific points of reservation will be noted in the minutes. Thank you.

Mr de Jager

Not only reservation but also opposition, Mr Chairman.

Chairman

Yes, I was just addressing Mr de Jager in this instance.

Mr Cronje

Chairman I will appreciate it if my comment that our understanding and support of this is against the background of the discussions that we have had today, if that could be minuted.