

The Constitutional Assembly (1994-1997)

1. The first democratic elections which took place on 27 April 1994 saw the election of four hundred public representatives to the National Assembly and ninety to the Senate. A joint sitting of these two bodies constituted the newly formed Constitutional Assembly mandated under section 68(1) of the Interim Constitution.
2. The Constitutional Assembly (CA) convened for the first time on 24 May 1994. Cyril Ramaphosa was elected as its chairperson with Leon Wessels as his deputy. The CA was required under the Interim Constitution to draft and adopt a final constitution within two years of the first sitting of the National Assembly.¹ The final constitution had to comply with thirty-four Constitutional Principles that were negotiated and agreed to by parties during the Multiparty Negotiating Process at Kempton Park. The newly formed Constitutional Court was required to certify whether these principles were adhered to, or not.
3. The Constitutional Committee was the main negotiating and coordinating structure that reported directly to the CA. It consisted of forty-four members representing the various political parties and was headed by Ramaphosa and Wessels as his deputy. A Management Committee was responsible for the day-to-day running of the CA. Hassen Ebrahim was in charge of the CA's administration, with Louisa Zondo and Marion Sparg as his deputies.

¹ See: *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at paras 8-16 and paras 20-21, for an overview of the historical and legal context.

4. The drafting of the final constitution took a massive effort. Apart from representations made by political parties, two million submissions were received from members of the public and civil society groups. Scores of public hearings and workshops were held and it is believed that three quarters of the South African population was aware of the process underway.
5. In September 1994, the CA established six Theme Committees that focussed on the thirty-four Constitutional Principles and ensured that submissions incorporated into the final Constitution complied with them. Each Theme Committee was assisted by experts on a Technical Committee.
6. Theme Committee 1 was tasked with examining the character of the democratic state. Theme Committee 2 looked at the structure of government. Theme Committee 3 focussed on the relationship between the different levels of government. Theme Committee 4 examined fundamental rights, while Theme Committee 5 focussed on the judiciary and the legal system. Theme Committee 6 examined the specialised structures of government and was divided into a further 4 sub-theme committees: public administration, financial institutions and public enterprises, transformation and monitoring, and security services.
7. While public participation in the process was going relatively smoothly, political disagreements were mounting, specifically from the Inkatha Freedom Party (IFP) which wanted international mediation on certain outstanding issues. In February 1995, the IFP walked out of Parliament.

8. A crucial aspect in the drafting of the final constitution was the establishment of an Independent Panel of Constitutional Experts in terms of section 72 of the interim constitution, with the mandate to advise the CA and chairpersons of Theme Committees, and resolve disagreements.
9. Members of the Panel included: Professors M G Erasmus, Christina Murray, J Kruger, Johann van der Westhuizen, and Advocates Z Yacoob, I Semanya and M P Sedibe-Ncholo. These were assisted by a Technical Refinement Team consisting of legal advisers and language experts, including Hassen Ebrahim, Louisa Zondo, Gerrit Grove, Philip Knight, a plain language expert.
10. A Commission on Provincial Government was also established in terms of section 163 of the Interim Constitution and a *Volkstaat* Council under chapter 11A.
11. In October 1995, the first working draft of the final constitution was produced for consideration by the CA. It was approved by the CA and published on 22 November 1995. Over four million copies of the draft constitution were printed and distributed in tabloid form. The public was given three months to comment.
12. By February 1996, it emerged that there were at least sixty-five unresolved issues pertaining to the draft and a political deadlock on five issues: the death penalty, lockout clauses, the appointment of judges, education and property rights.
13. The fourth working draft of the final constitution was published in March.

14. With the deadline looming for the adoption of the final constitution, it was decided that a behind closed doors '*bosberaad*' was required to break the deadlock. Negotiators met in Arniston in the Western Cape in the first week of April 1996.
15. A fifth draft of the final constitution was produced on 15 April. Parties had about a week to agree on the text before the deadline on which it had to be tabled in the CA. This resulted in bilateral talks, multilateral talks and subcommittee meetings. In a marathon twenty-two hour meeting that began on 18 April, agreement was reached on the basic text and preamble to the Constitution.
16. Further breakthroughs included agreement on the right to culture, language and religion following a meeting between the African National Congress (ANC), Freedom Front (FF) and the National Party (NP).
17. Unresolved issues included the lock-out clause, the death penalty, the property clause, local government and floor crossing. The Congress of South African Trade Unions (Cosatu) threatened mass action in protest against the lock-out clause.
18. On 22 April the draft final constitution was published in Bill form and tabled before the CA. The Democratic Party (DP), the Pan Africanist Congress (PAC) and the African Christian Democratic Party (ACDP) threatened to vote against the Bill if their concerns were not addressed. After two days of debate, the Constitutional Committee had to consider 298 proposals for amendments to the Bill, tabled by various parties.

19. On 28 April, Mandela, De Klerk, Ramaphosa and Roelf Meyer met with business and labour to try and break the deadlock, but a national strike called by Cosatu was staged on 30 April.
20. With just a week to go before the deadline for the final constitution to be adopted, there was still no agreement on the property clause, education and labour. There were frantic negotiations and the Constitutional Committee and the team of experts worked long hours to incorporate changes and amend the draft.
21. On 6 and 7 May, the Constitutional Assembly met for a final debate on the Bill even as bilateral talks continued. On the night of 7 May, agreement was finally reached on education. However, the DP stated that it intended to object to the certification of the Constitution for violating Constitutional Principle XVIII which dealt with the right of employers to engage in collective bargaining.
22. On 8 May 1996, an awareness of history-making pervaded Parliament as the final Constitution was adopted by the CA. Thabo Mbeki made his “I am an African” speech followed by other leaders. The FF announced that it would abstain from voting on the Constitution.
23. In the end, 421 votes were recorded in favour of the Constitution – the ANC, NP, DP and PAC voted yes. The ACDP voted no while the IFP did not take part. The Bill was referred to the Constitutional Court for certification.
24. On 9 May, the National Party announced its intention to withdraw from the government of national unity.

25. The Constitutional Court held nine days of hearings commencing on 1 July. Written representations and oral argument was presented by five political parties – the ACDP, DP, IFP, NP and Conservative Party (CP). Eighty-four private parties lodged objections. Twenty-seven parties were allowed to present oral argument to the Court.²
26. On 6 September the Constitutional Court handed down its judgment which found that the Constitutional Principles were not adhered to in some of the provisions. Some of the provisions that did not pass muster were those relating to: the right of individual employers to engage in collective bargaining; adequate protection of fundamental rights; the independence and impartiality of the Public Protector and Attorney General; the Public Service Commission; the framework and powers of local government and the powers and functions of the provinces.
27. The Management Committee met on 12 September and formed two sub-committees to work on amendments – one was chaired by Mavivi Myakayaka-Manzini and the other by Pravin Gordhan.
28. On 11 October the CA passed the amended text. The ACDP voted against while the FF again abstained. The IFP did not participate.
29. After a three day hearing commencing on 18 November, the Constitutional Court certified the amended text on 4 December.

² See: Certification judgment at paras 22-25

30. On 10 December 1996, President Nelson Mandela signed the first Constitution of a democratic South Africa into law at Sharpeville. The Constitution came into effect on 4 February 1997.