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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC)^{*}

THE COURT:¹

- [1] The formal purpose of this judgment is to pronounce whether or not the Court certifies that all the provisions of South Africa's proposed new constitution comply with certain principles contained in the country's current constitution. But its underlying purpose and scope are much wider. Judicial "certification" of a constitution is unprecedented and the very nature of the undertaking has to be explained. To do that, one must place the undertaking in its proper historical, political and legal context; and, in doing so, the essence of the country's constitutional transition, the respective roles of the political entities involved and the applicable legal principles and terminology must be identified and described. It is also necessary to explain the scope of the Court's certification task and the effect of this judgment, not only the extent and significance of the Court's powers, but also their limitations. Only then can one really come to grips with the certification itself.
- [2] That is in itself a complex and wide-ranging exercise, dealing with a large number and variety of issues, some interrelated but many not. Virtually all of those issues were raised in written submissions and oral representations received from political parties, special interest groups and members of the public at large. But, as will be shown shortly, the certification task extends beyond considering complaints specifically drawn to the Court's attention. We certainly derived great benefit from such contributions and wish to express our appreciation to counsel for the Constitutional Assembly and the political parties, to the representatives of other bodies and to the persons who submitted written submissions or oral argument. The thoroughness of their research and the cogency of their arguments greatly eased our task. Ultimately, however, it was our duty to measure each and every provision of the new constitution, viewed both singly and in conjunction with one another, against the stated Constitutional Principles, irrespective of the attitude of any interested party. In what follows we intend not only to record our conclusions regarding that exercise, but to make plain our reasons for each such conclusion.
- [3] We may however be called upon in future and in the context of a concrete dispute to deal with constitutional provisions we have had to construe in the abstract for the purposes of the certification process. In

^{*} All footnotes are omitted.

¹ This is the unanimous judgment of the available members of the Court.

order to avoid pre-empting decisions in such cases, we have endeavoured, where possible, to be brief and to provide reasons for our decisions without saying more than is necessary.

...

A LIST OF SOME ABBREVIATIONS USED IN THE JUDGEMENT	
CA	Constitutional Assembly
Ch	chapter
CP	Constitutional Principle
IC	Interim Constitution
LRA	Labour Relations Act 66 of 1995
NA	National Assembly
NCOP	National Council of Provinces
NT	New Text
s	section
sch	schedule

2 *Historical and political context*

- [5] South Africa's past has been aptly described as that of "a deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge". From the outset the country maintained a colonial heritage of racial discrimination: in most of the country the franchise was reserved for white males⁴ and a rigid system of economic and social segregation was enforced. The administration of African tribal territories through vassal "traditional authorities" passed smoothly from British colonial rule to the new government, which continued its predecessor's policy.
- [6] At the same time the Montesquieuan principle of a threefold separation of state power - often but an aspirational ideal - did not flourish in a South Africa which, under the banner of adherence to the Westminster system of government, actively promoted parliamentary supremacy and domination by the executive. Multi-party democracy had always been the preserve of the white minority but even there it had languished since 1948. The rallying call of apartheid proved irresistible for a white electorate embattled by the spectre of decolonisation in Africa to the north.
- [7] From time to time various forms of limited participation in government were devised by the minority for the majority, most notably the "homeland policy" which was central to the apartheid system. Fundamental to that system was a denial of socio political and economic rights to the majority in the bulk of the country, which was identified as "white South Africa", coupled with a Balkanisation of tribal territories in which Africans would theoretically become entitled to enjoy all rights.⁵ Race was the basic, all-pervading and inescapable criterion

for participation by a person in all aspects of political, economic and social life.

- [8] As the apartheid system gathered momentum during the 1950s and came to be enforced with increasing rigour, resistance from the disenfranchised - and increasingly disadvantaged - majority intensified. Many (and eventually most) of them demanded non-discriminatory and wholly representative government in a non-racial unitary state, tenets diametrically opposed to those of apartheid. Although there were reappraisals and adaptations on both sides as time passed, the ideological chasm remained apparently unbridgeable until relatively recently.
- [9] The clash of ideologies not only resulted in strife and conflict but, as the confrontation intensified, the South African government of the day - and some of the self-governing and "independent" territories spawned by apartheid - became more and more repressive. More particularly from 1976 onwards increasingly harsh security measures gravely eroded civil liberties. The administration of urban black residential areas and most "homeland" administrations fell into disarray during the following decade. The South African government, backed by a powerful security apparatus operating with sweeping emergency powers, assumed strongly centralised and authoritarian control of the country.
- [10] Then, remarkably and in the course of but a few years, the country's political leaders managed to avoid a cataclysm by negotiating a largely peaceful transition from the rigidly controlled minority regime to a wholly democratic constitutional dispensation. After a long history of "deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination", the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government and the universal enjoyment of fundamental human rights. That commitment is expressed in the preamble to the Interim Constitution by an acknowledgement of the:

... need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

With this end in view the IC:

... provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

- [11] Following upon exploratory and confidential talks across the divide, the transitional process was formally inaugurated in February 1990, when the then government of the Republic of South Africa announced its willingness to engage in negotiations with the liberation movements. Negotiations duly ensued and persevered, despite many apparent deadlocks. Some of the “independent homeland” governments gave their support to the negotiation process. Others did not but were overtaken by the momentum of the ensuing political developments and became part of the overall transition, unwillingly or by default.
- [12] One of the deadlocks, a crucial one on which the negotiations all but foundered, related to the formulation of a new constitution for the country. All were agreed that such an instrument was necessary and would have to contain certain basic provisions. Those who negotiated this commitment were confronted, however, with two problems. The first arose from the fact that they were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage. The second problem was the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and the insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement. The government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposition side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution: neither they, and certainly not the government of the day, had any claim to the requisite mandate from the electorate.
- [13] The impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle. What was no less important in the political climate of the time was that it enabled them to keep faith with their respective constituencies: those who feared engulfment by a black majority and those who were determined to eradicate apartheid once and for all. In essence the settlement was quite simple. Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But - and herein lies the key to the resolution of the deadlock - that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and

declare whether the new constitution indeed complied with the guidelines before it could come into force.

3 *Legal context and terminology*

[14] The settlement was ultimately concluded by the negotiating parties in November 1993. Shortly thereafter and pursuant thereto the South African Parliament duly adopted the Interim Constitution. Although the formal date of commencement of the IC was 27 April 1994 (a date agreed upon in advance by the negotiating parties), its provisions relating to the election of the transitional national legislature came into operation earlier.

[15] The importance of the deadlock-breaking agreement is highlighted by the preamble to the IC which, in its second paragraph, characterises the Constitutional Principles as “a solemn pact” in the following terms:

AND WHEREAS in order to secure the achievement of this goal, 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.

It is also clear from the language that the Constitutional Principles constitute the formal record of the “solemn pact”. They are contained in IC sch 4, which is incorporated by a reference under IC 71(1)(a). Although they are numbered from I to XXXIV¹² and are often referred to as the 34 Constitutional Principles, they list many more requirements than that. Henceforth they will be referred to collectively as the “CPs” and individually as “CP I” and so on. The wording and interpretation of the CPs will be discussed later; what is of importance at this stage is to note that they are acknowledged by the preamble to be foundational to the new constitution. As will be shown shortly, they are also crucial to the certification task with which the Court has been entrusted.

[16] IC ch 5, headed “The Adoption of the New Constitution”, fixes the basic framework and rules for the drafting exercise. First, in IC 68(1), it provides as follows:

The National Assembly and the Senate, sitting jointly for the purposes of this Chapter, shall be the Constitutional Assembly.

The body thus created, the Constitutional Assembly, will hereafter be referred to as the “CA”. In terms of IC 68(2), read with IC 68(3) and IC 73(1), the CA had to commence its task within seven days from the first sitting of the Senate and draft and adopt a new constitutional text within two years of the first sitting of the National Assembly (the “NA”). For such adoption IC 73(2) required a majority of at least two-thirds of all the members of the CA. The succeeding subsections of IC 73 make detailed provision for what transpires if the requisite majority is not obtained. In the event, such majority was indeed obtained and no more need be said about the alternative mechanisms. The constitution which

the CA adopted is formally titled the “Constitution of the Republic of South Africa, 1996” and will hereafter be referred to as the “New Text” or the “NT”. Its individual provisions will be identified by the prefix “NT”.

- [17] IC ch 5 then addresses the issue of certification. It will be recalled that the “solemn pact” envisaged independent determination of the question whether the new constitutional text complies with the CPs. Accordingly IC 71(2) reads as follows:

The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a).

It should be emphasised that the subsection requires that “all” the provisions be certified as complying with the CPs. Precisely what that entails will be dealt with later. Suffice it at this stage to make two points. First, that this Court’s duty - and hence its power - is confined to such certification. Second, certification means a good deal more than merely checking off each individual provision of the NT against the several CPs.

- [18] The provisions of IC 71(3), although not directly prescribed by the “solemn pact”, form a logical additional safeguard, and warrant quotation:

A decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.

Once this Court has certified a text in terms of IC 71(2) that is the end of the matter and compliance or non-compliance thereof with the CPs can never be raised again in any court of law, including this Court. That casts an increased burden on us in deciding on certification. Should we subsequently decide that we erred in certifying we would be powerless to correct the mistake, however manifest.

- [19] One then turns to IC ch 7 to complete the survey of the constitutional provisions which give effect to the “solemn pact”. That chapter deals with the judicial authority in the Republic. Among other things, it established two new organs of state, namely this Court and the Judicial Service Commission. For present purposes it is sufficient to observe that the appointment and dismissal mechanisms and the composition and powers of those two bodies constitute an attempt to create a sufficient safeguard that the decision regarding compliance of the NT with the CPs would be impartial.

4 *Adoption of the new text by the constitutional assembly*

- [20] The CA duly commenced its deliberations and all but one of the political parties represented in Parliament participated throughout. Numerous public and private sessions were held and a wide variety of experts on specific topics were consulted on an ongoing basis. In response to an intensive country-wide information campaign, including public meetings and open invitations to the general public, the CA also received numerous representations, both oral and written. Although the final text concerning some contentious issues was drafted only shortly before adoption of the NT, the CA had throughout its deliberations issued interim reports containing progressive drafts of the text and of alternative proposals on outstanding provisions. In the result political parties and other interested bodies or persons were kept up to date and had ample time to consider possible grounds for objecting to certification.
- [21] On 8 May 1996 the CA adopted the NT by a majority of some 86 percent of its members. Two days later the Chairperson of the CA, acting in accordance with rule 15 of the Rules of the Constitutional Court, transmitted the draft to this Court, certifying (i) that it had been adopted by the requisite majority, and (ii) that it complied with the CPs. At the same time he requested the Court to perform its certification functions in terms of IC 71(2).

5 ***Procedure adopted by the court***

5.1 *Directions*

- [22] The President of the Court, considering it to be in the national interest to deal with the matter as thoroughly yet expeditiously as possible, determined that both written and oral representations would be received and fixed 1 July 1996 as the date for the commencement of oral argument. On Monday 13 May 1996 he issued detailed directions, including a timetable, for its disposal. The directions included provision for written argument on behalf of the CA to be lodged with the Court and invited the political parties represented in the CA that wished to submit oral argument to notify the Court and to lodge their written grounds of objection. Although there was no legal provision for anyone else to make representations, because of the importance and unique nature of the matter, the directions also invited any other body or person wishing to object to the certification of the NT to submit a written objection. The directions required objectors to specify their grounds of objection and to indicate the CP allegedly contravened by the NT. The Court, through the good offices of the CA, also published notices (in all official languages) inviting objections and explaining the procedure to be followed by prospective objectors. Each written objection was studied and, if it raised an issue germane to the certification exercise which had not yet been raised, detailed written argument was invited.

...

5.2 *Objections*

[24] In the event, notices of objection, written representations and oral argument were submitted on behalf of five political parties.²¹ Objections were also lodged by or on behalf of a further 84 private parties. The political parties and the CA as well as 27 of the other bodies or persons were afforded a right of audience. In deciding whom to invite to present oral argument, we were guided by the nature, novelty, cogency and importance of the points raised in the written submissions. Interest groups and individuals propounding a particular contention were permitted to submit argument jointly notwithstanding the absence of a formal link between them. The underlying principle was to hear the widest possible spectrum of potentially relevant views...

5.3 *Oral Argument*

[25] Hearings commenced on Monday 1 July 1996 and continued until Thursday 11 July 1996. Individual objectors were heard in person; otherwise representation was permitted through persons ordinarily entitled to appear before the Court or through a duly authorised member of the organisation concerned. The objections were divided into broadly associated topics and in respect of each, counsel for the CA were afforded the right to open the debate; each objection was then heard and the CA replied. On the last day, after all the objections had been traversed, the Court heard argument on behalf of the CA and of the DP, the IFP and the NP on issues which the Court itself required to be traversed. At the same time everyone who had submitted oral argument and wished to make further submissions was afforded an opportunity to do so. In the process all relevant issues were fully canvassed in argument.

6 *The nature of the court's certification function*

[26] Notwithstanding publication of the directions by the President, in which the issues were identified, there remained considerable misunderstanding about the Court's functions and powers in relation to certification of the NT. As a result many objections - and even some of the oral arguments - were misdirected. Apparently, therefore, there is a risk that the tenor and import of this judgment may be misunderstood by some readers unless the more egregious misapprehensions are resolved.

[27] First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of

political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business.

[28] Nor do we have any power to comment upon the methodology adopted by the CA, unless and to the extent that it may amount to a breach of IC ch 5. No such infringement has been alleged, the objections being confined to complaints that submissions to it were ignored by the CA, that its deliberations at times lacked transparency, and the like. Even if such complaints were to be well-founded, which we are manifestly neither legally empowered nor practically able to determine, they would remain irrelevant to our task.

[29] There was also considerable confusion about the comparison the Court had to conduct in the performance of its duty under IC 71(2). That subsection is in itself quite unequivocal; and read in the context discussed above, there can be no doubt at all that the comparison we have to make is between the NT and the CPs. In general, and subject to an important proviso relating to CP XVIII.2, which is discussed in detail later, differences between the NT and the IC are not germane to the certification exercise the Court has to perform. It may be that reference to the IC is of assistance in trying to ascertain the meaning of a word or phrase in either the NT or the CPs, but it is generally of no consequence that some or other provision in the IC has been omitted from the NT, or has been reproduced in a different form. Provided it remained within the boundaries set by the CPs, the CA was fully entitled to do what it wished with any precedent in the IC. That is not only clear from the provisions of IC ch 5, but is inherent in the "solemn pact". The IC was expressly intended to provide "a historic bridge between the past of a deeply divided society ... and a future founded on the recognition of human rights ..." and to facilitate the "continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution". Compiled as it was by the un-mandated negotiating parties, it has no claim to lasting legitimacy or exemplary status. The CA, composed of the duly mandated representatives of the electorate, was entrusted with the onerous duty of devising a new constitution for the country, unfettered by the provisions of the IC other than those contained in the CPs.

[30] It should also be emphasised that, provided there is due compliance with the prescripts of the CPs, this Court is not called upon to express an opinion on any gaps in the NT, whether perceived by an objector or real. More specifically, there can be no valid objection if the NT contains a provision which in principle complies with the requirements of the CPs, or a particular CP, but does not spell out the details, leaving them to the legislature to flesh out appropriately later. Provided

the criteria demanded by the CPs are expressed in the NT, it is quite in order to adopt such a course. The subsequent legislation will be justiciable and any of its provisions that do not come up to the constitutionally enshrined criteria will be liable to invalidation. Here it is important to note that the CPs are principles, not detailed prescripts.

7 *Overview of the certification decision*

- [31] Before becoming involved in the detailed analysis of the objections to the certification of the NT, it is necessary to make a general observation. It is true we ultimately come to the conclusion that the NT cannot be certified as it stands because there are several respects in which there have been non-compliance with the CPs. But one must focus on the wood, not the trees. The NT represents a monumental achievement. Constitution making is a difficult task. Drafting a constitution for South Africa, with its many unique features, is all the more difficult. Having in addition to measure up to a set of predetermined requirements greatly complicates the exercise. Yet, in general and in respect of the overwhelming majority of its provisions, the CA has attained that goal.

8 **INTERPRETATION OF THE CONSTITUTIONAL PRINCIPLES**

8.1 *General approach*

- [32] It is necessary to underscore again that the basic certification exercise involves measuring the NT against the CPs. The latter contain the fundamental guidelines, the prescribed boundaries, according to which and within which the CA was obliged to perform its drafting function. Because of that pivotal role of the CPs their interpretation forms the logical starting point for the certification exercise.
- [33] In the light of the background described and in the context discussed above, the CPs have to be applied and interpreted along the following lines.
- [34] The CPs must be applied purposively and teleologically to give expression to the commitment “to create a new order” based on “a sovereign and democratic constitutional state” in which “all citizens” are “able to enjoy and exercise their fundamental rights and freedoms”.
- [35] The CPs must therefore be interpreted in a manner which is conducive to that objective. Any interpretation of any CP which might impede the realisation of this objective must be avoided.
- [36] The CPs must not be interpreted with technical rigidity. They are broad constitutional strokes on the canvas of constitution making in the future.

- [37] All 34 CPs must be read holistically with an integrated approach. No CP must be read in isolation from the other CPs which give it meaning and context.
- [38] It accordingly follows that no CP should be interpreted in a manner which involves conflict with another. The lawmaker intended each of the CPs to live together with the others so as to give them life and form and nuance.
- [39] There is a distinction to be made between what the NT may contain and what it may not. It may not transgress the fundamental discipline of the CPs; but within the space created by those CPs, interpreted purposively, the issue as to which of several permissible models should be adopted is not an issue for adjudication by this Court. That is a matter for the political judgment of the CA, and therefore properly falling within its discretion. The wisdom or correctness of that judgment is not a matter for decision by the Constitutional Court. The Court is concerned exclusively with whether the choices made by the CA comply with the CPs, and not with the merits of those choices.
- [40] What follows logically from this is that it is quite unnecessary for the CA to repeat the same constitutional structures and protections which are contained in the IC. Variations and alternatives, additions and even omissions are legitimate as long as the discipline enjoined by the CPs is respected.
- [41] The test to be applied is whether the provisions of the NT comply with the CPs. That means that the provisions of the NT may not be inconsistent with any CP and must give effect to each and all of them.
- [42] When testing a particular provision or provisions of the NT against the provisions of the CPs it is necessary to give to the provision or provisions of the NT a meaning. More than one permissible meaning may sometimes reasonably be supported. On one construction the text concerned does not comply with the CPs, but on another it does. In such situations it is proper to adopt the interpretation that gives to the NT a construction that would make it consistent with the CPs.
- [43] Such an approach has one important consequence. Certification based on a particular interpretation carries with it the implication that if the alternative construction were correct the certification by the Court in terms of IC 71 might have been withheld. In the result, a future court should approach the meaning of the relevant provision of the NT on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances. If it were otherwise, an anomalous and unintended consequence would follow. A court of competent jurisdiction might in the future give a meaning to the relevant part of the NT which would have made that part of the NT not certifiable in terms of IC 71 at the time of the certification process, but

there would have been no further opportunity in the interim to refuse a certification of the NT on that ground. This kind of anomaly must be avoided - and will be - if courts accept the approach which we have suggested in this paragraph.

8.2 *Structural compliance*

[44] If the CPs are approached in the way we have indicated in the preceding paragraphs of this judgment, two questions arise. First, are the basic structures and premises of the NT in accordance with those contemplated by the CPs? If such basic structures and premises do not comply with what the CPs contemplate in respect of a new constitution, certification by this Court would have to be withheld. If the basic structures and premises of the NT do indeed comply with the CPs then, and then only, does the second question arise. Do the details of the NT comply with all the CPs? If the answer to the second question is in the negative, certification by the Constitutional Court must fail because the NT cannot properly be said to comply with the CPs.

[45] In order to answer the first question it is necessary to identify what are indeed the basic structures and premises of a new constitutional text contemplated by the CPs. It seems to us that fundamental to those structures and premises are the following:

- (a) a constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary;
- (b) a democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular elections;
- (c) a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness;
- (d) the need for other appropriate checks on governmental power;
- (e) enjoyment of all universally accepted fundamental rights, freedoms and civil liberties protected by justiciable provisions in the NT;
- (f) one sovereign state structured at national, provincial and local levels, each of such levels being allocated appropriate and adequate powers to function effectively;
- (g) the recognition and protection of the status, institution and role of traditional leadership;

- (h) a legal system which ensures equality of all persons before the law, which includes laws, programmes or activities that have as their objective the amelioration of the conditions of the disadvantaged, including those disadvantaged on grounds of race, colour or creed;
- (i) representative government embracing multi-party democracy, a common voters' roll and, in general, proportional representation;
- (j) the protection of the NT against amendment save through special processes;
- (k) adequate provision for fiscal and financial allocations to the provincial and local levels of government from revenue collected nationally;
- (l) the right of employers and employees to engage in collective bargaining and the right of every person to fair labour practices;
- (m) a non-partisan public service broadly representative of the South African community, serving all the members of the public in a fair, unbiased and impartial manner; and
- (n) security forces required to perform their functions in the national interest and prohibited from furthering or prejudicing party political interests.

[46] An examination of the NT establishes that it satisfies the basic structures and premises of the new constitution contemplated by the applicable CPs.

[47] Having found that the NT complies with the structural guidelines drawn by the CPs, we turn to consider the second question posed above. Do the details of the NT comply with the CPs? ...

9 CENTRAL GOVERNMENT ISSUES

9.1 *Immunising legislation from constitutional scrutiny* *NT 241(1)*

[149] NT 241(1) provides that the provisions of the LRA shall, despite the provisions of the Constitution, remain valid until they are amended or repealed. This provision of the NT is objected to on the grounds that it is in conflict with CP IV, which provides that the Constitution shall be supreme, and CPs II and VII, which provide that the fundamental rights contained in the Constitution shall be justiciable. The purpose of NT 241(1) seems clear. The provisions of the LRA are to remain valid and not to be subject to constitutional review until they are amended or

repealed. This section is in conflict with the CPs. If CPs II, IV and VII are read together, it is plain that statutory provisions must be subject to the supremacy of the Constitution unless they are made part of the Constitution itself. If that route is followed, the provisions must comply with the CPs and must be subject to amendment by special procedures as contemplated by CP XV. This is not the route adopted in NT 241(1). Alternatively, if the provisions are not part of the Constitution, they must be subject to constitutional review as contemplated by CPs II and VII. If this were not the case, the CA would have been entitled to shield any number of statutes from constitutional review. This could not have been the intention of the drafters of the CPs. NT 241(1) clearly intends to protect the provisions of the LRA from constitutional review without making it part of the Constitution. The section is not in compliance with the CPs.

NT sch 6 s 22(1)

[150] NT sch 6 s 22(1)(b) provides that the provisions of the Promotion of National unity and Reconciliation Act 34 of 1995, as amended,¹⁰⁷ are valid. Although this is a slightly different formulation from that adopted in NT 241(1), it nevertheless seeks to achieve the same goal, exempting the named statute from constitutional review. For the reasons given above, neither is this provision in compliance with the CPs. However, NT sch 6 s 22(1)(a) is not in breach of the CPs. This provision adds the text of the epilogue of the IC to the text of the NT. As such, that provision is rendered part of the NT and subject to constitutional amendment in the ordinary course. It was not argued and it could not have been argued that the text of the epilogue was in breach of the CPs on any other ground.

9.2 *Amending the constitution*

[151] Two related objections were lodged with regard to the entrenchment of the provisions of the NT. The first relates to procedures for the amendment of the NT as prescribed in NT 74 and the second concerns the entrenchment of the Bill of Rights in the NT.

9.3 *Amendment of Constitutional Provisions: NT 74*

[152] The issue is whether the provisions of NT 74 comply with the requirements of CP XV, which prescribes “special procedures involving special majorities” for amendments to the NT. The objection is that NT 74 provides for “special majorities” but not for “special procedures”. It therefore becomes necessary to determine what is meant by “special procedures involving special majorities”.

[153] It is clear that CP XV makes a distinction between procedures and majorities involved in amendments to ordinary legislation, on the one hand, and to constitutional provisions on the other. Its purpose is obviously to secure the NT, the “supreme law of the land”, against

political agendas of ordinary majorities in the national Parliament. It is appropriate that the provisions of the document which are foundational to the new constitutional state should be less vulnerable to amendment than ordinary legislation. The requirement of “special procedures involving special majorities” must therefore necessarily mean the provision of more stringent procedures as well as higher majorities when compared with those which are required for other legislation.

[154] NT 74 must be contrasted with NT 53(1), which makes provision for amendments to ordinary legislation. The amendment of a constitutional provision requires the passing of a bill by a two-thirds majority of all the members of the NA. NT 53(1) deals with amendments to ordinary legislation (other than money bills). It requires that “a majority of the members of the National Assembly must be present before a vote may be taken on a bill or an amendment to a bill”¹¹² and that before a vote may be taken on any other question before the NA, at least one-third of the members must be present.¹¹³ Finally, it provides that all questions before the NA are decided by a majority of the votes cast.

[155] There is another form of entrenchment with regard to NT 1 and NT 74(2), where the amending provision must be supported by a majority of 75 percent of the members of the NA. Special procedures are invoked where an amendment affects the NCOP, provincial boundaries, powers, functions or institutions or deals with a provincial matter. Then the amendment must, in addition to the two-thirds majority of the members of the NA, be approved by the NCOP, supported by a vote of at least six of the provinces. Where the bill concerns only a specific province or provinces, the NCOP may not pass it unless it has been approved by the relevant provincial legislature or legislatures.

[156] The two-thirds majority of all members of the NA which is prescribed for the amendment of an ordinary constitutional provision is therefore a supermajority which involves a higher quorum.¹¹⁸ No special formalities are prescribed. We are of the view that, in the context of the CPs, the higher quorum is an aspect of the “special majorities” requirement and cannot be regarded as part of “special procedures”. It is of course not our function to decide what is an appropriate procedure, but it is to be noted that only the NA and no other House is involved in the amendment of the ordinary provisions of the NT; no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required. We consider that the absence of some such procedure amounts to a failure to comply with CP XV.

9.4 *Entrenchment of the Bill of Rights*

[157] CP II requires that:

all universally accepted rights, freedoms and civil liberties ... shall be provided for and protected by entrenched and justiciable provisions in the Constitution.

The complaint is that the provisions of the Bill of Rights contained in NT ch 2 do not enjoy the protection and entrenchment required by CP II. In particular there is nothing in the NT which elevates the level of protection of the Bill of Rights above that afforded the general provisions of the NT.

[158] In defence of the NT it was argued that the relevant provisions enjoy the requisite protection and entrenchment and that CP II is satisfied once those rights, freedoms and civil liberties are placed beyond the reach of ordinary legislative procedures and majorities, as has been done in the NT.

[159] We do not agree that CP II requires no more than that the NT should ensure that the rights are included in a constitution the provisions of which enjoy more protection than ordinary legislation. We regard the notion of entrenchment “in the Constitution” as requiring a more stringent protection than that which is accorded to the ordinary provisions of the NT. The objection of non-compliance with CP II in this respect therefore succeeds. In using the word “entrenched”, the drafters of CP II required that the provisions of the Bill of Rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgement. A two-thirds majority of one House does not provide the bulwark envisaged by CP II. That CP does not require that the Bill of Rights should be immune from amendment or practically unamendable. What it requires is some “entrenching” mechanism, such as the involvement of both Houses of Parliament or a greater majority in the NA or other reinforcement, which gives the Bill of Rights greater protection than the ordinary provisions of the NT. What that mechanism should be is for the CA and not for us to decide.

...

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995**

CHASKALSON P:

[1] This case involves fundamental questions of constitutional law. At issue are matters of grave public moment concerning the imminent local government elections. We would have preferred more time for consideration of these questions and the formulation of our views. Time does not permit that however. Because of the urgency of the matter and its possible impact on the local government elections there is a pressing need to announce our conclusions and basic reasoning within the shortest possible time.

1 Introduction

[2] The case arises from a dispute between the Executive Council of the Western Cape and the national government relating to the validity of amendments to the Local Government Transition Act (the "Transition Act") **[all foot notes omitted]**. These amendments were effected by the President by proclamation purporting to act in terms of powers vested in him under the Transition Act. The validity of the proclamations embodying the amendments was challenged on constitutional and non-constitutional grounds.

[3] The constitutional challenge was lodged with the Registrar of this Court at the end of June 1995 with a request that it be dealt with as a matter of urgency. It was said that if the dispute was not resolved promptly the local government elections within the Cape Town metropolitan area could not be held on the date planned, namely 1 November 1995. All the parties asked us to deal with the matter as one of urgency. It was set down for hearing on 16 August 1995 (the term commenced on 15 August) and directions were given in terms of Rule 17(5) for the speedy disposal of the preparatory phases of the case.

[4] A simultaneous challenge on non-constitutional grounds, seeking to review the validity of the proclamations as an abuse of the authority vested in the President, was launched in the Cape Provincial Division of the Supreme Court (the "CPD"). The matter was dealt with as one of urgency and on 11 August 1995 the CPD (per Conradie J, Kühn J concurring) dismissed the case.

[5] The relief sought by the Applicants in their original notice of motion to this Court was for an order for the following:

* All the footnotes are omitted.

- 1 Granting them direct access to this Court in terms of section 100(2) of the Constitution read with Rule 17, declaring unconstitutional certain amendments to the Transition Act effected by Proclamations R 58 of 7 June 1995 and R 59 of 8 June 1995 (the “Proclamations”), and the Proclamations themselves.
- 2 Setting aside the appointment of the Fourth and Fifth Respondents as members of the Provincial Committee for Local Government for the Western Cape Province (the “Committee”) which had been effected pursuant to Proclamation R 58 and reinstating the Fourth and Fifth Applicants as members of the Committee (which had been effected by the Third Applicant prior to the enactment of the Proclamations).
- 3 Directing that the First, Second and Third Respondents be jointly and severally liable for the costs of this application and that if the Fourth and Fifth Respondents opposed the application that all the Respondents be jointly and severally liable for such costs.

[6] Section 245(1) of the Constitution provides that Until elections have been held in terms of the Local Government Transition Act, 1993, local government shall not be restructured otherwise than in accordance with that Act. The Transition Act was assented to on 20 January 1994, approximately three months before the Constitution came into force. It provides the machinery for the transition from a racially based system of local government to a non-racial system. It establishes the process to be followed in order to reach this goal, a process which was to commence when the Act came into force on 2 February 1994, and to continue until the holding of the first non-racial local government elections which would take place on a date to be promulgated by the Minister of Local Government in the government of national unity.

[7] The Constitution itself makes provision for the complex issues involved in bringing together again in one country, areas which had been separated under apartheid, and at the same time establishing a constitutional state based on respect for fundamental human rights, with a decentralised form of government in place of what had previously been authoritarian rule enforced by a strong central government. On the day the Constitution came into force fourteen structures of government ceased to exist. They were the four provincial governments, which were non-elected bodies appointed by the central government, the six governments of what were known as self governing territories, which had extensive legislative and executive competences but were part of the Republic of South Africa, and the legislative and executive structures of Transkei, Bophuthatswana, Venda and Ciskei which according to South African law had been independent states. Two of these States were controlled by military regimes, and at the time of the coming into force of the new

Constitution two were being administered by administrators appointed by the South African authorities. The legislative competences of these fourteen areas were not the same. Laws differed from area to area, though there were similarities because at one time or another all had been part of South Africa. In addition the Constitution was required to make provision for certain functions which had previously been carried out by the national government, to be transferred as part of the process of decentralisation to the nine new provinces which were established on the day the Constitution came into force, and simultaneously for functions that had previously been performed by the fourteen executive structures which had ceased to exist, to be transferred partly to the national government and partly to the new provincial governments which were to be established. All this was done to ensure constitutional legislative, executive, administrative and judicial continuity.

- [8] The mechanism for this process is contained in Chapter 15 of the Constitution in a series of complex transitional provisions dealing with the continuation of laws, and the transitional arrangements for legislative authorities, executive authorities, public administration, the courts, the judiciary, the ombudsman, local government, the transfer of assets and liabilities and financial matters such as pensions and the like. The dispute in the present case depends on the interpretation of some of these provisions. I mention the complexity of the process because it is relevant to arguments addressed to us in regard to how we should interpret the relevant provisions.
- [9] Section 235(8) of the Constitution empowered the President to assign the administration of certain categories of laws to "competent authorities" within the jurisdiction of the various provinces who, by definition, were authorities designated by the Premiers. Some time after the Constitution came into force the President, purporting to act in terms of section 235(8), assigned the executive authority for the administration of the Transition Act to provincial administrators to be designated by the Premiers of each of the provinces. Section 235(8) also empowered the President when he assigned the administration of a law, or at any time thereafter, to amend or adapt such law in order to regulate its application or interpretation. This was permissible "to the extent that [the President] considers it necessary for the efficient carrying out of the assignment." When the President purported to assign the administration of the Transition Act to administrators in the provinces, he also purported to amend the law in terms of his powers under section 235(8). No objection was made by the Applicants at that time to the assignment or to the amendments to the Transition Act. In fact, the Third Applicant claims to be the Administrator in the Western Cape by virtue of such an assignment.
- [10] The process of restructuring of local government under the Transition Act proceeded and on 23 November 1994 Parliament amended the Act to include a provision under which the President was vested with the power to amend the Act by proclamation. He could do this provided the

Committees on Provincial and Constitutional Affairs of the Assembly and the Senate consented to the amendments. There was also a requirement under which the amendments had to be tabled in Parliament and would fall away if Parliament passed a resolution disapproving of them. Once again no objection seems to have been taken at the time by the Applicants to the constitutionality of this amendment. A number of proclamations were passed in terms of this provision, and no challenge was made prior to June 1995 to their constitutionality.

2 Factual Background

- [11] On the day that the assignment of the administration of the Transition Act and the consequential amendments were made (15 July 1994), the Second Applicant (the Premier of the Western Cape) designated the Third Applicant (the Minister of local government in the Western Cape) as the competent authority for the administration of the Transition Act for the Western Cape Province. In terms of the Transition Act, the Administrator's duties included the demarcation and delimitation of the Western Cape into areas of jurisdiction of transitional councils and transitional metropolitan sub-structures for the purposes of the local government elections anticipated to be held on 1 November 1995. Section 4(1) of the Transition Act required the Administrator to exercise any power conferred on him by the Act with the concurrence of the Provincial Committee, a body which (in terms of section 3(2) of the Transition Act) has to be "broadly representative of stakeholders in local government"; section 4(1) requires the Administrator to exercise any power conferred on him by the Transition Act with the concurrence of the Provincial Committee; and section 4(3) then provides that where they fail to concur, the matter is to be resolved by the Special Electoral Court.
- [12] The Transition Act as originally enacted provided that after the establishment of provincial government in a province members of a Provincial Committee would hold office during the pleasure of the Executive Council of that provincial government and that vacancies would be filled by the Executive Council. When the events which gave rise to the present dispute occurred, Mr A Boraine and Mr E Kulsen were members of the Committee. Kulsen resigned on 21 February 1995 and on 10 May 1995 the Third Applicant raised the question of Boraine's membership of the Committee with the First Applicant, which resolved to delegate to the Third Applicant the power to dismiss Boraine and to fill the two vacancies. The Third Applicant exercised that power by advising Boraine on 11 May 1995 that his membership was being terminated and by appointing the Fourth and the Fifth Applicants in the place of Boraine and Kulsen on 17 May 1995. The reconstituted Committee met on 23 May 1995 and four of its six members (including the Fourth and Fifth Applicants) approved the demarcation proposal of the Third Applicant. The other two members of the Committee (and Boraine) were opposed to the Third Applicant's

demarcation proposal. His actions made it possible for him to avoid referring to the Special Electoral Court the dispute which would otherwise have arisen between him and the Committee with regard to his demarcation proposal. Intensive negotiations ensued between the major political parties involved and also between representatives of the provincial and national government authorities concerned. It proved impossible to find common ground, however. In the result the reaction of the central government was for the First Respondent to use his powers under section 16A of the Transition Act to promulgate the Proclamations.

[13] By Proclamation R 58 of 7 June 1995 the First Respondent amended section 3(5) of the Transition Act by transferring the power to appoint and dismiss Committee members from the provincial to the national government. The amendment also served to nullify the appointment by the Third Applicant of the Fourth and Fifth Applicants. The next day the First Respondent amended section 10 of the Transition Act by Proclamation R 59. Before this amendment section 10 of the Transition Act had provided the Administrator with wide powers to make proclamations, *inter alia*, relating to the demarcation of local government structures and the division of such structures into wards. Proclamation R 59 made section 10 subject to the provisions of a new subsection (4), which effectively invalidated Provincial Committee decisions of the kind in issue taken between 30 April and 7 June. Section 2 of that Proclamation then rendered the amendment explicitly retroactive. The combined effect of the Proclamations was to nullify the appointment of the Fourth and Fifth Applicants as members of the Committee retroactively and also to nullify the Third Applicant's demarcation proposal which the Committee had approved on 23 May 1995. On 15 June 1995 the Second Respondent, acting in consultation with the Third Respondent and after consultation with the Second Applicant, appointed the Fourth and Fifth Respondents as members of the Committee to replace Boraine and Kulsén.

[14] That sequence of events led to the Applicants challenging the Proclamations before the CPD and in this Court. This set in motion a chain of events which has culminated in the Applicants challenging the constitutional validity of section 16A of the Transition Act, and the constitutional validity of the assignment of the administration of the Act to provincial administrators. Not only do the Applicants put in issue the validity of the Presidential proclamation from which the Third Applicant derives his own authority, but in so doing and in challenging the validity of section 16A they put in doubt the validity of everything that has been done under the Transition Act since 15 July 1994, including all the preparations that have been made for the holding of the elections which are scheduled to take place in most of the country on 1 November, barely a month from now.

...

3 Summary of Legal Argument before this Court

[19] In their founding affidavits the Applicants attacked the Proclamations on five separate grounds, in substance only one of which was relied upon in the first written argument lodged preparatory to the hearing. The argument that was persisted in was that the Proclamations were unconstitutional because they invaded the “functional or institutional integrity” of the Western Cape Province within the meaning of Constitutional Principle XXII, contained in Schedule 4 to the Constitution read with sections 74(1) and 232(4) thereof.¹¹ On the day before the hearing the Applicants sought to supplement their attack on the Proclamations by introducing an attack on the Proclamations on the grounds that they violated sections 61 and 62 of the Constitution and on the further ground that section 16A of the Transition Act was itself unconstitutional for its inconsistency with those sections of the Constitution.

...

[21] The Applicants’ augmented written argument, somewhat surprisingly, contained no express attack on the constitutionality of section 16A. At best there was an alternative submission, relegated to a footnote. The argument also did not deal with the possible application of section 235(8) of the Constitution. The Applicants’ augmented written argument, which consolidated all the grounds on which the Applicants at that stage relied, limited the attack on the Proclamations to three submissions. First, their alleged violation of Constitutional Principle XXII; second, their alleged subversion of sections 61 and 62(2) of the Constitution; and finally, that section 16A of the Transition Act, duly “read down” in accordance with section 232(3) of the Constitution so as to authorize only proclamations which do not violate Constitutional Principle XXII or subvert sections 61 and 62(2), renders the Proclamations *ultra vires* that section.

...

[23] Subsequent to the hearing this Court realised that there were questions regarding section 235(8) of the Constitution and related provisions which had not been addressed by counsel in their written or oral argument. These questions were of such importance that we considered it necessary to afford the parties an opportunity and the Court the benefit of debating them. The parties’ legal representatives were therefore urgently invited to canvass the particular issues at a further hearing set down on 14 September 1995. Having now had that further debate we are satisfied that the case ultimately turns on the resolution of five issues. They are (i) whether the Proclamations fall foul of Constitutional Principle XXII; (ii) whether they are invalidated by section 61 of the Constitution or (iii) by section 62(2) of the Constitution; (iv) whether section 16A of the Transition Act itself is unconstitutional; and (v) whether the Proclamations were nevertheless validly promulgated under section 235(8) of the Constitution. We proceed to consider each of those issues in turn.

...

4 The validity of Section 16A of the Local Government Transition Act

[50] Section 16A of the Transition Act provides:

- 1 The President may amend this Act and any Schedule thereto by proclamation in the Gazette.
- 2 No proclamation under subsection (1) shall be made unless it is approved by the select committees of the National Assembly and the Senate responsible for constitutional affairs.
- 3 A proclamation under subsection (1) shall commence on a date determined in such proclamation which may be a date prior to the date of publication of such proclamation.
- 4
 - (a) The Minister shall submit a copy of a proclamation under subsection (1) within 14 days after publication thereof to Parliament.
 - (b) If Parliament by resolution disapproves of any such proclamation or any provision thereof, such proclamation, or provision shall cease to be of force and effect but without prejudice to the validity of anything done terms of such proclamation or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such proclamation or such provision before it so ceased to be of force and effect.

[51] The legislative authority vested in Parliament under section 37 of the Constitution is expressed in wide terms - "to make laws for the Republic in accordance with this Constitution." In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.

[52] In the past our courts have given effect to Acts of parliament which vested wide plenary power in the executive. *Binga v Cabinet for South West Africa and Others* 1988 (3) SA 155(A) and *R v Maharaj* 1950 (3) SA 187(A) are examples of such decisions. They are in conformity with English law under which it is accepted that parliament can delegate power to the executive to amend or repeal acts of parliament. S. Wade and C. Forsyth, *Administrative Law*, pp. 863-864 (Clarendon Press,

Oxford, 7th ed. 1994). These decisions were, however, given at a time when the Constitution was not entrenched and the doctrine of parliamentary sovereignty prevailed. What has to be decided in the present case is whether such legislation is competent under the new constitutional order in which the Constitution is both entrenched and supreme. This requires us to consider the implications of the separation of powers under the Constitution, the "manner and form" provisions of sections 59, 60 and 61, the implications of the supremacy clause (section 4) and the requirement that parliament shall make laws in accordance with the Constitution (section 37).

- [53] In the United States of America, delegation of legislative power to the executive is dealt under the doctrine of separation of powers. Congress as the body in which all federal lawmaking power has been vested must take legislative decisions in accordance with the "single, finely wrought and exhaustively considered, procedure" laid down by the US Constitution, which requires laws to be passed bicamerally and then presented to the President for consideration for a possible veto. *In S v Chada* 462 US 919 (1983) per Burger CJ at 951. Delegation of legislative power within prescribed limits is permissible because, as the Supreme Court has said:

[w]ithout capacity to give authorizations of that sort we should have the anomaly of legislative power which in many circumstances calling for its exertion would be but a futility.

Per Hughes CJ in *Panama Refining Co. v Ryan* 293 US 388, 421 (1935). The delegation must not, however, be so broad or vague that the authority to whom the power is delegated makes law rather than acting within the framework of law made by Congress. This distinction was explained by Taft CJ in *Hampton & Co v United States* 276 US 394, 407 (1928)(quoting Ranney J in *Wilmington and Zanesville Railroad Co. v Commissioners*, 1 Ohio St. 77 (1852)) as follows:

The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

- [54] In Ireland, under the influence of the United States jurisprudence, the courts have adopted a similar approach. See the comments of McMahon J in the High Court in *Cityview Press Limited and Another v An Chomhairle Oiliuna and Others* [1980] IR 381. The Supreme Court, confirming the decision of McMahon J in the *Cityview Press* case, held that whilst parliament cannot delegate its power to make laws to the executive, it is competent for it to make laws under which a regulatory power is delegated to the executive. The test as to whether lawmaking or regulatory powers have been delegated is:

whether what is challenged as an unauthorised delegation of parliamentary power is more than the mere giving effect to principles and policies which are

contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. Per O'Higgins CJ, *supra*, at 395 et seq.

[55] The courts of some Commonwealth countries seem to take a broader view of the power to delegate legislative authority than the courts of the United States, and to permit parliament to delegate plenary law-making powers to the executive, including the power to amend Acts of parliament. In part this is due to the influence of English law and decisions of the Privy Council, and in part to the form of government in such countries. In the United States there is a clear separation of powers between the legislature and the executive. In Commonwealth countries there is usually a clear separation as far as the judiciary is concerned, but not always as clear a separation between the legislature and the executive. Many of the Commonwealth countries have followed the English system of executive government under which the head of the government is the Prime Minister, who sits in parliament and requires its support to govern. Although there is a separation of functions, the Prime Minister and the members of his or her cabinet sit in parliament and are answerable to parliament for their actions.

[56] The influence of English law is referred to by Dixon J in his judgment in the Australian High Court in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. & Meakes v Dignan* [1931] 46 CLR 73 at pages 101-102, in which the Court declined to follow the United States cases. In the same case, Evatt J (at page 114) drew attention to the differences in the form of government of Commonwealth countries and that of the United States, saying:

In dealing with the doctrine of "separation" of legislative and executive powers, it must be remembered that, underlying the Commonwealth frame of government, there is the notion of the British system of an Executive which is responsible to Parliament. That system is not in operation under the United States Constitution....This close relationship between the legislative and executive agencies of the Commonwealth must be kept in mind in examining the contention that it is the Legislature of the Commonwealth, and it alone, which may lawfully exercise legislative power.

In Australia, it seems to have been accepted that the Commonwealth parliament can delegate a legislative power to the executive and vest in the executive the power to make regulations which will take precedence over Acts of Parliament. That is what was done in *Dignan's* case which, in the context of subordinate legislation, was cited with approval by the Privy Council in *Attorney-General for Australia v The Queen* 1957 AC 288 at 315. In *Cobb & Co Ltd and Others v Kropp and Others* 1967 (1) AC 141 the Privy Council upheld a decision of the Supreme Court of Queensland finding that it was competent for the state legislature to vest in its Commissioner for Transport the power to impose taxes in the form of license fees on transport operators, as well as the power to determine the amount of the fees, which could be

made to vary between operator and operator. Queensland had a bi-cameral legislature and the Order in Council under which it was established provided that "all bills for appropriating any part of the public revenue for imposing any new rate tax or impost" should originate in the Legislative Assembly. It was held that the plenary powers vested in the Queensland legislature entitled it to vest this authority in the Commissioner for Transport. A similar decision had previously been given by the Privy Council in *Powell v Apollo Candle Company Ltd.* (1885) 10 AC 282, where a challenge to the levying of customs duties by the Governor of New South Wales under general empowering legislation was unsuccessful.

[57] Seervai in his work on the Indian Constitution deals at length with the Indian jurisprudence on the power of parliament to delegate legislative power to the executive. H. M. Seervai, *Constitutional Law of India*, vol. II, para. 22.1 et seq. (3d ed., 1983). He refers to various judgments and decisions of judges in the Supreme Court of India which in his view contradict each other and vacillate between on the one hand sanctioning a broad delegation of law-making power by parliament to the executive, and on the other, requiring such delegation of legislative power to be carried out within a policy framework prescribed by parliament. Seervai himself takes the view that under the Indian Constitution a legislature has the power to pass a law under which the executive is given the power to implement an Act and to modify its provisions to enable it to work smoothly. He states at paragraph 21.53 that:

[L]egislative power is not "property" to be jealously guarded by the legislature, but is a means to an end, and if the end is desired by the legislature and the difficulties in achieving that end cannot be foreseen, it is not only desirable but imperative that the power to remove difficulties should be entrusted to the executive Government which would be in charge of the day-to-day working of the law." (Citation omitted).

The cases referred to by Seervai were not available to us at the time this judgment was prepared, and in the limited time that we have had to prepare our judgments it was not feasible to make arrangements to procure copies of the judgments or to trace the development of the law in India since the publication of the third edition of his book in 1983.

[58] In Canada, under the influence of the Privy Council decision in *Hodge v The Queen* (1883) 9 AC 117 and *Shannon v Lower Mainland Dairy Products Board* [1938] AC 708, it seems to be accepted that parliament has wide powers of delegation. Hogg, *Constitutional Law of Canada* (3d ed. 1992) at paragraph 14.2, notes:

The difference between the Canadian and the American systems resides not only in the different language of the two constitutional instruments, but in Canada's retention of the British system of responsible government. The close link between the executive and the legislative branches which is entailed by the British system is utterly inconsistent with any separation of executive and legislative functions.

According to Hogg , although delegation of legislative power between parliament and provincial legislatures is not permitted, delegation of such power by parliament to the executive, “short of a complete abdication of its power”, is permissible. Supra paras. 14.2 and 14.3; see also, Finkelstein, *Laskin’s Canadian Constitutional Law*, vol. 1, pp. 42-46 (Carswell Student Edition, 5th ed. 1986). It is not clear what the Canadian Courts would regard as “a complete abdication of power”. In *Re Gray* (1918) SCR 150, as cited in Hogg, in which this statement was made, upheld wide powers to make laws vested in the Governor in Council. It was followed by the Supreme Court of Canada in *Reference Re Regulations (Chemical) Under War Measures Act* (1943) 1 DLR 248, where it was pointed out (at p. 253) that the Privy Council had laid down the principle that, in an emergency such as war, the autonomy of the Dominion to make laws for the peace, order and good government of the nation, in view of the necessities arising from the emergency, may “displace or overbear the authority of the Provinces” in areas which they would otherwise have had exclusive jurisdiction. These were war cases, and typically greater latitude is allowed to the legislature in such circumstances. Cf. *Dignan’s case* (supra) at 99; see also, *Re Manitoba Government Employers Association and Government of Manitoba* 79 DLR (3d) 1 at 15, which suggests that such broad delegations may not be permissible at other times. Hogg suggests that a possible exception to this rule is the federal taxing power because of the constitutional provisions requiring such legislation to originate in the House of Commons. He refers, at 344, to *In Re Agricultural Products Marketing Act* 84 DLR (3d) 257, in which such a challenge was raised but disposed of by the Supreme Court of Canada on the grounds that the disputed levies were not taxes but administrative charges. The majority of the Court, however, rejected the argument that the taxing power could not be delegated on the basis that if such a delegation were inconsistent with the relevant provisions of the Canadian Constitution, the Act under which the delegation was made should be treated as having impliedly amended them. *Id.*, per Pigeon J at 322. This is in accordance with the rule that an Act inconsistent with the constitution is to be regarded as amending the constitution unless the constitution prescribes special procedures for such amendments and those procedures have not been followed. *Kariapper v Wijesinha* [1968] AC 717(PC) at 742F. An argument along these lines would not be permissible under our Constitution because it prescribes special procedures for amendments. *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A). See also: *Attorney-General for New South Wales v Trethowan* [1932] AC 526 (PC) at 541; *The Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC) at 199.

- [59] The Canadian cases referred to in paragraph [58] were decided before the introduction of section 52 into the Canadian Constitution in 1982. This section provides that the Constitution shall be the supreme law and that legislation inconsistent with the Constitution shall be invalid.

Neither Hogg nor Finkelstein suggest that this has had any effect on the rule in *Hodge's* case or the cases that have followed it. Hogg takes the position that the Constitution was in any event supreme prior to the introduction of section 52, and that the amendment did no more than record what has always been accepted [Hogg para. 55.1]. But there is a difference between a constitutional order which limits Parliaments authority to make certain laws and binds Parliament to legislate according to certain procedures, and one which treats Parliament as supreme. Whatever the situation may be in Canada in the light of the Privy Council decisions and the terms of that country's constitution, we have to decide this issue in the light of the terms of our own Constitution.

[60] Whilst it seems to be accepted in most of the Commonwealth that parliament can delegate wide powers to the executive, the separation of powers as far as the judiciary is concerned has been strictly enforced, and the Privy Council has held to be invalid legislation which encroaches upon the judicial power. *Attorney General for Australia vThe Queen* (supra) and *Liyanage v The Queen* 1967 (1) AC 259 at 286C (an appeal from the Supreme Court of Ceylon). In *Liyanage's* case it was said that the power to make laws derived from the Constitution and had to be exercised in accordance with its provisions. Those provisions prevented parliament from issuing bills of attainder to the judiciary.

[61] This brief and somewhat limited survey of the law as it has developed in other countries is sufficient to show that where Parliament is established under a written constitution, the nature and extent of its power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history. Our history, like the history of Commonwealth countries such as Australia, India and Canada was a history of parliamentary supremacy. But our Constitution of 1993 shows a clear intention to break away from that history. The preamble to the Constitution begins by stating the "need to create a new order." That order is established in section 4 of the Constitution which lays down that:

- (1) This Constitution shall be the supreme law of the Republic and any law or Act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
- (2) This Constitution shall bind all legislative executive and judicial organs of the State at all levels of government".

Sub-section (2) is of particular importance in the present case.

[62] The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the

powers vested in it by the Constitution expressly or by necessary implication. Section 37 of the Constitution spells out what those powers are. It provides that:

The legislative authority of the Republic shall, subject to this Constitution vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution.

The supremacy of the Constitution is reaffirmed in section 37 in two respects. First, the legislative power is declared to be "subject to" the Constitution, which emphasises the dominance of the provisions of the Constitution over Parliament's legislative power, *S v Marwane* 1982(3) SA 717(A) at 747 H - 748 A, and secondly laws have to be made "in accordance with this Constitution." In paragraph [51] of this judgment we I pointed out why it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive. To do so is not inconsistent with the Constitution; on the contrary it is necessary to give efficacy to the primary legislative power that Parliament enjoys. But to delegate to the executive the power to amend or repeal Acts of Parliament is quite different. To hold that such power exists by necessary implication from the terms of the Constitution could be subversive of the "manner and form" provisions of sections 59, 60 and 61. Those provisions are not merely directory. They prescribe how laws are to be made and changed and are part of a scheme which guarantees the participation of both houses in the exercise of the legislative authority vested in Parliament under the Constitution, and also establish machinery for breaking deadlocks. There may be exceptional circumstances such as war and emergencies in which there will be a necessary implication that laws can be made without following the forms and procedures prescribed by sections 59, 60 and 61. Section 34 of the Constitution makes provision for the declaration of states of emergency in which provisions of the Constitution can be suspended. It is possible that circumstances short of war or states of emergency will exist from which a necessary implication can arise that Parliament may authorise urgent action to be taken out of necessity. A national disaster as a result of floods or other forces of nature may call for urgent action to be taken inconsistent with existing laws such as environmental laws. And there may well be other situations of urgency in which this type of action will be necessary. But even if this is so (and there is no need to decide this issue in the present case) the conditions in which section 16A were enacted fall short of such an emergency. There was, of course, urgency associated with the implementation of the Transition Act, but the Minister has regulatory powers under the Act, and legislation could have been passed to authorise the President to issue proclamations not inconsistent with the Act. Whether this could have included a power to amend other Acts of Parliament need not now be decided. An unrestricted power to amend the Transition Act itself cannot be justified on the grounds of necessity, nor can it be said to be a power which by necessary implication is granted by the Constitution to the President. Sections 59, 60 and 61 of the Constitution are part of an entrenched

and supreme Constitution. They can only be departed from where the Constitution permits this expressly [section 235 (8) is such a case] or by necessary implication. In the present case neither of these requirements is present.

[63] Insistence upon compliance with the manner and form provisions of the Constitution in these circumstances is not elevating form above substance. The authorisation of legislation such as section 16A allows control over legislation to pass from Parliament to the executive. Later this power could be used to introduce contentious provisions into what was previously uncontentious legislation. Assuming this is done at a time party A has a majority in the Assembly, but not in the Senate, it would be difficult for other parties to secure a resolution of Parliament which would be needed to invalidate the delegation. It would also render ineffective the special procedures prescribed by sections 60 and 61. A contention that this would be a consequence of the Assembly and the Senate having passed the legislation in the first place, would be of little solace to parties in the Senate in a situation in which the authorisation is given at a time when Party A has a majority in the Assembly and the Senate, but later loses its majority in the Senate. In such circumstances, it could block a resolution objecting to legislation enacted under the delegation which could never have been passed without such delegation.

[64] Mr Gauntlett on behalf of the Respondents placed considerable reliance on the fact -- which is also been mentioned in some of the Commonwealth judgments -- that Parliament retains control over the functionary to whom plenary legislative power is delegated and can withdraw it if the power is not exercised in accordance with its wishes. In the present case that element of control clearly exists, for the President can only legislate with the consent of the appropriate committees of both the Senate and the Assembly, on which there is multi-party representation, and Parliament can by resolution disapprove of the legislation made by the President, in which event it will cease to have validity. There is also the fact that the statute in issue in the present case is essentially a transitional provision, designed to manage the difficult and complicated transition to democratic local government for a limited period of time. The power vested in the President is a power to amend the Transition Act, which because of its far reaching implications would, even if section 16A were valid, have to be narrowly construed, *R v Secretary of State for Social Security, Ex Parte Britnell* 1991 (1) WLR 198 (HL), and would not necessarily include the power to make fundamental changes to the Act, *S v Mngadi and Others* 1986 (1) SA 526 (N)(but compare the judgment in the case on appeal *sub nom, Attorney-General, Natal v Mngadi and Others* 1989 (2) SA 13 (A) at 21C-F with 21H). These are all factors which could be relied upon to explain and justify the delegation of law-making power to the President in terms of section 16A. But if Parliament does not have the constitutional authority to delegate this power to the executive or to any other body, the reasonableness of the

delegation or the absence of objection is irrelevant. The only way in which Parliament can confer power on itself to act contrary to the Constitution is to amend the Constitution. And this was not done in the present case.

- [65] The Respondents placed considerable reliance on the fact that section 10 of the Transition Act vests extensive powers in the Administrator who is a provincial functionary. These powers include the power to modify or even repeal Acts of Parliament for the purpose of implementing decisions taken in terms of the Transition Act for the establishment and empowerment of transitional councils. This, they contend, is incorporated by reference through section 245 of the Constitution which requires the restructuring of local government to be carried out in accordance with the provisions of the Transition Act and impliedly sanctions the provisions of section 10 of that Act. Even if it is assumed that the provisions of section 10 of the Transition Act are sanctioned by section 245 of the Constitution (and there is no need to express any opinion on that issue) it does not follow that section 16A which is contained in a post-constitutional Act of Parliament was also sanctioned. The powers vested in the Administrator by section 10 of the Transition Act are limited to the making of "enactments not inconsistent with this [Transition] Act with a view to the transitional regulation of any matter relating to local government". It is essentially a regulatory power which, because of the conflicting provisions of various enactments which were given the force of law by section 229 of the Constitution, might have been needed in order to cut across the provisions of old laws which had not yet been repealed. Section 16A is quite different. It is a general power to amend the Transition Act itself. It is subject to no express limitation and can not be equated to the regulatory powers vested in the Administrators by section 10 of the Transition Act. Such a power cannot be inferred from section 245 of the Constitution.

**CONSTITUTIONAL COURT OF SOUTH AFRICA:
Case CCT26/97**

De Lange v Smuts NO and Others 1998 (3) SA 785*

ACKERMANN J:

[1] This matter concerns the correctness of a declaration of constitutional invalidity of subsection (3) of section 66 ("the subsection" or "section 66(3)") of the Insolvency Act 24 of 1936 ("the Insolvency Act") made by Conradie J in the Cape of Good Hope High Court, on 29 August 1997. The subsection reads as follows:

(3) If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book or document which he was summoned to produce, or if any person who may be interrogated at a meeting of creditors in terms of subsection (1) of section sixty-five refuses to be sworn by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the question fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of subsection (5).

[2] This declaration was made and referred to this Court for confirmation under section 172(2)(a) of the Constitution of the Republic of South Africa 1996 ("the 1996 Constitution"). At the request of the President, the Minister of Justice was represented at the hearing by counsel who addressed written and oral argument as to why the declaration ought not to be confirmed. The Association of Insolvency Practitioners of Southern Africa initially applied to be admitted as an *amicus curiae* in the proceedings but did not proceed with its application.

[3] The applicant was the only member of three close corporations ("the corporations") which were finally wound up on 15 December 1994. The second, third and fourth respondents are the liquidators, respectively, of the corporations. Various provisions of the Insolvency Act, including sections 64, 65 and 66 thereof, are, by section 416 of the Companies Act 61 of 1973 ("the Companies Act") made applicable, *mutatis mutandis*, in various ways to proceedings under section 414 and 415 of the latter Act, to the extent that they can be applied and are not inconsistent with its provisions.

[4] By section 66(1) of the Close Corporations Act 69 of 1984 ("the Close Corporations Act") the provisions of the aforementioned section 416 (as well as sections 414, 415 and various other provisions) of the Companies Act are made similarly applicable to the liquidation of a corporation in respect of any matter not specifically provided for in any other provision of the Close Corporations Act. Likewise the provisions

* All footnotes are omitted.

of section 39(2) of the Insolvency Act, to which reference will be made presently, are to be applied to the liquidation of a corporation. Save for the order made at the conclusion of this judgment, any reference hereinafter to a provision of the Insolvency Act must be understood, unless the contrary is stated, as a reference to such provision as incorporated into the Close Corporations Act in the above manner.

- [5] The applicant was summoned under section 64(2) of the Insolvency Act to attend the adjourned second meeting of creditors of the corporations on 13 and 14 January 1997. He was also required under section 64(3) to produce, amongst other things, the books of account and other financial records of the corporations. The applicant's interrogation under section 65 commenced on 14 January 1997. On that date application was made on behalf of the second, third and fourth respondents for the issue of a warrant committing the applicant to prison under section 66(3) on the grounds that he had, in breach of the injunctions of the subsection, failed to produce the books and documents he had been summoned to produce and that he had failed to answer questions lawfully put to him under section 65(1) fully and satisfactorily. The application was postponed for argument and thereafter the presiding officer (first respondent) issued a warrant on 22 February 1997 committing the applicant to prison. The warrant was therefore issued after the commencement of the 1996 Constitution on 4 February 1997 and accordingly this Constitution is the applicable one. Save to observe that the warrant was subsequently conditionally suspended and that the application which Conradie J ultimately heard was launched on 9 May 1997, it is unnecessary to deal with any of the intervening or other events.
- [6] In the application before Conradie J various orders were sought but only two were relevant. The one was for an order reviewing and setting aside the first respondent's decision to commit the applicant to prison. The grounds relied upon were not of a constitutional nature. The second was for an order declaring section 66(3) to be constitutionally invalid and on that ground to review and set aside the committal. The learned judge found that there was no merit in the applicant's non-constitutional review attack and in those circumstances correctly held that the issue of the constitutional invalidity of section 66(3) would, one way or the other, be dispositive of the case.
- [7] In the result the learned judge held that the subsection was invalid because of its inconsistency with section 12(1)(b) of the Constitution which guarantees the right "not to be detained without trial" and held further that the limitation of this right by the subsection could not be justified under section 36(1). Although he did not express himself explicitly on this issue, the general tenor of his judgment, and in particular his reliance on the judgments of this Court in *Bernstein and Others v Bester NO and Others* and *Nel v Le Roux NO and Others*, warrants the conclusion that Conradie J considered that, substantively, the "process in aid" which the subsection provides to compel

examinees, who are under a legal duty to do so, to testify or produce documents, was constitutionally unobjectionable. The thrust of the judgment went to determining whether the applicant had, for purposes of section 12(1)(b) of the Constitution, received a "trial"; the learned judge evidently assumed, in favour of the applicant, that committal to prison under section 66(3) constituted "detention". Conradie J held, in effect, that the only "trial" envisaged by section 12(1)(b) of the Constitution was a trial by a court of law.

- [8] Section 39(2) of the Insolvency Act provides that all meetings of creditors are to be presided over by the Master or by an officer in the public service, designated by the Master; or by a magistrate or by an officer in the public service designated by the magistrate. In a district wherein there is a Master's office a magistrate does not preside. In the present case the presiding officer (first respondent) was a magistrate. Conradie J held that a meeting of creditors presided over by any of these persons did not constitute a court of law and that consequently such meeting was not a trial for purposes of section 12(1)(b) of the Constitution. He considered that even where the meeting is presided over by a magistrate this does not constitute a court of law because a magistrate, in so presiding, is merely fulfilling an administrative function.
- [9] Mr Bryan Hack, on behalf of the applicant, sought confirmation of Conradie J's order and advanced essentially two lines of argument in support thereof. The first was that the subsection unjustifiably infringes paragraph (a) of section 12(1) of the Constitution, which guarantees to everyone the right "not to be deprived of freedom arbitrarily or without just cause." It did so, the argument went, because the objectives sought to be achieved by obtaining the oral and documentary information with which the meeting and interrogation under sections 64 and 65 of the Insolvency Act are concerned do not constitute such "just cause" for depriving examinees of their physical freedom by imprisonment under the impugned provisions of section 66(3).
- [10] It was submitted that the only "just cause" for which a person can be imprisoned is the prevention or punishment of crime or possibly "in the broader sense" where necessary for the maintenance of law and order, but not for any other non-punitive coercion. In developing this argument Mr Hack correctly pointed out that in South African criminal law, since the death penalty and certain forms of corporal punishment have been declared to be unconstitutional, imprisonment is the most severe punishment that the state can impose on a criminal and that both the legislature and the courts have sought to develop innovative alternative forms of punishment which are less harsh and invasive of a person's physical freedom than imprisonment.
- [11] He also correctly pointed out that our courts emphasise that imprisonment should only be resorted to after other appropriate forms of punishment have been considered and excluded. It is also correct

that in the past there has been much unwarranted deprivation of physical freedom in order to achieve particular social and political goals. This all emphasises the great importance to be attached to physical freedom, but does not by itself afford much assistance in considering the correctness of the submission that deprivation of physical freedom may only be used as punishment for a crime.

- [12] The second line of argument was that the subsection infringes paragraph (b) of section 12(1) because committal of an examinee constitutes "detention" which has not been preceded by the "trial" envisaged by paragraph (b). Mr Hack contended that in all cases the requisite trial had to be a trial before a duly constituted court of law following due and proper trial procedures and that the presiding officer at a meeting of creditors is not presiding over a court regardless of whether such officer is a magistrate or not. I shall deal with these arguments presently.
- [13] Before doing so it is necessary to analyse section 66(3) briefly in its context. The presiding officer at a meeting of creditors under section 64 of the Insolvency Act may, as previously indicated, be the Master, an officer in the public service or a magistrate. The presiding officer is under section 66(3) authorised to commit certain persons to prison under given circumstances. A person summoned to produce a book or document under section 64(3) who fails to do so may be committed; so may any person who is liable to be interrogated in terms of section 65(1) and who refuses to be sworn when called upon to give evidence or who refuses to answer any question lawfully put under section 65 or who does not answer the question fully and satisfactorily.
- [14] Under section 66(5) persons so committed may apply to court for their discharge from custody and the court may order their discharge if it finds that they were wrongfully committed to prison or are being wrongfully detained. Subject hereto, persons are detained under section 66(3) until they have undertaken to do what is required of them. Under section 66(4), if persons who have been released from prison after having so undertaken fail to fulfil their undertaking, the presiding officer may commit them to prison as often as may be necessary to compel them to do what is required of them. In addition, any act or omission for which a person has been or might have been lawfully so committed is a punishable offence. As will be discussed more fully later, the section 66(3) committal provision is a mechanism to compel the furnishing of information so that the legitimate objectives of the insolvency law may be properly and efficiently realised. Its purpose is not in the first instance punitive. It is a form of process in aid or a form of statutory civil contempt power.
- [15] The provisions of section 11 of the interim Constitution need to be compared with those of section 12(1) of the 1996 Constitution. Section 11 of the interim Constitution provides:

- (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
- (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

Section 12(1) of the 1996 Constitution provides:

Everyone has the right to freedom and security of the person, which includes the right -

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

[16] Paragraphs (d) and (e) of section 12(1) of the 1996 Constitution embody a reformulation of section 11(2) of the interim Constitution and a subdivision of its contents into two parts. Paragraph (c) of section 12(1) either incorporates a new right or else makes explicit what was previously implicit; the true explanation is not relevant for present purposes. A comparison between section 11(1) of the interim Constitution with the first line of section 12 (1) of the 1996 Constitution and paragraphs (a) and (b) thereof, is of greater significance for the present enquiry because it indicates that the constitution makers wished to clarify something which had previously been implicit, namely, that a person's right to freedom could not be encroached upon arbitrarily or without just cause.

[17] Before indicating what I believe the consequences of the above changes are I wish to refer to certain dicta of O'Regan J in relation to section 11(1) of the interim Constitution, with which I agree and fully endorse. In *Bernstein's* case O'Regan J observed in general terms:

In my view, freedom has two inter-related constitutional aspects: the first is a procedural aspect which requires that no-one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.

In the same judgment my learned colleague stated the following:

Section 25 is the principal provision in chapter 3 that requires procedural fairness when a person is deprived of physical freedom. It contains detailed rules which must be followed to protect the rights of persons who have been detained, arrested or charged. Section 11(1), which contains no detailed procedures or rules, other than the prohibition of detention without trial, is supplementary to section 25. In cases where people are deprived of physical freedom in circumstances not directly governed by section 25, section 11(1)

will require that fair procedures be followed, as was held in *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

- [18] In *S v Coetzee & Others* (a case decided under the provisions of the interim Constitution) O'Regan J, in that part of her judgment with which I concurred, stated the following:

[These questions] raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated [in *Bernstein's* case at paragraphs 145-147] our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.

- [19] In *Nel's* case this Court dealt with a constitutional attack on section 205 (incorporating as it does section 189) of the Criminal Procedure Act (the CPA) based on an alleged infringement of a person's right under section 11(1) of the interim Constitution 'not to be detained without trial'. Section 205 of the CPA provides for the compulsory examination of 'any person who is likely to give material or relevant evidence as to an alleged offence' before a judge of the supreme court, a regional court magistrate or magistrate. Section 189 of the CPA, which applies to section 205, provides, amongst other things, that if any sworn witness in criminal proceedings:

A... refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment [for varying periods of time.

- [20] A unanimous Court held that fair procedure was implicit in the trial component of the section 11(1) right and further held:

The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards . . . The nature of the fair procedure contemplated by this right will depend upon the circumstances in which it is invoked. The "trial" envisaged by this right does not . . . in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in section 25(3) of the Constitution. In most cases it will require the interposition of an impartial entity, independent of the executive and the legislature to act as arbiter between the individual and the state.

The Court did not explicitly address itself to the substantive aspect of the right to freedom referred to in paragraphs 15 and 16 above, namely, that the state may not deprive its citizens of liberty for reasons that are not acceptable, because the section 11(1) challenge was not brought on this basis. It is, however, implicit in the Court's judgment that this was an essential component of the right to freedom and that the reasons or purposes for the imprisonment of an examinee under

the circumstances provided for by section 205 read with section 189 of the CPA are constitutionally acceptable.

[21] Thus it was stated:

The imprisonment provisions in section 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so...

and more particularly:

Summary proceedings for imprisoning recalcitrant witnesses, where the normal strict criminal procedure rules are not applied, are not unknown in other open and democratic societies based on freedom and equality. In the United States of America the grand jury investigation, amongst its other objects, fulfils the same function as section 205 of the CPA of obtaining information under oath from persons unwilling to assist voluntarily in a criminal investigation; both civil and criminal contempt procedures are used to coerce the recalcitrant grand jury witness into testifying. 'Civil contempt is used to coerce the recalcitrant witness into complying with the subpoena. The witness is sentenced to imprisonment or to a fine (which may increase daily), but he may purge himself by complying with the subpoena.' In the case of such civil contempt proceedings in relation to grand jury proceedings, departures from criminal procedure applicable to ordinary criminal prosecutions are permissible and even in criminal contempt proceedings 'procedures may vary somewhat from procedures applicable to ordinary criminal prosecutions.' Rule 42(a) of the Federal Rules for Criminal Procedure authorises summary criminal contempt proceedings in matters other than grand jury investigations. In Germany section 70 of the Criminal Procedure Code provides for summary proceedings against a witness who refuses to testify without legal justification. The witness is fined and on failure to pay is imprisoned. The witness may also be imprisoned without being given the option of a fine. Such and similar summary proceedings leading to imprisonment have been upheld as constitutional by the German Federal Constitutional Court.

[22] It can therefore be concluded that section 12(1), in entrenching the right to freedom and security of the person, entrenches the two different aspects of the right to freedom referred to above. The one that O'Regan J has, in the above-cited passages, called the right not to be deprived of liberty "for reasons that are not acceptable" or what may also conveniently be described as the substantive aspect of the protection of freedom, is given express entrenchment in section 12(1)(a) which protects individuals against deprivation of freedom "arbitrarily or without just cause". The other, which may be described as the procedural aspect of the protection of freedom, is implicit in section 12(1) as it was in section 11(1) of the interim Constitution.

[23] The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur 'arbitrarily'; there must in other words be a rational connection between the deprivation and

some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a 'just' one. What 'just cause' more precisely means will be dealt with below.

[24] Although paragraph (b) of section 12(1) only refers to the right 'not to be detained without trial' and no specific reference is made to the other procedural components of such trial it is implicit that the trial must be a 'fair' trial, but not that such trial must necessarily comply with all the requirements of section 35(3). This was the Court's unanimous holding in respect of section 11(1) of the interim Constitution in *Nel's* case and is equally applicable to section 12(1)(b) in the context of the entrenchment of the "right to freedom and security of the person" in section 12(1) of the 1996 Constitution, there being no material difference between the two provisions.

...

[57] Viewed in the light of all these considerations I would conclude that the '(fair) trial' prescribed by section 12(1)(b) requires, apart from anything else, a hearing presided over or conducted by a judicial officer in the court structure established by the 1996 Constitution and in which section 165(1) has vested the judicial authority of the Republic.

[58] In coming to this latter conclusion I have not overlooked the argument which Mr Trengove, appearing for the respondents, pressed on us. He submitted that in the vast majority of cases creditors' meetings under the Insolvency Act are presided over by officers in the public service, designated for that purpose under the provisions of section 39(2) of the Act. These officers, he submitted, are persons of integrity and suitably qualified by way of legal knowledge, skill and experience to discharge all the functions of presiding officers under the relevant provisions of the Insolvency Act with a high degree of competence.

[59] I will assume all that in favour of the respondents. Such officers do not, however, meet one fundamental and indispensable criterion. However admirable they may be in all the respects mentioned, and I do not for a moment question any of these high qualities, they are officers in the public service C in the executive branch of the state C and therefore do not enjoy the judicial independence which is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution in the following manner:

- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

[60] In our first certification judgment dealing with the 1996 Constitution, *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, we stated that although it is clear that pursuant to Constitutional Principle VI the Constitution provides for a system of separation of powers among the three co-equal branches of government,

“[t]here is . . . no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute”.

I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

[61] This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided. For the moment, however, it suffices to say that whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here- i.e., the power to commit an uncooperative witness to prison - is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.

...

[177] The question that remains is whether magistrates functioning in terms of section 66(3) of the Insolvency Act can be said to be exercising the authority reserved to courts by section 165(1) of the Constitution. The word ‘court’ may refer to a building, to an institution exercising judicial functions and to the persons who carry out such functions. Normally the three go together. In the present case, the issue is whether persons selected, because of their membership of judicial institutions to exercise the intrinsically judicial function of sending people to jail, are acting within the authority conferred on courts by section 165(1) of the Constitution, even though they may do so outside of the physical, institutional and procedural setting within which courts normally function. With some hesitation I come to the conclusion that, in the context of the present case, they are.

[178] The essential characteristics of the courts exercising judicial authority as contemplated by the Constitution are that "[they] are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice". Unlike other appointees, magistrates exercising powers of committal to prison under section 66(3) of the Insolvency Act will enjoy institutional independence and can be expected to apply the law impartially and without fear, favour or prejudice. Furthermore, they will exercise their powers within the matrix of the superior hierarchical judicial control to which they are institutionally and habitually accustomed. The principles embodied in and the values to be protected by the separation of powers will accordingly be secured. In this respect, I agree with the broad evaluation made by Ackermann J on the character of the judicial function, and support the distinction which allows magistrates to order committal to prison and denies that power to other state functionaries. For these reasons, I concur in the order he proposes.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
Case CCT 8/02

Minister of Health and Others v Treatment Action Campaign and Others (No. 2) 2002 (5) SA 721 (CC)*

1 Introduction

...

[2] This appeal is directed at reversing orders made in a high court against government because of perceived shortcomings in its response to an aspect of the HIV/AIDS challenge. The court found that government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically the finding was that government had acted unreasonably in (a) refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated and (b) not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV.

[3] The case started as an application in the High Court in Pretoria on 21 August 2001. The applicants were a number of associations and members of civil society concerned with the treatment of people with HIV/AIDS and with the prevention of new infections. In this judgment they are referred to collectively as 'the applicants'. The principal actor among them was the Treatment Action Campaign (TAC). The respondents were the national Minister of Health and the respective members of the executive councils (MECs) responsible for health in all provinces save the Western Cape. They are referred to collectively as 'the government' or 'government'.

[4] Government, as part of a formidable array of responses to the pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth and identified nevirapine as its drug of choice for this purpose. The programme imposes restrictions on the availability of nevirapine in the public health sector. This is where the first of two main issues in the case arose. The applicants contended that these restrictions are unreasonable when measured against the Constitution, which commands the state and all its organs to give effect to the rights guaranteed by the Bill of Rights. This duty is put thus by sections 7(2) and 8(1) of the Constitution respectively:

7(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

.....

8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

* All foot notes omitted.

At issue here is the right given to everyone to have access to public health care services and the right of children to be afforded special protection. These rights are expressed in the following terms in the Bill of Rights:

- 27(1) Everyone has the right to have access to:
 - (a) health care services, including reproductive health care;
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- 28(1) Every child has the right to:
 - (c) basic nutrition, shelter, basic health care services and social services.

[5] The second main issue also arises out of the provisions of sections 27 and 28 of the Constitution. It is whether government is constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country. The applicants also relied on other provisions of the Constitution which, in view of our conclusions, need not be considered.

...

2 The powers of the courts

[96] Counsel for the government contended that even if this Court should find that government policies fall short of what the Constitution requires, the only competent order that a court can make is to issue a declaration of rights to that effect. That leaves government free to pay heed to the declaration made and to adapt its policies in so far as this may be necessary to bring them into conformity with the court's judgment. This, so the argument went, is what the doctrine of separation of powers demands.

[97] In developing this argument counsel contended that under the separation of powers the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy.

[98] This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.

[99] The primary duty of courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The

Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the *Mpumalanga* case, this Court set aside a provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months. Also, in the case of *August* the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications.

[100] The rights that the state is obliged to 'respect, protect, promote and fulfil' include the socio-economic rights in the Constitution. In *Grootboom* this Court stressed that in so far as socio-economic rights are concerned:

[t]he State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the State's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.

[101] A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172(1)(a) to make a declaration to that effect. But that is not all. Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also 'make any order that is just and equitable'.

...

[104] The power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented. In *Pretoria City Council v Walker*, Langa DP said:

[T]he respondent could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his s 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the Court in question. The Court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order.

...

[106] We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio- economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.

...

[113] South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may and if need be must use their wide powers to make orders that affect policy as well as legislation.

[114] A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices.

...

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/98

Premier of the Province of the Western Cape v President of the Republic of South Africa 1999 (4) BCLR 383 (CC)*

Decided on 29 March 1999

CHASKALSON P:

1 Introduction

[The province of the Western Cape challenged the constitutionality of an amendment to the Public Service Act 103 of 1994. In terms of this amendment, provincial heads of departments (e.g. the administrative head of the Western Cape's department of education) are given the same broad functions and responsibilities as heads of national departments, and no longer fall under the administrative control of the provincial Director-General (DG). The DG assumes responsibilities for, among other functions, the administration of the office of the Premier, intergovernmental relationships, and co-operation between the various departments of the provincial administration. The Western Cape government objected that it is part of the executive power of a province to structure its own administration, and that national legislation which seeks to impose on the provinces infringes the provincial power. The Court rejected this argument.]

[43] The sanctioning of national framework legislation is a feature of the Constitution and the system of cooperative government it prescribes. Such legislation is required for the raising and division of revenue, the preparation of budgets at all spheres of government, treasury control, procurements by organs of state, conditions according to which governments at all spheres may guarantee loans, the remuneration of public and various other matters. In the First Certification Judgment this Court held that such requirements were not inconsistent with the CPs.

2 Cooperative government

[The Western Cape government also argued that the detailed provisions of the amended legislation encroached on the "geographical, functional or institutional integrity" of provincial governments, contrary to section 41(1)(g) of the Constitution. The court had the following to say about co-operative government in general, and section 41(1)(g) in particular:]

[50] The principle of cooperative government is established in section 40 where all spheres of government are described as being 'distinctive, inter-dependent and inter-related'. This is consistent with the way

* All footnotes are omitted.

powers have been allocated between different spheres of government. Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is 'one sovereign, democratic state', and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government. These provisions vest concurrent legislative competences in respect of important matters in the national and provincial spheres of government, and contemplate that provincial executives will have responsibility for implementing certain national laws as well as provincial laws.

- [51] Local governments have legislative and executive authority in respect of certain matters but national and provincial legislatures both have competences in respect of the structuring of local government, and for overseeing its functioning. It is not necessary for the purposes of this judgment to give details of the legislative and executive competences of local authorities, or of the oversight powers of national and provincial governments.
- [52] The national legislature is more powerful than other legislatures, having a legislative competence in respect of any matter including the functional areas referred to in schedule 4, though its competence in respect of functional areas listed in schedule 5 is limited to making laws that are necessary for one of the purposes referred to in Section 44(2).
- [53] The national government is also given overall responsibility for ensuring that other spheres of government carry out their obligations under the Constitution. In addition to its powers in respect of local government, it may also intervene in the provincial sphere in circumstances where a provincial government 'cannot or does not fulfil an executive obligation in terms of legislation or the Constitution'. It is empowered in such circumstances to take 'any appropriate steps to ensure fulfilment' of such obligations.
- [54] The provisions of chapter 3 of the Constitution are designed to ensure that in fields of common endeavour the different spheres of government cooperate with each other to secure the implementation of legislation in which they all have a common interest. The cooperation called for goes so far as to require that every reasonable effort be made to settle disputes before a court is approached to do so.
- [55] Cooperation is of particular importance in the field of concurrent law-making and implementation of laws. It is desirable where possible to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made, and to ensure that adequate provision is made therefore in the budgets of the different governments.

[56] Principles of cooperative government and intergovernmental relations are dealt with in section 41 of the Constitution. In addition to provisions setting common goals for all spheres of government requiring cooperation between them in mutual trust and good faith, including avoiding legal proceedings against one another, section 41(1)(g) requires that:

All spheres of government and all organs of state within each sphere must . . . exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

This provision reflects a requirement of CP XXII that:

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

[57] Section 41(1)(g) is concerned with the way power is exercised, not with whether or not a power exists. That is determined by the provisions of the Constitution. In the present case what is relevant is that the constitutional power to structure the public service vests in the national sphere of government.

[58] Although the circumstances in which section 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.

[59] I have previously referred to the finding made by this Court in the *First Certification* Judgment that the CPs contemplated that the national government would have powers that transcend provincial boundaries and competences and that "legitimate provincial autonomy does not mean that the provinces can ignore [the constitutional] framework or demand to be insulated from the exercise of such power". Nor does it mean that provinces have the right to veto national legislation with which they disagree, or to prevent the national sphere of government from exercising its powers in a manner to which they object.

[60] The Constitution provides that provinces shall have exclusive functions as well as functions shared concurrently with the national legislature. The Constitution also requires the establishment of a single public service and gives the power to structure that public service to the national legislature. This power given to the national legislature is one which needs to be exercised carefully in the context of the demands of

section 41(1)(g) to ensure that in exercising its power, the national legislature does not encroach on the ability of the provinces to carry out the functions entrusted to them by the Constitution.

[61] The Western Cape government contends that the public service in that province functions effectively under the existing scheme and that there is no need for it to be reorganised in the manner contemplated by the amendments to which it objects. It contends further that the reorganisation will hamper rather than assist it in the execution of its executive functions, and that in all the circumstances the reorganisation of the provincial administration of the public service in the Western Cape, contrary to its wishes encroaches upon its functional or institutional integrity.

[62] Three principal objections are taken by the Western Cape government to the details of the new scheme. First, that it assigns functions to the provincial DGs and heads of departments in a manner that is unacceptable to it; secondly, that it constrains the Premier's executive power to establish or abolish departments of government; and thirdly, that it empowers the Minister to give directions concerning the transfer of certain functions to and from the provincial administration and its departments.

4 The functions of the provincial Director-General...

[64] As head of the Premier's office, the DG is responsible for the efficient management and administration of that office, and for the functions assigned to such office by the Premier, in terms of section 3A of the Act. In addition, the amended section 7(3) requires the provinces to appoint DGs as Secretaries to the Executive Councils and prescribes other duties for them, including the responsibility for intergovernmental relations, intra-governmental cooperation, including the coordination of the legislation and actions of the separate provincial departments, and the giving of strategic directions concerning policy matters. What has to be decided is whether national legislation can determine that the DG should perform these functions.

[65] There are good reasons why there should be a functionary in the public service of each provincial administration charged with the responsibility of coordinating intergovernmental relations. Provinces are required to implement national legislation and in areas of concurrent competences ongoing cooperation is clearly a necessity. Such functions are consistent with the principles of good governance and cooperative government. Section 41(2) of the Constitution specifically enjoins Parliament to enact legislation that facilitates intergovernmental relations. The subsection provides that:

An Act of Parliament must:

- (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

- (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

[66] The establishment of a post within the public service for the discharge of such functions does not infringe any provincial power or encroach upon provincial autonomy. The functionary is not a representative of the national government. He or she is appointed by the Premier, is required to act under the Premier's directions and instructions, and is answerable to the Premier and the Executive Council of the province. The same applies to the position of Secretary to the Executive Council. These are necessary functions which have to be assigned to a particular post in the public service.

[67] The crisp issue raised by the objection to section 7(3)(c) is whether provinces can be compelled by national legislation to have these essential functions carried out by the DG and not have the freedom to appoint another functionary or functionaries to attend to such duties.

[68] If it is correct that the structuring and functioning of the public service involves the creation of particular posts for the performance of particular functions, and the determination of functions to be carried out by each post, the fact that particular functions are assigned to the post of DG would not be inconsistent with the legislative competence vested in Parliament by section 197(1).

[69] It may be argued that at the highest sphere of the provincial administration in the public service, and in view of the sensitivity attaching to functions of Secretary to the Executive Council and intergovernmental relations, the provincial government should be free to assign such functions to whomever it chooses, including to persons other than the DG. Such a contention is not without substance, but in the light of the provisions of section 197(1) of the Constitution, there seems to me to be no basis on which it can be held that the determinations made by the 1998 Amendment fall outside the scope of the legislative power conferred upon the national Parliament. Nor can it be said that this encroaches on the functional or institutional integrity of the provinces.

[70] The national executive does not determine the structure of the public service. Under the Constitution that is a matter to be determined by national legislation. The executive at national as well as the provincial sphere must comply with that legislation, and no member of any executive in any sphere of government can ignore it.

[71] It cannot be said that the provincial government will not be able to carry out its functions effectively under the new scheme. There has been a shift of certain powers from the DG to heads of departments, but apart from this, the structure of a provincial administration remains substantially the same as it is under the existing scheme. The administration was and will be divided into departments. What will

change is that the heads of departments, including the DG of the Premier's office, will now have responsibility for the efficient management and administration, and certain supervisory and training functions in their departments, whereas under the existing scheme the DG has this responsibility and heads of departments act under delegations from the DG.

[72] In the *First Certification* Judgment what this Court required as protection for the limited 'autonomy' of provinces within the larger framework prescribed by the Constitution, was that they should have the ability to employ the personnel in the provincial administrations of the public service. The determination of posts and functions to be performed by the personnel in such posts, provides the framework within which the appointments are to be made. According to the Constitution, as certified, that framework must be determined by national legislation. One of the posts in the framework is that of DG in the Premier's office who, in addition to the administration of that office, is now required to assume responsibility as secretary to the Executive Council, the coordinator of intergovernmental and intra-governmental relations and other functions. These functions are of considerable importance and are not inconsistent with the post of the most senior person in the administration. The province has the competence to appoint the functionary who is to occupy this post, and that is all that the Constitution requires. It cannot be said that there are not valid reasons for having included such functions within the duties of the DG, or that to do so, would prevent the provincial government from carrying out its constitutional duties effectively.

[73] The same applies to the requirement that the DG should not exercise powers or perform duties entrusted or assigned by the legislative framework to heads of provincial departments. That is a perfectly reasonable provision in the light of the structure which has now been determined, and ensures that the heads of departments take responsibility themselves for the functions assigned to them. The provision does not prevent the MECs as executing officers from giving instructions to the heads of departments, nor does it prevent the Premier from seeking advice from the DG in regard to any department within the provincial administration, or from requiring important issues arising from such reports to be referred to the Executive Council for its consideration.

[74] It follows that the provisions of the 1998 Amendment dealing with the powers and functions of the DG are not inconsistent with the executive power of the province. It has also not been established that such provisions infringe section 41(1)(g) of the Constitution.

...

5 Establishment and abolition of departments

[76] The establishment and abolition of provincial departments is dealt with in Section 3A(a) which provides:

The Premier of a province may:

- (a) subject to the provisions of section 7(5), establish or abolish any department of the provincial administration concerned.

[77] This must be read with section 7(5)(a)(ii) which provides:

The President may - at the request of the Premier of a province for the establishment or abolition of any department of the provincial administration concerned, or their designation of any such department or the head thereof, amend schedule 2 by proclamation in the gazette.

The President is required to amend the schedule by Proclamation to give effect to such a request if he or she 'is satisfied that it is consistent with the provisions of the Constitution or this Act'.

[78] Whether or not a request is consistent with the Constitution or an Act of Parliament is a question which ultimately only a court can decide. Section 7(5)(b) should not be construed as vesting such power in the President. It should be construed, rather, as recognising that the President cannot be obliged to amend the schedule if it would be unconstitutional or otherwise unlawful for him to do so....

[79] If the President declines a request in circumstances when as a matter of law the request is in accordance with the provisions of the Constitution and the Act, there is no basis on which the President could be 'satisfied' that this is not so. If the President is wrongly advised on such an issue, a decision to withhold consent would be subject to judicial review. Counsel on both sides of this litigation correctly accepted that this was so.

[80] In substance, the premier has the power to establish or abolish provincial departments. This power is limited only to the extent that it must be exercised by way of a request directed to the President. The Premier has no right to demand that the request be implemented with retrospective effect, though the President may do so if he or she considers this necessary. This means that the implementation of a request may be delayed pending the President's decision. Where there is a dispute as to legality, that dispute may have to be resolved by the courts before the decision is implemented.

[81] The constitutionality of these provisions were challenged on the grounds that the constraints upon the power of the premier detracted from his or her executive authority and constituted an invasion of the 'functional or institutional integrity' of provincial governments.

[82] The argument as to the executive power of the Premier is no different to the argument concerning the interpretation of section 197 of the Constitution. The structuring and functioning of the public service into departments is not part of the executive power of the provinces. It is a power vested by section 197(1) of the Constitution in the national sphere of government. If the Premier had no say in the establishment or abolition of departments it may well be that this would infringe section 41(1)(g). But this is not the case. The effective power rests with the Premier and the constraints upon that power are of a very limited nature. The reorganisation of departments is not ordinarily an issue which calls for immediate decision, nor, as this case exemplifies, is it necessarily appropriate to undertake such reorganisation until disputes as to its legality have been resolved.

[83] A procedure requiring the President and the Premier to seek agreement concerning the legality of a proposed restructuring of the public service within a provincial administration, is entirely consistent with the system of cooperative government prescribed by the Constitution, and cannot be said to invade either the executive power vested in the Premier by the Constitution, or the 'functional or institutional' integrity of provincial governments.

6 Transfer of functions between departments and between different spheres of government

[84] Sections 3(3)(b) and 3A make provision for the allocation and transfer of functions to and from departments of government, which by definition include provincial departments. Section 3(b) provides:

The Minister may:

- (b) after consultation with the relevant executing authority or executing authorities, as the case may be, make determinations regarding the allocation of any function to, or the abolition of any function of, any department or the transfer of any function from one department to another or from a department to any other body or from any other body to a department: provided that the provisions of this paragraph shall not be construed so as to empower the Minister:
 - (i) to allocate any function to, or abolish any function of, any provincial administration or provincial department except in consultation with the Premier of the province concerned; or
 - (ii) to transfer any function from one provincial administration or provincial department to another or from a provincial administration or provincial department to anybody established by or under any provincial law or from any such body to a provincial administration or provincial department.

It was contended that this provision infringes the executive powers of the provinces.

[86] Sections 125(2)(b) and (c) of the Constitution which deal with the implementation by the provinces of national laws, contemplate that determinations as to whether or not such a law will be implemented by provincial governments will be made in terms of Acts of Parliament, and not by an executive direction from a Minister. Moreover, section 3(3)(b) permits the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body. The vesting of such a power in the Minister, without qualification, would clearly infringe the executive authority of the province to administer its own laws.

[Counsel for the Minister argued that section 3(3)(b) should be interpreted in a manner which would avoid the conclusion that the Minister has this power. However the court found that section 3(3)(b) was not reasonably capable of such an interpretation, and that it was therefore unconstitutional.]

...

7 Does the new scheme contravene section 41 of the Constitution?

[89] With the exception of section 3(3)(b) which infringes the executive power and autonomy of the provinces to the extent referred to in paragraph 86 above, none of the other provisions to which objection is taken can be said on their own to infringe section 41. What remains to be considered is whether, apart from section 3(3)(b), the new scheme as a whole can be said to infringe the functional and institutional integrity of the provinces.

[90] The new scheme was adopted after comprehensive investigations undertaken to determine the most appropriate structure for the public service in South Africa. The Western Cape government had the opportunity of making its views known on the relevant issues and of making representations concerning draft legislation. Indeed, the 1998 Amendment reflects changes to the original proposals to accommodate some of the objections raised by the Western Cape government.

[91] The Western Cape government has not been deprived of any power vested in it under the Constitution or the Western Cape Constitution. The Premier of the province has the power to appoint the members of the executive council, to determine what departments should be established within the provincial government, to allocate functions to departments and transfer functions from one department to another. Functionaries in the provincial administration of the public service are appointed by the provincial government, are answerable to it, and can be promoted, transferred or discharged by it. The right of the Premier and Executive Council to coordinate the functions of the provincial administration and its departments has been preserved.

- [92] Political direction and executive responsibility for the functions of provincial governments remain firmly in the hands of the Premier and Executive Council. The Executive Council is appointed by the Premier in terms of section 42 of the Western Cape Constitution, and in terms of section 132 of the Constitution in the case of the other provinces which have not adopted their own Constitutions. The national sphere of government has no say in such appointments. Functions are assigned to the Executive Council by the Premier as required by sections 42 and 43 of the Western Cape Constitution and sections 132 and 133 of the Constitution. Members of the Executive Council appoint the functionaries to the posts established in the public service, and are also entitled to give instructions necessary to ensure that provincial governmental policy is implemented, and that the department is administered efficiently.
- [93] The new scheme is rational and it cannot be said that it has been enacted arbitrarily or for a purpose not sanctioned by section 197, or that it is inconsistent with the structure of government contemplated by the Constitution. It requires the public service to be organised in a particular way, making provision for proper reporting between the public service and the executive sphere of government, and ensuring that the heads of departments, including the DG as head of the Premier's office, have clear responsibilities both in relation to the administration of their own offices and in reporting to the executive sphere of government.
- [94] In the circumstances, and subject to what has been said concerning section 3(3)(b), the provisions of the 1998 Amendment to which objection is taken, seen alone or cumulatively, do not detract from the executive power of the provinces, nor do they infringe their functional or institutional integrity.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 46/95

*In Re: The National Education Policy Bill No. 83 of 1995 1996 (4) BCLR 518 (CC)**

1 Introduction

[1] **CHASKALSON P:** The Speaker of the National Assembly, acting in terms of sections 98(2)(d) and 98(9) of the Constitution, has referred a dispute concerning the constitutionality of certain provisions of the National Education Policy Bill (B83-95) to this Court for its decision.

[2] At the hearing of the matter three political parties, the National Party, the Democratic Party, and the Inkatha Freedom Party, whose members had signed the petition, were represented by counsel. Counsel for the Inkatha Freedom Party also represented the Minister of Education of the KwaZulu-Natal Province, who is the member of the KwaZulu-Natal Executive Council responsible for education in that province, and who had been admitted as an amicus.

2 The National Education Policy Bill

[3] The objectives of the Bill are set out in clause 2. They are:

- (a) the determination of national education policy by the Minister in accordance with certain principles;
- (b) the consultations to be undertaken prior to the determination of policy, and the establishment of certain bodies for the purpose of consultation;
- (c) the publication and implementation of national education policy;
- (d) the monitoring and evaluation of education.

[4] The Minister referred to in the Bill, and to whom I will refer in this judgment as the Minister, is the Minister of Education in the national government. Clause 3 of the Bill makes provision for the determination of national education policy by the Minister. Clause 3(1) requires the Minister to do so in accordance with the provisions of the Constitution and the other provisions of the Bill, and clause 3(2) directs him or her to take into account 'the competence of the provincial legislatures in terms of section 126 of the Constitution, and the relevant provisions of any provincial law relating to education'. Clause 3(4) obliges the Minister to determine national policy for:

the planning, provision, financing, staffing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system,

* All footnotes are omitted.

and contains sub-paragraphs identifying 'without derogating from the generality' of the section, specific matters for which national policy may be determined. Clause 4 sets out 'directive principles of national education policy' which specify the goals to which such policy shall be directed. Clause 5 makes provision for the consultation that must be held before policy is formulated and clause 6 provides for consultation that is necessary before legislation is enacted. Clause 7 deals with a requirement to publish the policy instrument in which the national education policy will be set out after it has been determined. Clause 8 makes provision for the monitoring and evaluation of education and clauses 9 to 13 for the establishment and functioning of various consultative bodies. Clause 14 amends the National Policy for General Education Affairs Act, 1984, in respects that are not the subject of any objection.

3 The constitutional challenge

[5] In their written arguments the members of the National Party challenged the constitutionality of clauses 3(3), 3(4), 4 and 8 of the Bill; the members of the Inkatha Freedom Party (supported by the amicus) challenged clause 3(3) read with clauses 8(6) and 8(7) of the Bill; and the members of the Democratic Party challenged clauses 3(3), 8(6), 8(7), 9(1)(c) and 10(1)(c) of the Bill. An objection in the petition that the provisions of section 247 of the Constitution had not been complied with, was correctly not persisted in. There was no substance in the objection, as the Bill does not interfere with the "rights, powers and functions" of the bodies referred to in that section. The other signatories to the petition did not submit argument to the Court in support of their objections.

[6] Mr. Trengove who represented the Democratic Party was the first to argue. Whilst accepting that it would be competent for Parliament to enact legislation establishing consultative structures and enabling the department of national education to procure information from the provincial education departments, he contended that the provisions of the Bill read together went further than that: they would oblige members of provincial executive councils to promote policies that might be inconsistent with provincial policy, require them where necessary to amend their laws to bring them into conformity with national policy, and in effect would empower the Minister to impose the national government's policies on the provinces. It was argued that in so far as the Bill imposed such obligations on the provincial administrations, it would be inconsistent with the Constitution. He acknowledged, however, that there was at least some uncertainty as to whether the Bill had such a meaning. In the written argument on behalf of the Democratic Party it had been said:

It is not clear that the disputed provisions oblige provincial governments to implement and assist in the implementation of the minister's national education policy. We will submit that they do. If this court should however hold that they do not and that provincial governments are at liberty to ignore

the minister's national education policy, then the Democratic Party's constitutional objections would fall away.

This position was adhered to by Mr. Trengove at the hearing of the matter.

3.1 *The argument*

...

[22] It was pointed out in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* that the powers of Parliament depend ultimately upon "the language of the Constitution, construed in the light of [our] own history." Our history is different to the history of the United States of America, and the language of our Constitution differs materially from the language of the United States Constitution. The history and structure of the United States Constitution are discussed in the judgment of O'Connor J in the New York case. The Constitution addressed a situation in which several sovereign states were brought together in a federation. The constitutional scheme agreed upon was that each state would surrender part of its sovereignty to the federal government and retain that part which had not been surrendered. This is reflected in the language of the Constitution. Congress has only those powers specifically vested in it by the Constitution. All other power is vested in the states. Congress can make laws which encroach upon state sovereignty through the supremacy clause, commerce clause, the spending power and the power to make all laws which may be necessary and proper for the implementation of its powers, but cannot otherwise interfere with the rights vested in the states under the Tenth Amendment.

[23] Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution. Their legislative power is confined to schedule 6 matters and even then it is a power that is exercised concurrently with Parliament. Decisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution. And this is so whether the issue arises under the provisions of section 126 or any other provision of the Constitution.

[24] Although the Bill establishes structures and procedures which are directed to developing a national policy that will be adhered to by all provinces, and contains provisions which are calculated to persuade the provinces to do so, it does not in my view go so far as to require this to be done. In the circumstances the argument that the Bill empowers the Minister to override provincial law or to compel the provinces to amend their laws must be rejected. My reasons for rejecting this interpretation of the Bill are as set out below.

...

- [33] It was suggested in argument that the cooperation of a provincial political head of education who wishes to ignore a request made for the submission of a remedial plan, could be secured through a mandamus, or through a threat to withhold financial support for the province's education system, or through some other coercive action. It is by no means clear that a political obligation such as that contemplated by clause 8(6) could be made the subject of a mandamus, particularly if the province is not willing to implement the plan; nor is it clear that the offering or withholding of financial incentives (if otherwise lawful) would be open to objection. If the financial incentives or other action taken to persuade the provinces to agree to national policy are not legitimate they can be challenged under the Constitution or under the well established principle that a power given for a specific purpose may not be misused in order to secure an ulterior purpose; if they are legitimate, then they are not open to objection. These are not, however, issues that need trouble us in this case. It can be assumed that provincial administrations will act in accordance with a law which is consistent with the Constitution. If a law requires a provincial administration to act in a particular manner and that requirement is not constitutional, the law cannot be saved from constitutional challenge simply because there may be inadequate forensic mechanisms under the Constitution for its enforcement. It is therefore necessary to confront and answer the question: can an Act of Parliament require a provincial political head of education to cause a plan to be prepared as to how national standards can best be implemented in the province?
- [34] Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through cooperation. And this applies as much to policy as to any other matter. It cannot therefore be said to be contrary to the Constitution for Parliament to enact legislation that is premised on the assumption that the necessary cooperation will be offered, and which requires a provincial administration to participate in cooperative structures and to provide information or formulate plans that are reasonably required by the Minister and are relevant to finding the best solution to an impasse that has arisen.
- [35] Clauses 8(6) and (7) of the Bill contemplate a situation in which a provincial political head of education may be called upon to secure the formulation of a plan to bring education standards in the province into line with the Constitution or with national standards. All education policy, national or provincial, must conform with the Constitution. If national standards have been formulated and lawfully made applicable to the provinces in accordance with the Constitution, those must also be complied with. The effect of clauses 8(6) and (7) is therefore to give the province concerned an opportunity of addressing the alleged shortfall in standards itself, and of suggesting the remedial action that

should be undertaken. And this is so even if the national standards have been formulated, but have not yet been made the subject of legislation. The alternative would be for the government to act unilaterally and to take decisions without allowing the province this opportunity.

IN THE SUPREME COURT OF APPEAL: SOUTH AFRICA

Mthembu-Mahanyele v Mail & Guardian Ltd and Another* [2004] 3 All SA 511 (SCA)

1 Introduction

- [1] Minister of Housing Grade: F
Why is she still in the Cabinet? She has shown she cannot deliver in one of our key delivery ministries. *Her award of a massive housing contract to a close friend and her sacking of her former director general, Billy Cobbett, continue to haunt the public perception of her* (my emphasis).

Prognosis: A coupé on the gravy train would do nicely, thank you very much. This is the wording of a 'report card' in respect of the then Minister of Housing, the appellant in this matter, written and published by the first respondent, a weekly newspaper (referred to as 'the M & G'), late in December 1998. The second respondent, Mr Philip van Niekerk, was then the editor of the paper. The statement was part of a general 'report card' grading and commenting on the work of all members of the cabinet in 1997. The grade 'F' was stated to mean: 'Pathetic fail. Jump before you are pushed'.

2 The bone of contention

- [2] The appellant sued for defamation, asserting that the words in the report that I have emphasised were defamatory of her. She claimed damages in the sum of R3m. At the trial the appellant did not persist in asserting that the words relating to the dismissal of Mr Cobbett were defamatory, but rested her case on the publication of the words that she had awarded 'a massive housing contract to a close friend'.
- [3] The appellant alleged that the words complained of signified that she was a person of base moral standard; that she was dishonest, and would thus dishonestly award a massive housing contract to a close friend; that she was incompetent and unable to deliver as a minister; and was not worthy of holding public office. She pleaded that the respondents had acted recklessly, not caring whether the contents were true; and that they took no reasonable steps to establish whether the statement made was true.
- [4] The respondents pleaded that as a member of Cabinet, the appellant had no *locus standi* to sue for damages for defamation; that the words did not convey a defamatory meaning; that the words were at least substantially true; and that it was in the public interest that the facts were published. In so far as the statement constituted the expression of an opinion, that opinion was alleged to be honestly held and expressed

* All footnotes are omitted.

in good faith. In the alternative the respondents pleaded that publication of the statement was protected by qualified privilege in that they were members of the press which is both bound and entitled to make available to the public information, opinions and criticisms about every aspect of political activity, in the public interest. Further, they asserted, s 16 of the Constitution expressly protects the right of freedom of expression (including freedom of the press) such that the statement was published in the exercise of a duty to inform the public. A further alternative plea was that the statement was published reasonably (without negligence) and in the genuine and reasonable belief that it was true.

3 The reasoning and finding of the Court

...

[25] The test for determining whether words published are defamatory is to ask whether a 'reasonable person of ordinary intelligence *might* reasonably understand the words . . . to convey a meaning defamatory of the plaintiff. . . . The test is an objective one. In the absence of an innuendo, the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply'(per Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate*.

...

[33] This case, as I have mentioned, raises fundamental questions about the balance between the right to dignity, including reputation, and the right to freedom of expression. Both rights are now given special protection in the Bill of Rights. Should a class of people (members of government) lose the right to the protection of their dignity and reputation in the interest of public information and debate? In what follows I shall for convenience refer generally to cabinet ministers. But that should not be taken to mean that other members of government, or parliamentarians or officials of state –representatives of government generally – are to be treated differently.

[40] The criticisms made by the appellant and by Milo of Joffe J's decision to deny a cabinet minister *locus standi* to sue for defamation when the words complained of relate to performance of work as a cabinet minister are, with respect, well-founded. A blanket immunity for defaming cabinet ministers would undermine the protection of dignity. It would give the public, and the media in particular, a licence to publish defamatory material unless the plaintiff can prove malice. In elevating freedom of expression above dignity in this way the decision simply goes too far. A balance must be struck. That there is no hierarchy of the rights protected by the Constitution is affirmed by the Constitutional Court in *Khumalo v Holomisa*.

...

[65] Freedom of expression in political discourse is necessary to hold members of government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: that is with the reasonable belief that the statements made are true. Accountability is of the essence of a democratic state: it is one of the founding values expressed in s 1(d) of our Constitution...

...

[74] The tone of the report card was undoubtedly irreverent. It was critical of the performance of all members of government, even those to whom it awarded 'good grades'. It was an overall assessment of performance over the year under review. It assumed knowledge of political events over the year. It did not purport to convey new information. And it relied on the myriad of reports made in a multitude of papers over the course of the year, all calling for an explanation from the *appellant herself* of the Motheo contract. Admittedly what was said was stated to be fact, not opinion, but it nevertheless was clearly proffered as political criticism. And it concerned the actions of a public figure in relation to a major political talking-point. Thus even if the report were to have conveyed the impression that the appellant had personally made the award and signed the contract, the conduct of the writer and the editor, the second respondent, was reasonable in all the circumstances.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/05

*Doctors for Life International v The Speaker of the National Assembly and Others**

Decided on: 17 August 2006

1 Introduction

NGCOBO J:

...

[115] In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.

...

1.1 *The meaning and scope of the duty to facilitate public involvement*

[118] Public involvement is not a uniquely South African concept. In other countries, notably, in the United States, it is a concept that is used in the context of rule-making by administrative agencies. It is one of the requirements of the rule-making process by these agencies. In the international terrain, there is a growing number of instruments that make provision for the principle of public participation, in particular, in the context of environmental issues. It is commonly used to refer to the active participation of the public in the decision-making processes. The words “public involvement” and “public participation” are often used interchangeably.

[119] The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making

* All footnotes are omitted.

process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”.

- [120] According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a).
- [121] This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.
- [122] Our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy. Section 72(1)(a), like section 59(1)(a) and section 118(1)(a), addresses the vital relationship between representative and participatory elements, which lies at the heart of the legislative function. It imposes a special duty on the legislature and pre-supposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship. The ultimate question is whether there has been the degree of public involvement that is required by the Constitution.
- [123] It is apparent that the Constitution contemplates that Parliament and the provincial legislatures would have considerable discretion to determine how best to fulfil their duty to facilitate public involvement. Save in relation to the specific duty to allow the public and the media to attend the sittings of the committees, the Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in a given case. In addition, it empowers Parliament and the provincial legislatures to “determine and control [their] internal arrangements, proceedings and procedures” and to make their own rules and orders concerning their businesses.

[124] It follows that Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution.

[125] What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

[126] The standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government's fulfilment of positive obligations to realise social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that "reasonable measures may be taken" to regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if "it is reasonable and justifiable to do so in an open and democratic society."

[127] Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. "In dealing with the issue of reasonableness," this Court has explained, "context is all important."

[128] Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed,

this Court will pay particular attention to what Parliament considers to be appropriate public involvement.

[129] What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity to participate.

...

[204] In the clearest and most unmistakeable language possible, the Preamble to our Constitution declares the intention to establish “a democratic and open society in which government is based on the will of the people.” Consistent with this goal, the Constitution: (a) establishes as part of the founding values “a multi-party system of democratic government, to ensure accountability, responsiveness and openness;” (b) embraces a democracy that has both representative and participatory elements; and (c) makes provision for public involvement in the processes of the legislative organs of state. Thus in peremptory terms, section 72(1)(a) imposes an obligation on the NCOP to facilitate public participation in its legislative and other processes including those of its committees. And the supremacy clause of the Constitution requires that this “obligation [which is] imposed by [the Constitution] must be fulfilled.” Public involvement provisions therefore give effect to an important feature of democracy: its participative nature. The “participation of citizens in government . . . forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives.”

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 41/07
[2008] ZACC 10

Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*

Decided on: 13 June 2008

1 Introduction

VAN DER WESTHUIZEN J:

...

[26] The meaning of the concept of the facilitation of public involvement – as it appears in sections 59(1)(a), 72(1)(a) and 118(1)(a) – was explained in *Doctors for Life*²⁸ and *Matatiele 2*. The requirement to facilitate public involvement is in line with the contemplation in the Constitution of elements of participatory democracy, in addition to representative democracy. Participatory and representative democracy must be seen as mutually supportive. Public involvement also enhances responsible citizenship and legitimate government. It furthermore accords with the constitutional principle of co-operation and communication between national and provincial legislatures, as institutionalised in the NCOP.

[27] The obligation to facilitate public involvement may be fulfilled in different ways. It is open to innovation. Legislatures have discretion to determine how to fulfil the obligation. Citizens must however have a meaningful opportunity to be heard. The question for a court to determine is whether a legislature has done what is reasonable in all the circumstances. In determining whether the legislature acted reasonably, this Court will pay respect to what the legislature assessed as being the appropriate method. The method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the legislation and the intensity of its impact on the public. In the process of considering and approving a proposed constitutional amendment regarding the alteration of provincial boundaries, a provincial legislature must at least provide the people who might be affected a reasonable opportunity to submit oral and written comments and representations.

...

[44] In support of the first submission, the applicants refer to passages from the majority judgment of Ngcobo J in *Doctors for Life*, emphasising the need for citizens to be involved in public affairs, to identify with institutions of government and to become familiar with laws. Public

* All footnotes are omitted.

participation strengthens the legitimacy of legislation in the eyes of the people. It is an important counterweight to secret lobbying and influence-peddling.

[45] They also rely on the concurring judgment of Sachs J in that case, which highlights the assurance that people or groups who have been victims of historical silencing will be listened to, and the need for people to feel that they have been given a real opportunity to have their say and that they are taken seriously. Whereas here the people were given an opportunity to say what they wished to, they were not taken seriously, the argument goes, and the opportunity to be heard was not meaningful.

[46] The applicants, furthermore, rely on a passage from my minority judgment in the same case warning against the mechanical holding of cosmetic public hearings in situations where the will of the majority party will in any event necessarily prevail. This statement, however, must be understood within the context of the minority's disagreement with the majority of this Court in *Doctors for Life*. The minority held that whereas section 118(1)(a) created an obligation for the legislature to facilitate public participation in its processes, it was not intended to result in the possible constitutional invalidity of specific legislation. It expressed scepticism about the practical meaning of requiring public involvement with regard to every piece of legislation and about the workability of the yardstick of reasonableness. The applicants of course based their case on the majority judgments in *Doctors for Life* and *Matatiele 2*. The respondents did not argue that these judgments were incorrectly decided and that they should not be followed. This matter must therefore be dealt with according to the standards and guidelines set out in the majority judgments.

...

[50] On the available evidence, it is not possible to determine whether and to what extent the final voting mandate and the debate in the NCOP Select Committee were directly or indirectly influenced by previously formulated policies of the ruling party. One would also not know how the party leadership came to adopt its policy position and to what extent it might have resulted from a consideration of public interests or of the views of the majority. The passages from the *Doctors for Life* majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process,

which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.

- [51] To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.
- [52] If it is correct that the submissions of the community were indeed taken into account, as I conclude, the focus has to shift to the change in the Portfolio Committee's position between the negotiating mandate and the final voting mandate. The adoption of the negotiating mandate in the language quoted above creates the impression that the Portfolio Committee agreed with the community and formulated the negotiating mandate on the assumption that the Bill could be substantively amended in the NCOP to include Merafong in Gauteng. As is shown below, this was not possible. Did this misconception render the consultation process unreasonable? Furthermore, were the members of the Committee obliged to report back to the community of Merafong during the few days between the deliberations in the NCOP and the formulation of the final voting mandate? Did they fail to act reasonably in not doing so?
- [53] It was not submitted on behalf of the applicants that the consultation was unreasonable because the Gauteng Provincial Legislature or its Portfolio Committee did not fully appreciate the legal position as to amendments to the Bill in the NCOP at the time of the consultation. Nor could it be so argued persuasively. The facilitation of public involvement is aimed at the legislature being informed of the public's views on the main issues addressed in a bill, not at the accurate formulation of a legally binding mandate. Consultation requires the free expression of views and the willingness to take those views into account. This did happen.
- [54] The applicants' contention that the Gauteng Provincial Legislature or the Portfolio Committee was at fault for not reporting back to the community emerged mainly during oral argument. In response to a suggestion from the bench, counsel for the applicants argued that when the Gauteng delegates realised that they were not able to fulfil their mandate and amend the Bill in the NCOP, they should have returned to the Merafong community to explain and again to consult them, before finally mandating their delegation to the NCOP. He submitted that the failure to do so was not reasonable – and thus fell short of the requirements set out in *Doctors for Life* and *Matatiele 2* – and also not rational.

- [55] From the perspective of respectful dialogue and the accountability of political representatives it might well have been desirable to report to the people of Merafong that it was impossible to adhere to the position taken by the Portfolio Committee in the negotiating mandate. To the extent that the community was given the impression that the Committee agreed with them and that an understandable expectation was created that their views would prevail, it was possibly disrespectful not to return to inform them of subsequent events. The question, though, is whether the omission to consult again after the alteration of the Portfolio Committee's negotiating mandate amounts to a failure to facilitate public involvement in the processes of the Gauteng Provincial Legislature.
- [56] In my view the failure to report back to the Merafong community does not rise to the level of unreasonableness which would result in the invalidity of the Twelfth Amendment which was otherwise properly passed by Parliament. It cannot result in a finding that Gauteng failed to take reasonable measures to facilitate public involvement, as required by sections 72(1)(a) and 118(1)(a) of the Constitution.
- [57] This Court has invoked reasonableness as a standard by which a court ought to determine whether the measures taken or methods followed by a legislature comply with the obligation to facilitate public involvement. In this case no one argues that the calling for submissions and the public hearing were not reasonable measures. The question raised is whether the further measures taken or not taken by the Gauteng Provincial Legislature in the continuation of its relationship with the community were reasonable.
- [58] The Portfolio Committee was well aware of the strong views of the majority of the Merafong community. There was agreement on the need to do away with cross-boundary municipalities. On the issue of whether Merafong should be located in Gauteng or North West, the conflict between the contents of the Bill and the majority view was stark. The Portfolio Committee decided to change its position as a result of the deliberations in the Select Committee of the NCOP, where Gauteng's representative learned that an amendment to the Bill, to include Merafong in Gauteng, was not possible.
- [59] If they had gone back to Merafong to explain the situation to the people, a better understanding might have been fostered, but it is unlikely that the majority would have been sufficiently impressed by the explanation to change their strongly held views. If they agreed to the incorporation into North West, the Bill would in any event have been passed. If they persisted in their original position, the Gauteng Provincial Legislature still would not have been bound by their view and would in all likelihood have proceeded to vote in favour of the passing of the Bill. The possibility of the Portfolio Committee being persuaded anew by views of which it was already fully aware, is indeed small. In all probability little would have been achieved by another round of

exchanging views, other than to inform and perhaps educate the community. Whereas speculation about the likely outcome of further consultation is not ultimately decisive, the fact is that the community had a proper opportunity to air their views. The previous decisions of this Court, on which the applicants rely, do not require an ongoing dialogue. In fact, continuing discussion which does not result in a changed outcome, could strengthen possible perceptions that the consultation was not meaningful.

[60] In this case possibly discourteous conduct does not equal unconstitutional conduct which has to result in the invalidity of the legislation. Politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable. A democratic system provides possibilities for this, one of which is regular elections.

[61] I am unable to conclude that the Gauteng Provincial Legislature failed to facilitate public involvement in its procedures leading to its support for the Twelfth Amendment in the NCOP.

...

[116] The applicants have not shown that the Gauteng Provincial Legislature failed to facilitate public involvement, or acted irrationally, in supporting the Twelfth Amendment Bill in the NCOP. The Legislature created a reasonable opportunity for the public to express its views and those views were taken into account. It also did not exercise its powers irrationally. Based on the submissions of the public, the Portfolio Committee formulated a negotiating mandate and indeed negotiated accordingly. After being informed of the legal position, the Committee considered the available options and decided on a final voting mandate. The Committee explained its change of position. The Legislature debated the issue and took a decision. It did not materially misunderstand its constitutional role. The merits of its decision also do not indicate irrational conduct. The application cannot succeed.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 8/99

August v Electoral Commission and Others* 1999 (4) BCLR 363 (CC)

Decided on: 01 April 1999

SACHS J:

1 The Context

[1] The issue before this Court concerns the voting rights of prisoners. It arises in an appeal against the judgment of Els J in the Transvaal High Court which in effect held that the Electoral Commission (the Commission) had no obligation to ensure that awaiting trial and sentenced prisoners may register and vote in the general elections which has been announced for 2 June 1999.

[2] In the first democratic elections held five years ago, Parliament determined that, with certain specified exceptions, all prisoners could vote. The interim Constitution provided for universal adult suffrage and did not expressly disqualify any prisoners. It did, however, provide that disqualifications could be prescribed by law. The Electoral Act (the 1993 Electoral Act) disqualified persons on four grounds, two of which related to mental incapacity, the third to drug dependency and the fourth to imprisonment for specified serious offences. More specifically, section 16(d) of the 1993 Electoral Act declared that no person shall be entitled to vote in the election if that person was:

- (d) detained in a prison after being convicted and sentenced without the option of a fine in respect of . . .
 - (i) [m]urder, robbery with aggravating circumstances and rape;
or
 - (ii) (ii) any attempt to commit [such an] offence. . .

All other prisoners were therefore entitled to vote. This Act went on to state that the Commission should make regulations providing for voting stations for and the procedure regulating the casting and counting of votes by prisoners and persons awaiting trial, other than those specifically excluded.

[3] The 1996 Constitution provides that one of the values on which the one, sovereign and democratic state of the Republic of South Africa is founded is “[u]niversal adult suffrage” and “a national common voters roll”. It goes on to guarantee that “[e]very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; . . .” Unlike the interim Constitution,

* All footnotes are omitted.

however, the above sections contain no provision allowing for disqualifications from voting to be prescribed by law. Accordingly, if Parliament seeks to limit the unqualified right of adult suffrage entrenched in the Constitution, it will be obliged to do so in terms of a law of general application which meets the requirements of reasonableness and justifiability as set out in section 36.

- [4] As far as the coming general elections are concerned, Parliament has not sought to limit the right of prisoners to vote. The Electoral Act (the 1998 Electoral Act) provides that:

6(1) Any South African citizen in possession of an identity document may apply for registration as a voter....

The disqualifications are given as follows:

- 8(2) The chief electoral officer may not register a person as a voter if that person:
- (a) Has applied for registration fraudulently or otherwise than in the prescribed manner;
 - (b) is not a South African citizen;
 - (c) has been declared by the High Court to be of unsound mind or mentally disordered;
 - (d) is detained under the Mental Health Act, 1973 (Act No. 18 of 1973); or
 - (e) is not ordinarily resident in the voting district for which that person has applied for registration.

Prisoners are not included in the list of disqualified persons.

- [5] The Act goes on to deal with applications for special votes by persons who find it impossible to appear in person at the voting stations. Section 33 provides for special votes in the following terms:

- (1) The Commission:
- (a) must allow a person to apply for a special vote if that person cannot vote at a voting station in the voting district in which the person is registered as a voter, due to that person's-:
 - (i) physical infirmity or disability, or pregnancy;
 - (ii) absence from the Republic on Government service or membership of the household of the person so being absent; or
 - (iii) absence from that voting district while serving as an officer in the election concerned, or while on duty as a member of the security services in connection with the election;
 - (b) may prescribe other categories of persons who may apply for special votes.

Once more, no express mention is made of prisoners.

2 The Issues

[6] It was in this setting of legislative silence, where Parliament has done nothing to limit the constitutional entitlement of prisoners to vote, that the applicants approached the Commission to ensure that as prisoners they would indeed be enabled to register and vote. First applicant is a convicted prisoner serving a long sentence for fraud, while the second applicant is an unsentenced prisoner in custody awaiting her trial later this year on charges of fraud. Acting in their own interest and on behalf of all prisoners, the applicants sought an undertaking from the Commission that prisoners would be able to take part in the elections.

...

[8] The matter came before Els J in the Transvaal High Court on 22 February 1999 and judgment was delivered the next day. Relying heavily on the affidavit filed by the second respondent, the learned judge stated that in his view there had been neither a commission nor an omission on the part of first and second respondents which resulted in undue limitation to the constitutional right of prisoners to vote. He went on to hold that:

[a]ll prisoners have the right to register as voters and to vote as any other South African citizen who is over 18 and in [possession] of an identification document. If a person does something which deprives him or her of the opportunity to register as a voter or to vote, the first and second respondents cannot be held responsible. An example is a person who specifically decides not to register because he does not want to vote, also a person who is on vacation and decides not to return to his ordinary place of residence for the purpose of voting. The predicament in which the first and second applicants and all other prisoners, sentenced or unsentenced, find themselves, is of their own making. They have deprived themselves of the opportunity to register and or to vote. (Emphasis in the original).

Bearing in mind what he regarded as insurmountable logistical, financial and administrative difficulties, and on the basis that special measures to accommodate voters should be reserved for those voters “whose predicament was not of their own making”, Els J dismissed the application, making no order as to costs.

...

[10] The applicants, relying on the right to vote, the right to equality and the right to dignity, sought leave to appeal to this Court. They seek an order declaring that they and all prisoners are entitled to register as voters on the national common voters’ roll and to vote in the forthcoming general elections, and requiring the respondents to make all necessary arrangements to enable them and all prisoners to do so....

[11] At the hearing in this Court, counsel for the applicants contended that the right to vote of all persons, including prisoners, was entrenched in the Constitution and that all prisoners’ rights, save those necessarily taken away by the fact of incarceration, were protected by the common

law and the Constitution. He argued that the Commission was accordingly under a duty to facilitate the registration of prisoners who were eligible to vote, as well as to create conditions enabling them to vote, and that the Court should issue a declaration affirming the rights of applicants and all prisoners to register and vote and an order directing the respondents to make the necessary arrangements for these rights to be realised.

...

3 Constitutional and Statutory Context

[14] Section 1(d) of the founding provisions of our Constitution declares that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

...

- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[15] Section 19 provides that:

- (1) Every citizen is free to make political choices, which includes the right -
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right -
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.

[16] The right to vote by its very nature imposes positive obligations upon the legislature and the executive. A date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process. For this purpose the Constitution provides for the establishment of the Commission to manage elections and ensure that they are free and fair. The Constitution requires the Commission to be an independent and impartial body with such additional powers as are given to it by legislation. Section 5(1)(e) of the Electoral Commission Act (the Commission Act) therefore provides that it is one of the functions of the Commission to:

... compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters.

This clearly imposes an affirmative obligation on the Commission to take reasonable steps to ensure that eligible voters are registered.

[17] Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.

[18] It is a well-established principle of our common law, predating the era of constitutionalism, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed. Of course, the inroads which incarceration necessarily makes upon prisoners' personal rights and liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress. In *Minister of Justice v Hofmeyr*, Hoexter JA emphasised the need to:

...negate the parsimonious and misconceived notion that upon his admission to gaol a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations. . . [T]he extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights.

[19] These words were written before South Africa became a constitutional democracy. Now the common law rights have been reinforced and entrenched by the Constitution. It is in this context that the powers and responsibilities of the Commission under the 1998 Electoral Act and the Commission Act must be interpreted, and the question should be answered as to whether prisoners' constitutional rights to vote will be infringed if no appropriate arrangements are made to enable them to register and vote.

- [20] As has been stated above, the right of every adult citizen to vote in elections for every legislative body is given in unqualified terms. The first and second respondents correctly conceded that prisoners retain the right to vote, since Parliament has not passed any law limiting that right. It is not necessary in the present case to determine whether or not Parliament could have disqualified all or any prisoners. The fact is that it has not sought to do so. The basic argument of the respondents, therefore, was that although the right of prisoners to vote remained intact, prisoners had lost the opportunity to exercise that right through their own misconduct. This argument was accepted by Eis J. At the heart of his judgment is a statement that prisoners are the authors of their own misfortune and therefore cannot require special arrangements to be made for them to vote.
- [21] The suggestion that prisoners otherwise eligible should be disqualified from enjoying their rights not by statute, but by the mere fact of their incarceration, was considered and firmly rejected by the US Supreme Court in the case of *O'Brien v Skinner*...
- [22] ... These views are directly applicable in the present case. In reality no provision has been made either in the 1998 Electoral Act or in the Commission Act or in the regulations of the Commission to enable the prisoners to exercise their constitutional right to register and vote. Nor has the Commission made any arrangements to enable them to register and vote. The Commission accordingly has not complied with its obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote. The consequence has been a system of registration and voting which would effectively disenfranchise all prisoners without constitutional or statutory authority unless some action is taken to prevent that. The applicants have accordingly established a threatened breach of section 19 of the Constitution.
- [23] In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of section 36 of the Constitution as there was no law of general application upon which they could rely to do so.
- ...
- [28] There are a variety of ways in which enfranchisement of prisoners could be achieved in practice. Polling stations could be set up in the prisons or special votes could be provided to prisoners. Prisoners are literally a captive population, living in a disciplined and closely monitored environment, regularly being counted and recounted. The Commission should have little difficulty in ensuring that those who are eligible to vote are registered and given the opportunity to vote, and that the objective of achieving an easily managed poll on election day is accomplished.

- [30] It was also contended that if special arrangements were to be made for prisoners, then the resources of the Commission would be strained to bursting point by the need to make equivalent arrangements for citizens abroad, pilots, long-distance truck drivers, and poor persons living in remote areas without public transport. A similar argument was robustly rejected by Marshall J in *O'Brien*. On the one hand we have a determinate class of persons, subject to relatively easy and inexpensive administrative control, who have consistently asserted their claims, who are physically prevented from exercising their voting rights whatever their wishes are and who have been given a specific undertaking by the first and second respondents that should the Court so direct, the necessary arrangements would be made for them to register and vote. On the other hand there are speculative notional claims by a variety of other persons who could point to difficulty rather than impossibility of enjoyment of rights, and who have not come timeously to court to assert their claims. We cannot deny strong actual claims timeously asserted by determinate people, because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups.
- [31] We recognise that, in a country like ours, racked by criminal violence, the idea that murderers, rapists and armed robbers should be entitled to vote will offend many people. Many open and democratic societies impose voting disabilities on some categories of prisoners. Certain classes of prisoners were in fact disqualified by legislation from voting in the 1994 elections, but that was specifically sanctioned by the interim Constitution. Although there is no comparable provision in the 1996 Constitution, it recognises that limitations may be imposed upon the exercise of fundamental rights, provided they are reasonable and justifiable and otherwise meet the requirements of section 36. The question whether legislation disqualifying prisoners, or categories of prisoners, from voting could be justified under section 36 was not raised in these proceedings and need not be dealt with. This judgment should not be read, however, as suggesting that Parliament is prevented from disenfranchising certain categories of prisoners. But, absent such legislation, prisoners have a constitutional right to vote and neither the Commission nor this Court has the power to disenfranchise them.
- [32] In any event, this case is not only about criminals convicted of serious offences. Indeed the second applicant has not been convicted of any offence and, on the evidence of the amicus, more than a third of all prisoners are in her position. In addition, thousands of them are in prison because they cannot afford to pay low amounts of bail or small fines. One should not underestimate the difficulties that would confront the legislature in our particular context in determining whether or not certain classes of prisoners may legitimately have their right to vote limited.

[33] Parliament cannot by its silence deprive any prisoner of the right to vote. Nor can its silence be interpreted to empower or require either the Commission or this Court to decide which categories of prisoners, if any, should be deprived of the vote, and which should not. The Commission's duty is to manage the elections, not to determine the electorate; it must decide the how of voting, not the who. Similarly the task of this Court is to ensure that fundamental rights and democratic processes are protected.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/04

Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NNICRO) and Others 2004 (5) BCLR 445 (CC)*

1 Introduction

CHASKALSON CJ:

- [1] This application is concerned with the right to vote enshrined in section 19(3) of the Constitution. We have been called upon to deal with it as a matter of urgency on the eve of the elections which are to be held on 14 April 2004, some seven weeks after argument was addressed to us.
- [2] The dispute arises out of the Electoral Laws Amendment Act (the Amendment Act) which amends the Electoral Act. The Amendment Act was promulgated on 6 November 2003 and brought into force on 17 December 2003. It introduced provisions into the Electoral Act which in effect deprive convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in elections during the period of their imprisonment. The crisp point in this application is the constitutionality of these provisions.
- [3] The proceedings have not taken a normal course. Litigation commenced in the Cape High Court (the High Court) on 23 December 2003, six days after the Amendment Act was brought into force. An urgent application was lodged on that date in the High Court by the National Institute for Crime Prevention and the Re-integration of Offenders (Nicro) and two convicted prisoners serving sentences of imprisonment, for an order declaring the provisions that deprive serving prisoners of the right to participate in the upcoming elections, to be inconsistent with the Constitution and invalid.
- [4] The Minister of Home Affairs (the Minister) only lodged an answering affidavit in the High Court on 29 January 2004, and on the following day he applied urgently to this Court, through the State Attorney, for an order allowing the dispute in the matter pending in the High Court to be brought directly to this Court for determination. Nicro and the two convicted prisoners supported the application. There is no satisfactory explanation why this urgent matter was allowed to stagnate in the High Court for over a month. It should have been dealt with promptly. If this had happened a decision could have been given early in January and if the matter had then to come to this Court, it could have been disposed of without the extraordinary difficulties that have arisen as a direct consequence of this delay.

* All footnotes are omitted.

...

- [8] We heard the application on 25 February 2004. It raises important issues on which I would have preferred to have had more time to formulate a judgment. Unfortunately that is not possible because further delay would frustrate any relief that this Court might grant to the applicants.
- [9] For the purposes of this judgment, the parties will be referred to as they were in the High Court application. Thus Nicro and the two prisoners serving sentences without the option of a fine who brought the initial application in the High Court will be cited as the applicants, and the Minister of Home Affairs, the Electoral Commission (the Commission) and the Minister of Correctional Services will be cited as the respondents.

2 Background to the impugned provisions

- [10] Section 1 of the Electoral Act provides that a “voter” is a South African citizen who is 18 years old or older and whose name appears on the voters’ roll. Section 1 of that Act, read with section 5, defines “voters’ roll” as the national common voters’ roll compiled and maintained by the chief electoral officer. It appears from section 8 of the Act that a person’s name will only be entered on the voters’ roll once that person has registered as a voter.
- [11] Prior to its amendment, the Electoral Act contained no provisions dealing specifically with prisoners serving sentences of imprisonment. If this had remained so, in terms of the decision of this Court in *August and Another v Electoral Commission and Others*, the Commission would have been obliged to allow prisoners to register as voters and to vote in the upcoming elections and would also have been obliged to provide the necessary facilities to enable this to be done.
- [12] The changes introduced into the Electoral Act by the Amendment Act include sections 8(2)(f), and 24B(1) and (2). They read as follows:

8(2) The chief electoral officer may not register a person as a voter if that person: . . .

(f) is serving a sentence of imprisonment without the option of a fine.”

24B(1) In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters’ roll for another voting district, is deemed for that election day to have been registered by his or her name having been entered on the voters’ roll for the voting district in which he or she is in prison.

24B(2) A person who is in prison on election day may only vote if he or she is not serving a sentence of imprisonment without the option of a fine.

- [13] In effect, these changes disenfranchised prisoners serving sentences of imprisonment without the option of a fine by precluding them from registering as voters and voting whilst in prison. Unsentenced prisoners, and prisoners incarcerated because of their failure to pay fines imposed on them, retained the right to register and vote.
- [14] Special provision was made by the Amendment Act to regulate the voting of those prisoners who retained the right to vote. Under section 8, a person's name may only be entered on the voters' roll for the voting district in which that person is ordinarily resident. Where a prisoner is "ordinarily resident" is regulated by two deeming provisions. For registration purposes, a prisoner is regarded to be "ordinarily resident" in the voting district where that person normally lived when not imprisoned. For voting purposes, section 24B(1) stipulates that a prisoner who is not serving a sentence of imprisonment without the option of a fine and whose name appears on the voters' roll for another district will be deemed for that election day to be registered for the voting district in which the prison is located.
- [15] Section 64 of the Electoral Act empowers the Commission to establish mobile voting stations in a voting district. In terms of section 64(1A)(b), introduced by the Amendment Act, such mobile voting stations may be employed where necessary for use in a prison.
- [16] The applicants who challenged the validity of the changes made in respect of the voting rights of prisoners sought the following relief in the notice of motion lodged with the urgent application. First, an order declaring section 8(2)(f), the phrase "and not serving a sentence of imprisonment without the option of a fine" in section 24B(1), and section 24B(2) of the Electoral Act to be unconstitutional and invalid; and secondly, an order directing the second and third respondents to ensure that all prisoners who are or will be entitled, in terms of the Electoral Act, to vote in the forthcoming elections, are afforded a reasonable opportunity to register as voters for and to vote in the forthcoming elections. If granted, this relief would remove the provisions that disenfranchised them.
- [17] I turn now to deal with the arguments advanced on behalf of the applicants in support of their claims.

2.1 Sections 1 and 3 of the Constitution

- [18] In the founding affidavit the applicants rely in the first instance on sections 1(d) and 3(2) of the Constitution which form part of the first chapter that contains the founding provisions of the Constitution. They contend that sections 8(2)(f) and 24B(1) and (2) of the Electoral Act, which disenfranchise them, are inconsistent with these provisions which are absolute and not subject to limitation in terms of the Constitution.

[19] There is no substance in this contention and counsel for the applicants correctly did not seek to support it. Section 1 deals with the values of the Constitution and section 3 with the rights of citizenship. Neither of these sections requires voting rights to be absolute and immune from limitation.

[20] Section 1 reads as follows:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[21] The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.

[22] The first section of the Bill of Rights (which is section 7 of the Constitution), provides:

- (1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

[23] The rights entrenched in the Bill of Rights include equality, dignity, and various other human rights and freedoms. These rights give effect to the founding values and must be construed consistently with them. They are, however, not absolute and in principle are subject to limitation in terms of section 36(1) of the Constitution which provides:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
 - (a) the nature of the right;

- (b) the importance of the purpose of the legislation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve that purpose.

[24] Section 3 of the Constitution makes provision for a common and equal citizenship. Section 3 provides:

- (1) There is a common South African citizenship
- (2) All citizens are:
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

This section includes both an entitlement to the rights that citizens have and an obligation to comply with the duties and responsibilities of citizenship. The rights include the right to vote in elections. The duties and responsibilities include at least an obligation to respect the rights of others and to comply with the law.

[25] To sum up, the right to vote is vested in all citizens. It is informed by the foundational values in section 1 of the Constitution and in particular section 1(d). It is, however, not an absolute right. It is subject to limitation in terms of section 36. Citizens who commit crimes break the law in breach of their constitutional duty not to do so. It is within this framework that the challenge to the constitutionality of sections 8(2)(f) and 24B(1) and (2) of the Electoral Act must be determined.

[26] In their founding affidavit, the applicants contend that various rights that prisoners have were infringed by the provisions of the Electoral Act disenfranchising them. Although they based their claim initially on the alleged infringement of the rights contained in sections 9, 10, 12(1)(a), 15(1), 33, 35(2)(e), and 35(3)(n) of the Constitution, at the hearing they relied only on the right to vote and the right to equality.

3 The right to vote

[27] The right to vote is entrenched in section 19(3)(a) of the Constitution which provides:

Every adult citizen has the right:

- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.

[28] As Sachs J held in *August*:

the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.

The right to vote “by its very nature imposes positive obligations upon the legislature and the executive”. This was reaffirmed in *New National Party of South Africa v Government of the RSA and Others* where the “nature, ambit and importance” of the right to vote was analysed by Yacoob J. He stressed that this right which is fundamental to democracy requires proper arrangements to be made for its effective exercise. This is the task of the legislature and the executive which have the responsibility of providing the legal framework, and the infrastructure and resources necessary for the holding of free and fair elections.

[29] In terms of the Constitution, elections for the national assembly are based on the national common voters’ roll, and elections for provincial legislatures and municipal councils on the province’s segment and the municipality’s segment of the national common voters’ roll respectively. Inclusion in the national common voters’ roll is thus essential for the exercise of the right to vote.

[30] The Constitution requires elections to be managed by the Commission in accordance with national legislation. The relevant legislation is the Electoral Act. It makes provision for various matters pertaining to the running of elections including the registration of voters and the compilation of a national common voters’ roll. The voters’ roll must contain the names of all registered voters and be kept open for registration until the date of proclamation of the election date by the President. Once the election date has been proclaimed, the voters’ roll is closed and persons whose names are not on the roll may not vote in the elections. The implications of this for the relief claimed by the applicants are dealt with later in this judgment.

[31] The Electoral Act curtails the right of convicted prisoners to vote in elections in two respects. Convicted prisoners who on the day of the elections are serving a sentence of imprisonment without the option of a fine are precluded by section 24B(2) from voting. Convicted prisoners serving a sentence of imprisonment without the option of a fine are precluded by section 8(2)(f) from registering as voters whilst they are in prison. Thus, if they had not registered before being imprisoned and are released from prison after the voters’ roll has closed but before the day of the elections, they will not be able to vote even though they are no longer in prison.

[32] Counsel for the Minister correctly accepted that these provisions limit the voting rights of convicted prisoners serving sentences of

imprisonment without the option of a fine. Counsel contended, however, that the limitation is justifiable in terms of section 36 of the Constitution. Whether or not that is so is the question that has to be decided in this application.

...

4 Contentions advanced on behalf of the Minister

[39] Mr Gilder, the Director-General of Home Affairs, in an answering affidavit lodged on behalf of the Minister gives the government's reasons for limiting the voting rights of prisoners. He says that prior to the passing of the Amendment Act consideration was given to the need to make provision for voting by people qualified to vote, but who would not be able to find their way to polling stations on election day. Arrangements necessary for this purpose would involve sanctioning the casting of special votes at places other than polling stations, and the use of mobile voting stations on election day to enable people unable to travel to polling stations to cast their votes.

[40] According to Mr Gilder, both these procedures involve risks for the integrity of the voting process. Scrutiny to ensure that there is no tampering with special votes or interference with voters at mobile voting stations presents certain difficulties. Arrangements have to be made for the storage and transportation of the special votes to places where they can be counted and this too has risks. Moreover, the provision of special arrangements of this nature puts a strain on the logistical and financial resources available to the Commission for the purpose of conducting the elections and this too has to be taken into account.

[41] For these reasons, the categories of people for whom special arrangements should be made had to be limited. The favoured categories were people unable to travel to polling stations because of physical infirmities, disabilities or pregnancy, persons and members of their household absent from the Republic on government service, and people who would be absent from their voting districts on election day because of duties connected with the elections.

[42] In addition, attention was given to the position of prisoners. Regard was had to the decision of this Court in *August* where it was held that absent legislation preventing them from doing so, prisoners have a constitutional right to vote, and the Commission has no power to disenfranchise them by failing to make adequate provision for this vote. The question whether legislation disqualifying prisoners or categories of prisoners from voting could be justified under section 36 of the Constitution was not raised in the *August* case and the judgment specifically refrained from dealing with that issue.

[43] According to Mr Gilder, it was appreciated that in the light of this judgment, unless the position of prisoners was addressed in legislation,

arrangements would have to be made for them to vote. He says that it was decided that some but not all prisoners should be allowed to vote. A distinction was made between three classes of prisoners. Awaiting trial prisoners were entitled to the benefit of the presumption of innocence and should not be excluded from voting. Prisoners sentenced to a fine with the alternative of imprisonment who were in custody because they had not paid the fine should also be allowed to vote. Their being in custody was in all probability due to their inability to pay the fines and they should not lose the right to vote because of their poverty. Prisoners serving sentences of imprisonment without the option of a fine were, however, in a different category. It was considered reasonable to deny them the right to register or vote whilst they were serving their sentences.

- [44] Mr Gilder says that the main rationale for this is that these prisoners have been deprived of their liberty by a court after a fair trial. This has various consequences. Because their liberty has been curtailed, they are unable to avail themselves of the ordinary facilities made available for voter registration and voting. If they were not excluded from registering and voting then, in the light of the decision in the *August* case, special provision would have had to have been made for them to vote. There are, however, other categories of persons who for good reasons have difficulty in getting to registration and voting stations. Rather than putting the scarce resources of the state at the disposal of convicted prisoners, such resources should, he contends, be used for the provision of facilities to enable law abiding citizens to register and vote.
- [45] The main thrust of the justification offered by him was that it would be unfair to make provision for voting by prisoners and not to do the same for law abiding citizens unable to vote. Although counsel for the Minister correctly did not support this contention, Mr Gilder went so far as to contend in his affidavit that the prisoners had not been deprived of their right to vote saying: "There was no denial of the right to vote. There was simply a refusal to make special arrangements." A similar contention was specifically rejected by this Court in *August*. When people are incarcerated under the laws of the country and no arrangements are made for them to vote, it cannot be said that their right to vote has not been impaired. The contention is also untenable in the light of section 24B(2) of the Electoral Act which provides in express terms that prisoners may only vote if they are not serving sentences of imprisonment without the option of a fine.
- [46] Mr Gilder also referred to the fact that various open and democratic societies curtail the right of prisoners to vote. He says that it is reasonable to do so, particularly in a country like ours where there are strong feelings against the high level of crime. It would not be fair, he says, to devote resources to criminals who are responsible for their own inability to vote, if similar provision cannot be made for deserving categories of people who through no fault of their own are unable to

register or attend polling stations on election day. Counsel for the Minister submitted that making provision for convicted prisoners to vote would in these circumstances send an incorrect message to the public that the government is soft on crime.

5 Logistics and expense

[47] Counsel for the applicants contended that issues such as cost are not relevant to an enquiry into the limitation of rights. In *Ferreira v Levin NO and Others: Vryenhoek and Others v Powell NO and Others*, Ackermann J pointed out that problems involving resources cannot be resolved in the abstract “but must be confronted in the context of South African conditions and resources — political, social, economic and human”. Whilst it is true, as Ackermann J explained in his judgment, that what is reasonable in “one country with vast resources, does not necessarily justify placing an identical burden on a country with significantly less resources” the right to vote is foundational to democracy which is a core value of our Constitution. In the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected.

[48] Resources cannot be ignored in assessing whether reasonable arrangements have been made for enabling citizens to vote. There is a difference, however, between a decision by Parliament or the Commission as to what is reasonable in that regard, and legislation that effectively disenfranchises a category of citizens.

[49] In the present case, however, it is not necessary to take this issue further for the factual basis for the justification based on cost and the lack of resources has not been established. Arrangements for registering voters were made at all prisons to accommodate unsentenced prisoners and those serving sentences because they had not paid the fines imposed on them. Mobile voting stations are to be provided on election day for these prisoners to vote. There is nothing to suggest that expanding these arrangements to include prisoners sentenced without the option of a fine will in fact place an undue burden on the resources of the Commission. Apart from asserting that it would be costly to do so, no information as to the logistical problems or estimates of the costs involved were provided by Mr Gilder. The Commission abided the decision of the Court. It lodged affidavits to explain its attitude to the Court, and was represented by counsel at the hearing. It did not place any information before the Court in regard to costs and logistics and did not suggest that it would be unable to make the arrangements necessary to enable all prisoners to vote.

[50] It will no doubt be costly and logistically difficult because of time pressures to go through the registration process again for the benefit of prisoners who were not previously allowed to register. But if that be

necessary, the added cost and allocation of human resources will be due largely to the prior exclusion.

- [51] In so far as this aspect of the case is concerned, the burden of justifying the limitation falls at the first hurdle and it is not necessary to engage in the proportionality analysis that would have been necessary if the factual underpinning for the contention based on lack of resources had been established.

6 Favouring prisoners over other voters

- [52] There is no substance in the contention that prisoners would be favoured over others who have difficulty in attending polling stations if arrangements are made to enable them to register and vote at the prisons in which they are detained.

- [53] Prisoners are prevented from voting by the provisions of the Electoral Act and by the action that the state has taken against them. Their position cannot be compared to people whose freedom has not been curtailed by law and who require special arrangements to be made for them to be able to vote. Whether the failure to make such arrangements for particular categories of persons is reasonable and justifiable will depend on the facts of those cases. We are not called upon to consider that in the present case. The mere fact that it may be reasonable not to make special arrangements for particular categories of persons who are unable to reach or attend polling stations on election day does not mean that it is reasonable to disenfranchise prisoners. Whether or not that is reasonable as a matter of policy raises different considerations.

7 Policy

- [54] Mr Gilder says in his affidavit that

in a country in which crime is a major problem and there is a strongly negative attitude to criminals it would be highly insensitive, and indeed irresponsible, to say to law-abiding citizens that some of the resources which could have been utilised to ameliorate the effect of the obligation to get themselves to their voting stations have been diverted to those who have infringed their rights. This applies especially to victims of crimes, whether involving violence or even a crime such as theft. Confidence in the electoral process could be seriously undermined.

- [55] Counsel for the Minister submitted that this gives rise to a concern that if prisoners are allowed to vote that will send a message to the public that the government is soft on crime. Counsel pointed out that this perception is not correct, and, as appears from Mr Gilder's affidavit, the government has in fact taken various stringent measures to combat crime.

- [56] This Court has previously expressed concern about the need:

to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights.

A fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration. It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor could it reasonably be argued that the government is entitled to deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals.

[57] I will assume that Mr Gilder intended to convey something different. That at the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens. Such a purpose would be legitimate and consistent with the provisions of section 3 of the Constitution.

[58] The justification of such a policy, however, raises difficult and complex issues. This is well illustrated by the decision of the Supreme Court of Canada in *Sauvé v Canada (Chief Electoral Officer)*. In 1988, Mr Sauvé, a convicted prisoner serving a sentence of imprisonment, unsuccessfully challenged the constitutionality of a provision of the Canada Elections Act which in effect deprived convicted prisoners of their right to vote whilst serving their sentences. On appeal, the Supreme Court of Canada disposed of the matter summarily in an oral judgment holding that the legislation did not meet the minimum impairment test required for the limitation of rights in Canada. Following this decision new legislation was prepared in which prisoners sentenced to two years' imprisonment or more were denied the right to vote whilst in prison. That legislation was preceded by an investigation into the matter by a special committee on electoral reform which reviewed a report by a Commission (the Lortie Commission) which had previously considered the same issue. That Commission had recommended that only those prisoners who had been convicted of an offence punishable by a maximum of life imprisonment and who had been sentenced to imprisonment for ten years or more should be disqualified from voting. The report of the Special Committee is referred to in the judgment of Gonthier J who said that the Committee

spent a great deal of time trying to determine whether a two year cutoff or five years or seven years or ten years (as recommended by the Lortie Commission) was more justifiable. Eventually the Special Committee recommended a two-year cutoff since, in their view, serious offenders may be considered to be those individuals who have been sentenced to a term of two years or more in a correctional institution.

[59] The Canadian government contended that the disqualification served two broad objectives: to enhance civic responsibility and respect for the

rule of law; and to provide additional punishment, or “enhance the general purposes of the criminal sanction”.

- [60] It appears from the judgments in the *Sauvé* case that the record of evidence included details of the previous reports on whether it would be appropriate and consistent with Canadian values to disqualify prisoners from voting. There was also a considerable body of expert evidence dealing with this issue. In dealing with the minimum impairment test, the Crown and its experts gave three reasons for supporting the legislation. They were:

only prisoners serving sentences of two years or more are disenfranchised, and thus the provision only targets what Parliament has identified as those who have perpetrated ‘serious offences’; the disenfranchisement is temporary, in the sense that the vote returns to the offenders once they leave jail; and the return of the vote once the offender leaves jail is automatic.

- [61] The Supreme Court of Canada divided 5 to 4 on the decision. The majority took the view that the government had failed to establish a rational connection between the denial of prisoners’ right to vote and the objectives of enhancing respect for the law and ensuring appropriate punishment. McLachlin CJ, writing for the majority, said:

The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament’s claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardises its claims to representative democracy, and erodes the basis of its right to convict and punish law-breakers.

- [62] She concluded this part of her judgment as follows:

When the facade of rhetoric is stripped away, little is left of the government’s claim about punishment other than that criminals are people who have broken society’s norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognised goal of sentencing. On all counts, the case that section 51(e) [of the Canada Elections Act] furthers lawful punishment objectives fails.

She went on to question whether the measure would, if rational, have met the minimum impairment test and the requirements of proportionality, and concluded that it did not.

- [63] Gonthier J writing for the minority took a different view, saying:

Given that the objectives are largely symbolic, common sense dictates that social condemnation of criminal activity and a desire to promote civic responsibility are reflected in the disenfranchisement of those who have committed serious crimes. This justification is rooted in a reasonable and rational social and political philosophy which has been adopted by

Parliament. Further, it can hardly be seen as 'novel', as stated in the Chief Justice's reasons, at para 41. The view of the courts below is that generally supported by democratic countries. Countries including the United States, the United Kingdom, Australia, New Zealand, and many European countries such as France and Germany, have, by virtue of choosing some form of prisoner disenfranchisement, also identified a connection between objectives similar to those advanced in the case at bar and the means of prisoner disenfranchisement.

- [64] Gonthier J distinguished the first *Sauvé* case on the grounds that it dealt with a blanket exclusion of prisoners regardless of the duration of their incarceration, and concluded that the two year line drawn by Parliament after an exhaustive investigation of the matter was an acceptable line:

Since Parliament has drawn a line which identifies which incarcerated offenders have committed serious enough crimes to warrant being deprived of the vote, any alternative line will not be of equal effectiveness. Equal effectiveness is a dimension of the analysis that should not be under emphasised, as it relates directly to Parliament's ability to pursue its legitimate objectives effectively. Any other line insisted upon amounts to second-guessing Parliament as to what amounts to a 'serious' crime.

8 Conclusion

- [65] In a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve. In so far as the government relies upon policy considerations, there should be sufficient information to enable the Court to assess and evaluate the policy that is being pursued. In this regard, and bearing in mind that we are concerned here with legislation that disenfranchises voters, I agree with the comments of McLachlin CJ in the second *Sauvé* case:

At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remains constant throughout the justification process. As this Court has stated, the objective 'must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective.

- [66] I have dealt in some detail with the second *Sauvé* case because the two judgments are both compelling and articulate lucidly the case for and against prisoner disenfranchisement. What will be apparent from the reference to the two judgments is that the present case is markedly different from *Sauvé*. The main thrust of the justification in the present case was directed to the logistical and cost issues which cannot be sustained. The policy issue has been introduced into the case almost tangentially. In contrast, the detailed record in the second *Sauvé* case contained evidence which addressed the issues relevant to the policy

decisions to disenfranchise prisoners, and the purpose that it would serve. In the present case we have only statements such as that made by counsel that the government does not want to be seen to be soft on crime, and that made by Mr Gilder that it would be unfair to others who cannot vote to allow prisoners to vote.

[67] Moreover, we are concerned with a blanket exclusion akin to that which failed to pass scrutiny in the first *Sauvé* case. Mr Gilder mentions crimes involving violence or even theft, but the legislation is not tailored to such crimes. Its target is every prisoner sentenced to imprisonment without the option of a fine. We have no information about the sort of offences for which shorter periods of imprisonment are likely to be imposed, the sort of persons who are likely to be imprisoned for such offences, and the number of persons who might lose their vote because of comparatively minor transgressions. In short we have wholly inadequate information on which to conduct the limitation analysis that is called for. Moreover, the provisions as formulated appear to disenfranchise prisoners whose convictions and sentences are under appeal. Another relevant factor to consider is the fact that the Electoral Act prohibits all prisoners sentenced to imprisonment without the option of a fine from voting, while the Constitution permits a prisoner serving a sentence of imprisonment of less than 12 months without the option of a fine to stand for election. No explanation is given, and none is apparent, as to why a person who qualifies to be a candidate should be disqualified from voting. In the circumstances, the attempt by the Minister to justify the limitation fails, and the challenge to the constitutionality of the legislation on the ground that it infringes the right to vote must be upheld. That being so, there is no need to discuss the case based on the right to equality, and whether in the circumstances of this case it should be treated separately or taken only as reinforcing the right to vote, which is the primary right on which the applicants rely.

...

8.1 *Order*

[80] The following order is made:

- 1 It is declared that the following provisions of the Electoral Act 73 of 1998 are inconsistent with the Constitution and invalid:
 - a the whole of section 8(2)(f);
 - b the phrase “and not serving a sentence of imprisonment without the option of a fine” in section 24B(1); and
 - c the whole of section 24B(2).
- 2 The Electoral Commission and the Minister of Correctional Services are ordered to ensure that all prisoners who are entitled to vote, in terms of the Electoral Act 73 of 1998 and paragraph 1 of this order, are afforded a reasonable opportunity

to register as voters for, and to vote in, the forthcoming elections of April 2004.

- 3 Notwithstanding the provisions of Chapter 2 and section 24 of the Electoral Act 73 of 1998, the Electoral Commission is ordered that, not later than 9 April 2004, it must:
 - a give notice to prisons and prisoners that registration of voters will take place on a specified date;
 - b visit prisons and register prisoners who, pursuant to this order, are entitled to vote;
 - c prepare, print and distribute to all who are so entitled, a supplementary voters' roll of prisoners so registered; and
 - d receive, properly consider and dispose of any objection or appeal relating to registration as a voter or the supplementary voters' roll.
- 4 The time within which the various steps referred to in paragraph 3 of this order may be taken may be determined by the Electoral Commission, with due regard to the provisions of paragraph 2 of this order.
- 5 The Electoral Commission is required on or before Wednesday 10 March 2004 to serve on the Minister of Correctional Services, Nicro and the two prisoners with whom it brought this application, and lodge with the Registrar of this Court, an affidavit setting out the manner in which it will comply with paragraphs 2 and 3 of this order. Any interested person may inspect this affidavit at the Registrar's office once it has been lodged.
- 6 The Minister of Home Affairs is ordered to pay the costs of this application, including the costs of two counsel....

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 09/09
[2009] ZACC 3

*Richter v Minister for Home Affairs and Others**

1 Introduction

- [1] Is the current legislative scheme which limits the right of South African citizens who are registered as voters but who will be out of the country when the elections take place on 22 April 2009 consistent with the Constitution? This is the question raised by the applications before us. Mr Willem Richter, the applicant in both these applications, is a South African citizen and registered voter who is working as a teacher in the United Kingdom. He intends to return to South Africa at the end of this year. He wishes to vote in the 2009 elections but is not permitted to do so because section 33 of the Electoral Act 73 of 1998 (the Electoral Act) restricts the classes of people absent from the country on polling day who may vote.
- [2] In seeking to secure the right to vote in these elections, Mr Richter launched two applications – the first in the High Court in Pretoria on 26 January 2009 and the second in this Court the following day. In the High Court application, he sought an order declaring certain provisions of the Electoral Act and some of the regulations promulgated thereunder to be inconsistent with the Constitution and invalid. In the application for direct access to this Court, he sought an order that the dispute in the High Court be brought directly to this Court and that the papers in the High Court be transferred to this Court. On 30 January the Chief Justice gave directions in relation to the application for direct access, affording the respondents until 9 February to lodge answering affidavits and requiring the applicant to lodge a further affidavit on the same day to inform the Court of the status of the High Court application on that date.
- [3] On 9 February, Ebersohn AJ handed down a judgment in the High Court application declaring sections 33(1)(b) and 33(1)(e) of the Electoral Act to be inconsistent with the Constitution at least in part, as well as declaring regulations 6(b), 6(e), 9, 11 and 12 of the Election Regulations, 2004 (the Election Regulations) to be similarly inconsistent with the Constitution, again at least in part. Ebersohn AJ also made certain mandatory orders requiring the Electoral Commission (the Commission) to ensure that those registered voters absent from the country on polling day be given an opportunity to vote by means of a special vote. Ebersohn AJ further ordered that the orders of invalidity be referred to this Court for confirmation. The day after the judgment was handed down Mr. Richter launched a second

* All footnotes are omitted.

application in this Court seeking confirmation of the order made by the High Court.

- [4] This brief history explains why there are two applications by Mr. Richter seeking the same relief contemporaneously. The first is the application for direct access to this Court in terms of rule 18 lodged on 27 January (case number CCT 03/09); and the second is the application for confirmation of the order of constitutional invalidity made by the Pretoria High Court on 9 February and lodged in this Court on 10 February (case number CCT 09/09). As counsel for Mr. Richter has conceded, the first application has been overtaken by the second and it is not necessary in this judgment to consider that application further. It must be dismissed. The only issue that arises in relation to it is costs, a matter to which I turn at the end of this judgment.

...

1.1 *The electoral system*

- [15] The Constitution requires that elections take place on the basis of a national common voters' roll. Section 1(d) of the Constitution provides that amongst the founding values of the Constitution are "universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Section 46(1) of the Constitution then provides that:

Subject to Schedule 6A, the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that:

- (a) is prescribed by national legislation;
- (b) is based on the national common voters' roll;
- (c) provides for a minimum voting age of 18 years; and
- (d) results, in general, in proportional representation.

- [16] The Electoral Act is the national legislation contemplated in section 46(1) which establishes the electoral system. Section 5 of the Electoral Act provides for a national common voters' roll and requires the Chief Electoral Officer⁷ to compile and maintain it. All South African citizens in possession of a bar-coded identity document may apply for registration as a voter on the national common voters' roll. According to Adv P Tlakula, the current Chief Electoral Officer, the Electoral Commission has 302 offices located in local municipalities throughout the country and voters may register at these offices on any working day. These offices have been in existence since 1998.

- [17] In addition, Adv Tlakula tells us, the Electoral Commission runs voter registration drives prior to national elections. Two weekend drives have been held in the run-up to the 2009 elections, one on the weekend of 8 and 9 November 2008 and the other on the weekend of 7 and 8 February 2009. Upon registration, a voter's name is entered in the voters' roll for that district in which he or she is ordinarily resident. If a

voter changes his or her place of ordinary residence, that voter must apply to have the change recorded in the voters' roll.

...

[20] The national common voters' roll is segmented into voting districts, and each voter is registered for a specific district. The Electoral Act provides for the Electoral Commission to establish voting districts for the whole of the territory of the Republic.¹⁶ There are currently 19 726 voting districts. The Act provides guidelines for the determination of the boundaries of voting districts including the number and distribution of eligible voters, the availability of transport and any geographical features that may impede access. The segmentation of the voters' roll in this way permits it to be used for national, provincial and local elections, including ward elections for local government.

[21] The general rule is that voters must vote at the electoral station in the voting district (section 24A). This procedure will permit the voter to vote only in the national elections, unless the voting district in which the voter seeks to vote is in the same province in which the voter is registered. According to Adv Tlakula, in the 2004 national and provincial elections, nearly two million voters voted in terms of section 24A in voting districts other than those in which they were registered district for which they are registered. However, there is a provision for voters who cannot vote in the electoral district for which they are registered on polling day to apply to the presiding officer of a voting station in another district to vote in that district (section 24A). This procedure will permit the voter to vote only in the national elections, unless the voting district in which the voter seeks to vote is in the same province in which the voter is registered. According to Adv Tlakula, in the 2004 national and provincial elections, nearly two million voters voted in terms of section 24A in voting districts other than those in which they were registered.

...

[23] The Electoral Act is therefore based on the principle that voters must vote in the voting districts for which they are registered. There are two important exceptions to this rule. The first is the procedure provided for in section 24A, discussed above, whereby a voter who cannot vote in his or her voting district on polling day, may, on that day, apply to the presiding officer at a voting station in another district for permission to vote in that district. If the voter is seeking to vote outside the province in which he or she is registered, the presiding officer may permit the voter to vote in the national elections only.

[24] The second exception permits voters, in circumstances where they will not be able to vote at a voting station in the voting district for which they are registered on polling day, to apply for a special vote within the stipulated time which will permit them to vote before polling day. That exception is to be found in section 33 and it is the focus of the issues that arise in this case.

1.2 *Section 33: special votes*

[25] Section 33 provides as follows:

- (1) The Commission must allow a person to apply for a special vote if that person cannot vote at a voting station in the voting district in which the person is registered as a voter, due to that person's:
 - (a) physical infirmity or disability, or pregnancy;
 - (b) absence from the Republic on Government service or membership of the household of the person so being absent;
 - (c) absence from that voting district while serving as an officer in the election concerned;
 - (d) being on duty as a member of the security services in connection with the election; or
 - (e) temporary absence from the Republic for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event, if the person notifies the Commission within 15 days after the proclamation of the date of the election, of his or her intended absence from the Republic, his or her intention to vote, and the place where he or she will cast his or her vote.
- (2) The Commission must prescribe:
 - (a) the procedure for applying for special votes; and
 - (b) procedures, consistent in principle with Chapter 4, for the casting and counting of special votes.

[26] Arrangements for special votes are provided in chapter 3 of the Election Regulations promulgated in terms of section 100 of the Electoral Act. Regulation 6 provides that chapter 3 of the regulations will provide for the procedures to govern the application for and casting and counting of special votes as required by section 33(2) of the Electoral Act. Regulation 6(e) records, in terms identical to section 33(1)(e), that voters may obtain a special vote if they are unable, on polling day, to vote in their voting district due to their:

temporary absence from the Republic for the purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports events, if the person notifies the Commission within 15 days after the proclamation of the election, of his or her intended absence from the Republic, his or her intention to vote, and the place where he or she will cast his or her vote.

1.3 *Special votes in terms of section 33(1)(a)*

[27] Regulation 7 governs the special voting procedure that may, on application by those who are physically infirm, disabled or pregnant, be afforded. The procedure requires two voting officers to visit the voter at an address specified by the voter within the voting district in which he or she is registered.²⁵ The voting officers provide the voter with a voting paper which the voter then marks in secrecy and places in an envelope, which is in turn placed in another sealed envelope and returned to the presiding officer of the relevant voting district.

1.4 *Special votes in terms of section 33(1)(b)*

- [28] Regulation 9 governs the special voting procedure for voters who are, in terms of section 33(1)(b), absent from the Republic on government service. It again provides that the voter must make an application for a special vote to a special voting officer at the South African embassy, high commission or consulate on the dates specified in the election timetable. On the same day, the voter is then afforded an opportunity to vote. It should be noted that voters who fall within the terms of section 33(1)(b) may vote in both national and provincial elections – this is a matter to which I shall return later.
- [29] Once the special votes have been received, the special voting officer will package and seal the votes and return them to the Chief Electoral Officer. The votes are then distributed to the presiding officers of the voting districts in which the voters are registered. In this regard, it should be noted that in terms of the Electoral Act, the ordinary residence of section 33(1)(b) voters for determining their voting district is the “head office in the Republic” of the government department for which the voter works.²⁷ This deeming provision also relates to all the members of the section 33(1)(b) voter’s household.
- [30] Regulation 10 regulates the procedure for special votes for election officers and those on duty as members of the security services on polling day. It provides that application is to be made to the presiding officer for the voting district in which the voter is registered on times and dates to be specified in the election timetable. If the application is granted, the voter is permitted to vote there and then. The ballot paper is placed in an unmarked envelope and then sealed in another envelope and securely kept by the presiding officer until polling day.

1.5 *Special votes in terms of section 33(1)(e)*

- [31] Regulations 11, 12 and 13 govern the procedure for special votes accorded to those voters who will be absent from the Republic on polling day. The voter must, within 15 days of the proclamation of the election date, give notice to the Chief Electoral Officer of his or her intention to apply for a special vote and the place where he or she intends to do so. Regulation 11(3) provides that a voter may apply to vote at any South African embassy, high commission or consulate or at the office of the presiding officer of the voting station at which she or he is a registered voter, on the dates and times specified in the election timetable.
- [32] Upon receipt of notification that a voter intends to apply for a special vote abroad, the Chief Electoral Officer will inform the head of the embassy, high commission or consulate abroad of the voter’s intention. On the date specified in the election timetable, the voter will then apply to the special voting officer at the relevant embassy, high commission

or consulate. If the application is approved, the voter will then be permitted to vote there and then but only in elections for the National Assembly, not for a provincial legislature. The voter will mark the ballot paper and place it in a sealed unmarked envelope.

[33] The special voting officer will then place the unmarked envelope in another envelope marked with the applicant's name, identity number and voting district number. All the marked envelopes will then be packaged together and sealed and returned to the Chief Electoral Officer who keeps them until polling day when they are counted.

[34] Regulation 13 provides for voters contemplated in section 33(1)(e) to cast a special vote before proceeding abroad. A voter who wishes to do so should inform the Chief Electoral Officer of this within 15 days of the proclamation of the election date, just as if the voter wishes to vote abroad. The Chief Electoral Officer will then inform the presiding officer of the voting district for which the voter is registered. On the date specified in the election timetable, the voter must then make application to the presiding officer for the voting district in which he or she is registered. If the application is granted, the applicant will be permitted to vote for both the national and provincial elections there and then and the vote will then be sealed, kept and counted with the other votes cast on polling day.

...

1.6 *Special votes in terms of section 33(1)(c) and (d)*

[36] In the High Court in Pretoria, the applicant's argument was that section 33(1)(e) [of the Electoral Act] and certain of the regulations promulgated under the Electoral Act infringe the right to vote of those South Africans who are registered as voters but who will not be in the country on polling day.³⁹ By restricting the classes of absent voters, those voters who do not fall within the prescribed classes are deprived of the right. This deprivation, the applicant argued, is an unjustifiable limitation of the right to vote.

...

[44] The High Court then decided that, in restricting the classes of voters who will be afforded a special vote because they are absent from the country on polling day, section 33(1)(e) limits the right to vote. The High Court reasoned that any limitation of this right must be supported by clear and convincing reasons. The High Court also noted that section 33(1)(b) of the Electoral Act permits citizens abroad on government service to vote. The Court considered this to create a "privileged group of citizens" that constituted an unacceptable form of discrimination⁴⁵ in breach of section 9 of the Constitution.

[45] The High Court noted that the only explanation tendered on behalf of the respondents to justify the provisions related to the need to protect the integrity of the polling process and the financial and logistical strains that permitting a broader class of absentee voters to vote would entail.⁴⁶ However, the Court reasoned that given that those on government service would be permitted to vote at embassies, high commissions and consulates, the only additional cost would be the ferrying of additional ballot papers to and from these places. This, the Court decided, would not constitute an undue burden on the state's resources. The Court therefore concluded that the provisions constituted unfair discrimination and had to be declared inconsistent with the Constitution.

...

[47] The High Court thus ordered that the following provisions were inconsistent with the Constitution and therefore invalid:

- section 33(1)(b);
- the words "temporary", "intended" and "for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event" in section 33(1)(e);
- Regulation 6(1)(b) which refers to section 33(1)(b) voters;
- the words "temporary", "intended" and "for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event" in regulation 6(1)(e) which refers to section 33(1)(e) voters;
- Regulation 9;
- the words "temporary" and "intended" in regulation 11; and
- the words "temporary" and "for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event" in regulation 12.

1.7 *Proceedings in this Court*

[48] The applicant now seeks confirmation of the order in this Court. The application is supported by the *amici curiae*, Afriforum and the Freedom Front Plus, as well as the intervening parties, the Democratic Alliance, Mr. Tipper and the Inkatha Freedom Party. The primary issue before the Court is whether the High Court order should be confirmed.

...

[50] The issues to be considered are therefore the following:

- (a) To the extent that section 33(1)(e) of the Electoral Act restricts the classes of voters who, due to absence from the Republic on polling day, may apply for a special vote, is it inconsistent with the Constitution?
- (b) To the extent that section 33(1)(e) requires voters to notify the Chief Electoral Officer within 15 days of the proclamation of the election of their intention to apply for a special vote, and affords no power of condonation to the Chief Electoral Officer, is it inconsistent with the Constitution?
- (c) To the extent that regulation 12(4) permits voters afforded a special vote within the meaning of section 33(1)(e) to vote only

in national and not provincial elections, is it inconsistent with the Constitution?

- (d) If section 33(1)(e) is inconsistent with the Constitution for the reasons given in paragraph (a), are regulations 6, 11, 12 and 13, which are based on the provisions of section 33(1)(e) inconsistent with the Constitution for the same reason?
- (e) What remedy, if any, should this Court order, which includes the question whether the relief granted by the High Court in terms of paragraphs 3, 4 and 5 of the notice of motion in the High Court should be confirmed?

...

1.8 *The importance of the right to vote in our constitutional democracy*

[52] On a number of previous occasions, this Court has had to consider the importance of the right to vote in our constitutional democracy. Memorably, in *August v Electoral Commission*, Sachs J declared that the vote of each and every citizen is a “badge of dignity and personhood. Quite literally, it says that everybody counts.” The precious value of the vote in South Africa arises in no small measure from a history in which the right to vote was denied to the majority of our citizens. Sachs J went on to note that in a country of great inequality such as South Africa, the right to vote declares that we all belong to the same nation and that “our destinies are intertwined in a single interactive polity”.

[53] The right to vote is symbolic of our citizenship, as Sachs J declared. In entrenching the right of *every citizen* to vote, section 19 of our Constitution affirms that symbolic value. But the right to vote, and its exercise, has a constitutional importance in addition to this symbolic value. The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.

[54] Unlike many other civil and political guarantees, as this Court has remarked on previous occasions,⁵¹ the right to vote imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised. The right to vote necessitates an electoral system and the calling of elections. Running an election is a difficult task which calls for

expertise and dedication. Section 190 of the Constitution recognises the need for an organisation to take responsibility for elections. It provides for an Electoral Commission which will manage elections, ensure that they are free and fair, and declare the result in a time to be provided for in national legislation that is “as short as reasonably possible.” As a nation, we have been fortunate indeed to have been served by an Electoral Commission which has taken this task seriously and developed an expertise and dedication to its task.

[55] In designing and establishing an electoral system, one of the crucial considerations is the need to foster enfranchisement. The electoral system should recognise that the right to vote has both symbolic and democratic value and that wherever possible the participation of citizens should be encouraged. There are of course other important constitutional considerations relevant to the design of an electoral system. Amongst them is the need to ensure that the election process will be free and fair⁵³ and that the results will be both credible and accurate.

[56] Just as the state bears a responsibility to take positive steps to enable elections to take place, the right to vote itself cannot be exercised by a citizen unless he or she takes the trouble to exercise it. The very process of regulating the elections which requires the composition of a national voters’ roll, the establishment of voting stations and voting times will impose burdens upon members of the public who wish to exercise their right to vote. First, they will have to register in good time. Then, on polling day, they may have to journey some distance to a voting station; they will have to be in possession of a bar-coded identity document; and they may have to stand in a long queue to vote. These burdens are largely unavoidable.

[57] In assessing whether the restrictions or burdens placed on a voter who wishes to exercise his or her right to vote are inconsistent with the constitutional protection of the right to vote, a court will accept that a voter may not complain if the burden imposed does not prevent the voter from voting, as long as the voter takes reasonable steps to do so. As the majority in this Court noted in *New National Party*:

Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I conclude, therefore, that the Act would infringe the right to vote if it is shown that, as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do so, even though they acted reasonably in pursuit of the right.

[58] In approaching each of the provisions in question in this case, therefore, I would suggest that to determine whether any provision constitutes an infringement of section 19 of the Constitution, we must establish whether the consequence of any of the challenged provisions is such that, were a voter to take reasonable steps to seek to exercise his or her right to vote, any of the provisions would prevent the voter

from doing so. In determining what would constitute reasonable steps for the voter to take, we should bear in mind both the fact that the process of voting inevitably imposes burdens upon a citizen as well as the important democratic value of fostering participation in elections that I discussed above. Should it be found that the provision would prevent a voter from voting despite the voter's taking reasonable steps to do so, the provision will constitute an infringement of section 19. The next question that will arise is whether the infringement is justifiable in terms of section 36 of the Constitution.

[59] With this prelude, I turn now to consider each of the constitutional questions raised.

1.9 *Section 33(1)(e) – the classes of absentee voters permitted a special vote*

[60] Section 33(1)(e) provides that a registered voter who is unable to vote in his or her voting district on polling day must be allowed a special vote if the inability to vote is due to “temporary absence from the Republic for purposes of a holiday, a business trip, the attendance of a tertiary institution or an educational visit or participation in an international sports event.”

[61] Counsel for the Minister argued that the classes identified in section 33(1)(e) were capable of being interpreted sufficiently broadly to include any citizen who is registered as a voter, and who is out of the country on polling day for whatever reason, as long as he or she remains ordinarily resident in the country within the meaning of section 7 of the Electoral Act. Counsel argued that as section 2 of the Electoral Act requires the provisions of the Act to be interpreted in the light of the Constitution, it would be appropriate to read section 33(1)(e) to enhance enfranchisement in this way.

[62] There are two related difficulties with this argument. The first is that a court may only attribute a meaning to a provision which it is reasonably capable of bearing. As Langa CJ stated in *Hyundai*, “such an interpretation should not, however, be unduly strained.”

[63] To read section 33(1)(e) in the manner proposed would, in my view, unduly strain the text. The text lists classes of voters who are entitled to special votes. Those classes of voters are those who are absent because they are on a holiday, a business trip, attending a tertiary institution or on an educational visit or participating in an international sports event. On an ordinary reading of these categories, it is not possible to say that a person such as Mr Richter falls within them. Mr Richter is a teacher working on contract in an English school. He is certainly not on holiday. Nor is he on a business or educational trip or visit. Nor is he attending a tertiary institution. And he is not participating in an international sports event. It is not surprising then that the Electoral Commission concluded, as it confirmed in its affidavit before

the High Court, that Mr Richter did not qualify for a special vote in terms of section 33(1)(e) and that it considered itself to be bound by the provision. The meaning of section 33(1)(e) is clear: it sets a range of relatively clear categories within which a voter must fall to qualify for a special vote. It is not a provision which generally permits those absent from the Republic on voting day for whatever reason to a special vote.

- [64] The second difficulty, driving the conclusion that the language of section 33(1)(e) is not reasonably capable of the meaning counsel wishes to attribute to it, arises from the principle that a law that regulates a fundamental right should be expressed in a manner which will enable citizens to determine with relative clarity what rights they have and do not have. Section 33(1)(e) on its ordinary reading identifies groups of people who have a right to a special vote. Were this Court to attribute an extended meaning to section 33(1)(e) in order to render it consistent with the Constitution, the section would continue to misinform those voters (probably very many of them) who remain in ignorance of this Court's judgment. A corollary of this principle is the following. Given that section 33(1)(e) requires the Chief Electoral Officer and voting officials to determine whether a voter who seeks to come within its ambit does so, it is important that as far as possible its meaning be clear. Were this not to be the case, similarly situated voters might be treated differently by different voting officers because the language of section 33(1)(e) would not provide accurate guidance to them in determining whether a voter did fall within the terms of the subsection.
- [65] It is clear from the applications before us that there are many registered voters who will be absent from the Republic on polling day for reasons other than those mentioned in section 33(1)(e). Mr Richter is one. He is 27 years old, trained as a teacher at the University of the North-West and graduated at the end of 2006. He is registered as a voter and voted in the 2004 elections. He has since spent two years in the United Kingdom teaching on contract and he intends to return at the end of this year. As someone who is working abroad, he falls outside the categories mentioned in section 33(1)(e), yet he has not permanently left the country.
- [66] Mr Tipper, the second intervening party, is another. He is a 47-year old registered voter who has voted in every national election since 1994. He is currently working as a teacher in South Korea on a year-long contract which began in April 2008. He considers himself to be a resident of South Africa who is abroad working. He too does not fall within the classes of voters permitted a special vote by section 33(1)(e).
- [67] The application of Mr Kwame Moloko and eleven others argued at the same time as the Richter application gives further examples of ten other South Africans who are registered as voters who will be absent

from the country on 22 April and who will not be afforded a special vote. Mr Moloko, the first applicant in that matter, is a 30- year old registered voter who is working as a financial adviser for an international accounting firm in Vancouver, Canada. He states that he intends to return to South Africa once he has gained work experience and that he intends to raise his children in South Africa. He voted in the national elections in 1999 and 2004 but, again because he does not fall within the terms of section 33(1)(e), he will not be able to vote in 2009. His wife, Mrs Lebohang Moloko, a 30-year old South African, is in the same predicament as are eight of the other applicants in the Moloko application.

[68] Apart from travelling back to South Africa from the United Kingdom, South Korea and Canada in order to be present in South Africa on polling day 2009, there are no steps that Mr Richter, Mr Tipper or Mr and Mrs Moloko can take to vote in the 2009 elections. Can it be said that in requiring them to return home to South Africa to vote, the election regulations are imposing an obligation of reasonable compliance upon them? I do not think so. It is acceptable to ask voters to travel some distances from their homes to a polling station. One cannot quibble, either, at the fact that delays in casting votes at a polling station may require voters to queue for considerable periods of time to vote. It cannot be said, however, that requiring a voter to travel thousands of kilometres across the globe to be in their voting district on voting day is exacting reasonable compliance from a voter. All the more so, given that section 33(1)(b) expressly does not require those working abroad on government service to return home to vote, but provides voting facilities for them at embassies, high commissions and consulates.

[69] In reaching this conclusion, I am influenced by the fact that, as several of the parties noted, we now live in a global economy which provides opportunities to South African citizens and citizens from other countries to study and work in countries other than their own. The experience that they gain will enrich our society when they return, and will no doubt enrich, too, a sense of a shared global citizenship. The evidence before us, too, shows that many South African citizens abroad make remittances to family members in South Africa while they are abroad, or save money to buy a house. To the extent that citizens engaged in such pursuits want to take the trouble to participate in elections while abroad, it is an expression both of their continued commitment to our country and their civic-mindedness from which our democracy will benefit.

[70] I conclude therefore that section 33(1)(e) constitutes a limitation of section 19 of the Constitution by restricting the classes of voters who are absent from the Republic on polling day from participating in elections.

- [71] The next question that arises is whether the limitation occasioned by section 33(1)(e) is reasonable and justifiable within the meaning of section 36 of the Constitution.⁵⁸ In determining this question, it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose.
- [72] The main thrust of both written and oral argument for the Minister in relation to justification addressed the question whether citizens absent from the country should be permitted to register to vote at foreign missions. This question does not arise in this case. There is nothing to be found either in the affidavit lodged by the Minister in the High Court, the affidavit opposing direct access to this Court or in the written argument submitted to this Court to constitute justification of the restrictive classes contained in section 33(1)(e). Indeed, during oral argument, counsel for the Minister conceded that restricting the class of registered voters who are abroad on polling day to obtain special votes was a limitation of section 19 of the Constitution and that he could proffer no justification for the limitation.
- [73] In this regard, it should be noted that in its affidavit lodged in the High Court, the Ministry of Home Affairs stated that time was needed to respond to the applicant's challenge to section 33(1) of the Electoral Act. It was stated that time was needed in particular to deal with the question of the practicability of extending the categories of persons provided for in section 33. Despite the fact that over a month elapsed between the date on which the answering affidavit was lodged in the High Court and the date on which this Court heard the application, no further answering affidavit was filed.
- [74] I should add for the sake of completeness that the record includes the affidavit lodged on behalf of the Minister in the Democratic Alliance matter in the High Court in Cape Town. In that affidavit, which is in similar terms to the affidavit lodged in this Court to oppose direct access, the deponent on behalf of the Minister points merely to the perceived difficulty that there would always be more categories that can be added to those provided in section 33(1)(e). Clearly this is correct, but no cogent reason is given for preventing any citizen from voting who wishes to vote in the election, is a registered voter and who makes the effort to make the necessary arrangements provided for in regulations 11 to 13.
- [75] On the other hand, the Electoral Commission both in its affidavit before the High Court in Pretoria, and again in the affidavit lodged in this Court, took the position that if ordered to do so it would facilitate voting overseas by voters similarly situated to the applicant. It did not oppose relief in this regard. During oral argument, counsel for the Commission informed this Court that as long the Commission received the notifications contemplated in section 33(1)(e) and regulation 11 by the

“end of the month”, the integrity of the election would not be threatened.

[76] In deciding whether the limitation of section 19 occasioned by the under inclusiveness of section 33(1)(e) is reasonable and justifiable, it is relevant to note that in addition to those voters who fall within the categories listed in section 33(1)(e), all citizens in government service abroad and the members of their households are also permitted to vote abroad.

[77] It is also important to bear in mind that in many other open and democratic societies, facilities are afforded to citizens who will be abroad on polling day. A useful survey of the electoral regulations of 214 countries and territories, compiled by the International Institute for Democracy and Electoral Assistance (IDEA), a nongovernmental organisation based in Sweden whose objective is to facilitate democratic elections, was furnished to the Court.⁶¹ That survey suggests that of the 214 countries and territories reviewed, 115 make provision for voting by absent voters. Only 14 of the 115 countries or territories restricted the entitlement to vote on the basis of the activity undertaken abroad by the absent voters.

[78] In the light of the above, I conclude that the limitation of the right to vote occasioned by section 33(1)(e) of the Electoral Act cannot be saved by section 36 of the Constitution. Government has not sought to point to any legitimate government purpose served by restricting the categories of registered voters who qualify for a special vote, and I can think of none. This conclusion renders it unnecessary to consider whether the High Court was correct when it concluded that section 33(1)(e) constituted unfair discrimination and/or arbitrary differentiation. I do not consider this matter further.

[79] It will be necessary to consider the relief that should flow from this conclusion in a moment. First, I turn to consider the two arguments made by the Democratic Alliance: the first relating to the 15-day time limit provided in section 33(1)(e) and the second relating to provincial votes.

1.10 *The 15-day time limit in section 33(1)(e)*

[80] Section 33(1)(e) requires voters who wish to apply for a special vote to notify the Chief Electoral Officer of their intention with 15 days of the date of the proclamation of the election. Counsel for the Democratic Alliance argued that the 15-day period infringed section 19 of the Constitution. His argument was that the time period was a rigid one and did not afford the Chief Electoral Officer the power to condone a failure to comply with that time limit. This was one of the aspects of the relief opposed by the Electoral Commission.

[81] In my view, this argument must fail. It cannot be said that requiring voters who seek special votes in terms of section 33(1)(e) to notify the Chief Electoral Officer of that fact within 15 days of the date of proclamation of the election is to ask too much of a voter. In this regard, it should be noted that in addition to being annexed to the Election Regulations, the necessary forms are available on the Electoral Commission's website⁶² and the duly completed forms may be submitted by post or fax.

[82] Being notified of the number of voters who intend to apply for special votes enables the Electoral Commission to make the necessary arrangements to ensure that sufficient ballot papers are furnished to each embassy, high commission and consulate. Such notice also allows the Commission to ensure that an adequate number of voting officers are appointed to ensure that the casting of votes runs smoothly and to make adequate arrangements for counting.

[83] Were a discretion afforded to the Chief Electoral Officer (as counsel for the Democratic Alliance argued) to condone non-compliance with the 15-day period, the administrative burden placed on the Chief Electoral Officer might well be unbearable. It would raise the real prospect of administrative reviews of the decisions of the Chief Electoral Officer which would inevitably hamper the efficient performance of her duties. It is true that there may be voters who, for whatever reason, fail to notify the Chief Electoral Officer in time, just as there may well be voters who, due to accident or other misfortune, may not arrive at a voting station until after closing time and be denied the right to vote. Given the nature of elections, it is not possible to accommodate misfortunes of this kind. Were we to require the Electoral Act to do so, the work of the Electoral Commission would be undermined.

[84] This argument must therefore fail.

...

1.11 *Remedy*

[92] I have reached the conclusion that section 33(1)(e) is inconsistent with the Constitution in that it deprives some registered voters who will be absent from the country on polling day of a special vote. The question that now arises is what order this Court should make.

[93] It is immediately clear that the High Court in Pretoria should not have declared section 33(1)(b) of the Electoral Act to be invalid and that order cannot be confirmed. The next question that arises is whether the severance ordered in relation to section 33(1)(e) is correct. There can be no doubt that it is necessary to sever the specific classes of voter from the section, so the High Court was correct to sever the words "for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event". The High Court also severed the word "temporary" from

the section. In my view, this order is correct. If these words are severed, the section that will remain will read as follows:

- (e) absence from the Republic, if the person notifies the Commission within 15 days after the proclamation of the date of the election, of his or her intended absence from the Republic, his or her intention to vote, and the place where he or she will cast his or her vote.

[94] The language of the section, thus rendered, will be easy to interpret and apply – an issue that was raised by the Electoral Commission in its comprehensive and helpful affidavit before this Court. The language of the section will now make clear that special votes should be accorded to any registered voter who will be absent from the Republic on polling day and who gives notice in the prescribed time to the Chief Electoral Officer. The High Court also severed the word “intended” from section 33(1)(e). No argument was addressed to the Court on this severance, and it does not seem to me to be one that is necessitated by the reasoning in this judgment. This severance is therefore not confirmed.

[95] This conclusion must now be applied to the Election Regulations promulgated under the Act. It follows that the High Court’s declaration of invalidity in relation to regulation 6(1)(b) which relates to section 33(1)(b) voters cannot stand. Similarly, its declaration that regulation 9 was invalid cannot stand as that regulation, too, governs the procedure for special votes for section 33(1)(b) voters. Nothing in this judgment supports the High Court’s conclusion that these provisions are invalid.

[96] On the other hand, the High Court’s severance of the words “temporary” and “for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event” from regulation 6(e) should be confirmed, though its severance of the word “intended” from the same regulation cannot stand. Similarly, the High Court’s severance in relation to regulations 11 and 12 should stand save for its decision to sever the word “intended” from regulation 11. For consistency, the word “temporary” as well as the words “for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event” should also be severed from regulation 13, although the High Court did not make this order.

[97] The effect of these orders is that any registered voter who will not be in the country on polling day will be entitled to a special vote in terms of section 33(1)(e). However, the period for these voters to notify the Chief Electoral Officer of their intention to apply for a special vote and to indicate the place where they intend to apply has now elapsed. It elapsed on 27 February 2009, 15 days after the election was proclaimed.

[98] Counsel for the Minister and the Electoral Commission were asked during oral argument how this could be rectified. As mentioned above, counsel for the Commission, indicated that it would be possible for the

Commission to accommodate special votes to be cast abroad as long as the Commission received notification from voters by “the end of the month”. It seems to me that the just and equitable order to make for purposes of urgent relief in the imminent elections would be to issue an order stating that the period of 15 days contemplated in section 33(1)(e) of the Electoral Act shall commence to run on the date that this judgment is handed down. If this approach is adopted, those voters eligible for a special vote under section 33(1)(e) will get no more and no less time than is their due to give notice of their intention to apply for a special vote. As the judgment is handed down on 12 March, the 15 days will expire on 27 March 2009. This remedy is least invasive of the scheme in the Act. Voters who wish to apply for special votes should therefore notify the Chief Electoral Officer of their intention to do so on the form provided for in the regulations and in the stipulated manner on or before 27 March.

*The AParty and Other v Moloko and Others**

1 Introduction

NGCOBO J:

...

[2] There are two applications for direct access before us which were brought as a matter of urgency. They both concern the exclusion of certain categories of South African citizens who are living abroad, from voting. These applications for direct access are part of a flurry of applications that were brought in the various High Courts and in this Court as a matter of urgency. One came by way of an application for confirmation of an order of invalidity. The others came by way of applications for intervention² and admissions as amici³ in those confirmatory proceedings. The procedural history of these cases is set out in the judgment in *Richter v Minister for Home Affairs and Others* which is delivered contemporaneously with this judgment. As these cases are concerned with the exclusion of South Africans who are abroad from voting, they were set down for hearing on 4 March 2009 and heard together. This judgment is concerned only with two of the applications for direct access. A separate judgment deals with the other cases.

[3] These applications concern the exclusion of adult South African citizens who are abroad from voting. They concern both those South African citizens who are registered as voters and those who are not. Both cases involve challenges to sections 7, 8, 9, 60 and 33(1)(e) of the Electoral Act⁶ as well as the regulations giving effect to them. The applicants are seeking orders declaring these sections invalid so as to pave the way for them, and those who are in the same position, to cast their votes abroad in the 2009 election. But the hurdle they must surmount first is to make out a case for direct access to this Court.

...

[13] Against this background I now turn to the facts.

1.1 *The AParty and Another v Minister for Home Affairs and Others* CCT 06/09

[14] On 5 February 2009 the AParty and Mr Andrew Pepperell, the first and the second applicants respectively, launched an urgent application for direct access to this Court. The respondents are the Minister for Home Affairs (the Minister) and the Commission. The applicants seek an order declaring sections 7(2), 7(3)(a), 8(3), 9(1) and 60(1) of the

* All footnotes are omitted.

Electoral Act unconstitutional and invalid to the extent that they preclude South African citizens not ordinarily resident in South Africa from registering as voters in terms of the Electoral Act. They also challenge section 33(1) of the Electoral Act insofar as it makes no provision for South African citizens who are not ordinarily resident in the Republic who wish to apply for a special vote.

[15] In the alternative they are seeking an order declaring section 33(1)(e) of the Electoral Act unconstitutional to the extent that it infringes the right to vote of South African citizens who are not present in the Republic of South Africa on polling day. In addition to these statutory provisions, they are also challenging regulations 2 (voter registration) and 11 (registration in voting district) of the Voter Registration Regulations²⁹ and regulations 12 (voting abroad), 13 (casting a special vote before proceeding abroad) and 17 (voting where a voter is not registered) of the Election Regulations. They contend that the challenged provisions are inconsistent with sections 1(d), 3(2)(a), 9, 10 and 19(3)(a) of the Constitution. The AParty did not seek urgent relief requiring the Commission to register voters abroad for the imminent elections. Although they sought an order of invalidity in relation to these provisions, they proposed that the order be suspended to afford Parliament the opportunity to rectify the matter.

[16] The AParty is a registered political party which was recently established to contest the 2009 general elections. Mr Pepperell is a South African citizen currently living in Dubai. He has been living in Dubai since March 2004 and intends returning to South Africa in about two years time. He is a registered voter and his voting district is in Somerset West. He has been a registered voter since 1994 and last cast his vote in the 1999 general elections. He wished to vote in 2004 but could not do so because, he claims, there were no facilities in Dubai.

[17] He desires to vote in the 2009 general elections. He thought that this would not be possible because he believed that he was not registered as a voter. He claims he cannot register while he remains ordinarily resident in Dubai, and that there are no facilities to enable him to cast his vote at the South African diplomatic mission in the United Arab Emirates. He is mistaken when he suggests that he is not a registered voter. Once you are registered as a voter you remain on the voters' roll until your name is removed. He is, therefore, a registered voter. Indeed, the Commission takes the view that he is a registered voter.

1.2 *Moloko and Others v Minister for Home Affairs and Others CCT 10/09*

[18] Twelve individual applicants who are South African citizens are seeking direct access to this Court in this case. They have varying interests and backgrounds and are employed in a variety of fields, including economics, law, hospitality, education, finance, administration, child welfare and human resources. The common feature which they share

is that they all reside abroad and will not be in South Africa on the date of the 2009 general elections for the National Assembly and the provincial legislatures.

[19] On 5 February 2009 these applicants launched an urgent application in the High Court in Cape Town where they challenged the constitutionality of sections 7, 8(3) and 33(1) of the Electoral Act. In addition, they challenged regulation 12(4) of the Election Regulations.³⁶ They contended that these provisions violate sections 3(2)(a), 9(1), 10 and 19(3)(a) of the Constitution. That application was overtaken by events. The High Court in Pretoria handed down judgment in *Richter v Minister of Home Affairs and Others* in which it declared invalid sections 33(1)(b) and 33(1)(e) of the Electoral Act and certain regulations. In view of the referral of the order of invalidity in *Richter* to this Court for confirmation, the applicants launched the present urgent application for direct access. Their application in the High Court has apparently been stayed pending the outcome of the present application.

[20] All the applicants except Ms Rall and Mr Xala are registered voters. Ms Rall has been outside this country for about 28 months while Mr Xala has been away for 6 years. Neither has furnished any explanation for not registering as a voter.

...

[23] ... the Commission expresses concern about the implications of the relief sought in these cases, focusing as it does on the registration of voters abroad. In particular the Commission draws our attention to the following:

- (a) The number of people in respect of whom the relief is sought is unknown. It is estimated there may be as many as two million in over 100 countries.
- (b) Neither the Department of Home Affairs nor the South African Revenue Service keep accurate records of South Africans living abroad.
- (c) It would be “extremely difficult” for it to register South Africans living abroad on short notice.

[24] The Commission also draws attention to the difficulties associated with registering voters abroad, arising from the fact that the voters are not physically in South Africa. In relation to voters who are ordinarily resident in a voting district in South Africa, each foreign mission would require a copy of the full voters’ roll. In addition, when registering a voter abroad who asserts that he or she is ordinarily resident in a particular voting district, it will be difficult for the foreign mission to ascertain this and this may threaten the integrity of the voters’ roll. The Commission expresses the view that “it is not inconceivable that South Africans wishing to influence provincial elections could state that they

were ordinarily resident in a certain province.” Those citizens who are not ordinarily resident in a voting district in South Africa fall outside the scope of the electoral system.

- [25] Finally, the Commission emphasises the fact that its activities have to run to an “incredibly tight schedule.” It is required by the Electoral Act to develop the election timetable once the elections are proclaimed. It therefore has to ensure that a myriad of deadlines and complicated arrangements come together on time and in the correct sequence so that the elections are credible. As these applications have been brought at such a late stage, they could have negative implications for the timetable and ultimately for the elections. And this could endanger the right to vote of an estimated 23 million South Africans who wish to vote in the 2009 elections.

...

2 The challenge to section 33(1)(e)

- [33] The applicants’ challenge to section 33(1)(e) raises the same issues that were considered by the High Court in *Richter*.⁴³ And thus it raises the same issues as those that are before this Court in the confirmatory proceedings in the Richter matter. In considering the applicants’ challenge to section 33(1)(e) this Court is therefore not sitting as the court of first and final instance. We have the benefit of the judgment of the High Court which traversed the issue of the constitutionality of section 33(1)(e). The similarities between the issues raised in relation to section 33(1)(e) require them to be dealt with together. In these exceptional circumstances we consider it appropriate to grant direct access to the applicants in both cases.

2.1 Constitutionality of section 33(1)

- [34] Having granted direct access in relation to the question of the constitutionality of section 33(1)(e) of the Electoral Act, we should note that the submissions advanced on behalf of the applicants in the AParty and Moloko matters mirror the arguments made by the applicant, intervening parties and *amici* in the Richter matter in which the judgment is handed down at the same time as this judgment. The *Richter* judgment considers all the arguments made in relation to the constitutionality of section 33(1)(e). It is not necessary to repeat what is said there. Furthermore, the Court there declares certain portions of section 33(1)(e) and regulations 6(e), 11, 12 and 13 of the Election Regulations to be unconstitutional, and makes an order for further just and equitable relief. For the reasons given in the Richter matter, that is the relief to be afforded to the applicants in these cases. Accordingly an order to that effect will be given in each of these cases.
- [35] The applicants have also challenged regulation 17 of the Election Regulations. This regulation provides for the form which a sworn statement referred to in section 24A(1)(b) of the Electoral Act must

take. Section 24A in turn deals with a voter who casts his or her vote in a voting district where the voter is not registered. This provision applies to a vote cast within the Republic of South Africa. It is not clear why this regulation is said to be inconsistent with the Constitution. Neither the founding affidavit nor the written argument provides any substantiation. I can find no basis for the constitutional attack on this regulation. None was suggested. It follows that the constitutional attack on regulation 17 must be dismissed.

[36] To the extent, therefore, that the applicants' challenges relating to section 33(1)(e) and regulations 12 and 13 of the Election Regulations have been successful, they are entitled to an appropriate costs order. This is a matter to which we return later.

[37] The remaining issue in these cases is whether the applicants are entitled to come directly to this Court in relation to the constitutional challenges to sections 7, 8(3), 9(1) and 60(1).

2.2 *The challenges to sections 7 and 8(3)*

[38] Sections 7 and 8 of the Electoral Act provide:

7(1) A person applying for registration as a voter must do so in the prescribed manner.

(2) The head office in the Republic of a person referred to in section 33(1)(b) is regarded as the ordinary place of residence of that person or a member of that person's household.

(3)(a) A person is regarded to be ordinarily resident at the home or place where that person normally lives and to which that person regularly returns after any period of temporary absence.

(b) For the purpose of registration on the voters' roll a person is not regarded to be ordinarily resident at a place where that person is lawfully imprisoned or detained, but at the last home or place where that person normally lived when not imprisoned or detained.

8(1) If satisfied that a person's application for registration complies with this Act, and that person is a South African citizen and is at least 18 years of age, the chief electoral officer must register that person as a voter by making the requisite entries in the voters' roll.

(2) The chief electoral officer may not register a person as a voter if that person:

(a) has applied for registration fraudulently or otherwise than in the prescribed manner;

(b) ...

(c) has been declared by the High Court to be of unsound mind or mentally disordered;

(d) is detained under the Mental Health Act, 1973 (Act 18 of 1973); or

(e) ...

(3) A person's name must be entered in the voters' roll only for the voting district in which that person is ordinarily resident and for no other voting district.

[39] The applicants in both these cases challenge the provisions of sections 7 and 8(3). While the arguments they advanced overlapped to a certain extent, they took different positions, in particular, on the relief they sought. For this reason, it would be convenient to deal with each application separately.

2.2.1 *The Moloko Application*

...

[41] Reduced to their essence, the applicants rely upon four grounds: First, the issues raised in their application are similar to those raised in the Richter matter which is before this Court for confirmation; second, the matter is one of extreme urgency; third, the issues raised are of considerable public importance; and fourth, there are no disputes of fact. To this must be added the suggestion that the Commission has consented to direct access being granted.

...

2.2.2 *Urgency*

...

[60] The Cape application was lodged on 5 February 2009. On their own version, the issue of the rights of litigants living abroad to register and to vote has been dragging on for approximately 11 years. Two general elections have taken place and they have not challenged the Electoral Act. They advance as a reason for this inordinate delay their faith in a political solution. All along they had hoped that their plight would be alleviated politically. This faith in the political process has cost them, or some of them, the right to vote. In a somewhat faint tone they plead lack of funds, lack of organisation and lack of access to South African lawyers until they were offered pro bono assistance.

[61] All the applicants do is to point out to what they describe as “many political and popular initiatives attempting to convince Parliament and the [Commission] to extend the franchise to all categories of South Africans abroad.” These initiatives, we are told, included demonstrations at South African missions abroad, the formation of various non-governmental organisations, electronic petitions, organisation on social networking sites, lobbying by and of politicians and discussions with the Commission. We are told that these initiatives were partially successful in 2003 when Parliament extended the franchise to certain South African citizens abroad but excluded those who fell within the applicants’ category. Despite this, they still did not take any steps to vindicate their rights in any court of law. And apparently nothing happened after 2003 until, the applicants say, “political and popular attention returned to matters electoral towards the end of 2008” and “such initiatives were reinvigorated.”

[62] There is no explanation why these initiatives were only “reinvigorated” towards the end of 2008. They would have us believe that they learned of their exclusion “at various times in the months before the filing of the application.” What they thought was happening in the interim is not explained. Despite the lateness of the hour they “continued to pin their hopes on the political processes under way.” They then point to a media statement issued by the Commission referring to a meeting between it and the Democratic Alliance. They rely in particular on the paragraph in which it is stated:

The Chairperson of the commission indicated to the leader of the DA that the commission will consider the proposals presented by the DA, taking into account the practicalities and legal implications pertaining to this matter. The meeting further noted that the Electoral Commission is always open to suggestions that give opportunities to as many South Africans as possible to register and to vote.

[63] No attempt was made to put the Commission on terms given the fact that the elections were not very far away.

[64] Nor do the applicants set out the precise steps that they themselves took to assert their right to register and to vote. They tell us that “even though some of the Applicants became aware of the exclusions some time in advance of the filing of this application, [they] felt powerless to challenge the exclusions.” This is so because they claim, by its very nature, “the community of South Africans abroad is a diffuse group which is politically relatively powerless, without ready access to legal and other resources in South Africa to pursue their rights.” They claim that:

[I]t was only when [they] were brought together and were offered legal representation on a *pro bono* basis by [their] legal representatives that a challenge such as the present became viable.

[65] We should not be understood as suggesting that the applicants should not have sought a political solution. This is a desirable course to follow where possible. However, these initiatives should be pursued up to a certain point. They should not be pursued on the eve of the election leaving litigants with little or no time to approach a court for relief. Approaching courts at the eleventh hour puts extreme pressure on all involved including respondents and the courts, as these cases amply demonstrate. It results in courts having to deal with difficult issues of considerable importance under compressed time limits. The result is that courts which have jurisdiction to hear these matters are bypassed in order to obtain a final ruling on these issues from this Court. This is undesirable. As this Court pointed out in *Dormehl*:

It is not ordinarily in the interests of justice for a Court to sit as a Court of first and last instance, without there being any possibility of an appeal against its decisions. Nor is it in the interests of justice for 11 Judges of the highest Court in constitutional matters to hear matters at first instance which can conveniently be dealt with by a single Judge of a High Court.

- [66] Matters concerning elections should ordinarily be brought at the earliest available opportunity because of their potential impact on the elections. If they are brought too close to the elections, this might result in the postponement of the elections. This is not desirable in a democratic society. There may well be circumstances where bringing a challenge earlier is not possible having regard to the nature of the dispute. These circumstances would be very rare. Where the challenge could and should have been brought earlier, a litigant must put out facts, covering the entire period of delay, explaining why the challenge could not have been brought earlier. Failure to do so may well result in the refusal of the relief.
- [67] There is a further consideration which militates against direct access. Two of the applicants are not registered. These applicants have not provided any explanation for why they have not registered as voters. The Commission has 302 permanent offices throughout the Republic and these offices are open all year. Persons wishing to register as voters can do so at any time of the year during the Commission's office hours. Had Ms Rall and Mr Xala wished to register as voters, they could have done so.
- [68] As is plain from section 3 of the Constitution, while "all citizens are equally entitled to the rights, privileges and benefits of citizenship",⁶² they are "equally subject to the duties and responsibilities of citizenship."⁶³ Equally true, therefore, is that while all adult citizens are entitled to vote in elections,⁶⁴ this right carries with it the responsibility to register as a voter. Ms Rall and Mr Xala have this responsibility too. They could have applied for registration as voters before they left the country or at any time during their visit to this country as the other 10 of their co-applicants apparently did. We are not told why this could not be done. It would therefore take more than just the fact that they are not registered as voters, for this Court to come to their assistance and hear their case at this late stage.
- [69] In these circumstances, the applicants have not established any urgency that does not arise from their own failure to act.
- [70] As we have pointed out above, the challenge in these applications goes to the heart of the electoral scheme. As the Commission pointed out, the relief sought could have a negative impact on the election timetable and, ultimately on the elections themselves. On the facts and circumstances of this case, it cannot be in the interests of justice to come to the assistance of the two individual applicants at the expense of jeopardising the elections. Indeed, it is doubtful whether, even if the applicants were to be successful, they would have been entitled to any relief given the logistical and practical difficulties described by the Commission. It was in the light of these difficulties that the AParty sought declaratory relief only.
- ...

2.2.3 *The AParty and Mr Pepperell*

[73] Like the applicants in the Moloko matter, the applicants' challenge goes beyond section 33(1)(e). They also challenge the constitutionality of sections 7(2), 7(3)(a), 8(3), 9(1) and 60(1). The considerations that militate against direct access being granted in the Moloko matter apply equally to this application.

...

[78] The relief that the AParty applicants seek is an order of constitutional invalidity coupled with a suspension order to give Parliament an opportunity to make provision for voters to register abroad. This is not the relief sought in the Richter matter. Although the relief, therefore, would not have the potential to disrupt the forthcoming elections, it nonetheless requires this Court to determine difficult issues relating to the electoral scheme in great haste and as a court of first and final instance. This is not desirable.

[79] Ordinarily urgency arises because immediate relief is required. It is not in the interests of justice to deal with constitutional challenges that involve the fundamental nature of the electoral system provided for in the Electoral Act on an urgent basis, particularly where no immediate relief is sought. The applicants have not shown exceptional circumstances justifying this Court in exercising its discretion to grant direct access. It follows therefore that direct access must be refused in relation to the challenges to sections 7(2), 7(3)(a), 8(3), 9(1) and 60(1). The constitutional attack to regulations 2 and 11 of the Voter Registration Regulations must suffer the same fate.

[80] In relation to both applications, the key issue is the question of the constitutional validity of the electoral system – a matter that lies peculiarly with Parliament's constitutional remit. The fundamental basis for our refusal to grant direct access lies in this Court's reluctance to deal in undue haste with a matter of this sort as a court of first and last instance. For this reason, nothing in this decision should be read as prejudging the constitutionality of the challenged registration provisions, including those which may prevent South African citizens from registering while abroad.

...

3 *Order*

[86] In the event, the following orders are made:

- (a) The application for direct access in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* in relation to the constitutional challenge to section 33(1)(e) of the Electoral Act 73 of 1998 is granted.
- (b) The application for direct access in *Moloko and Others v Minister for Home Affairs and Another CCT 10/09* in

- relation to the constitutional challenge to section 33(1)(e) of the Electoral Act 73 of 1998 is granted.
- (c) The words “temporary” and “for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event” in section 33(1)(e) of the Electoral Act 73 of 1998 are declared to be inconsistent with the Constitution and invalid.
 - (d) The words “temporary” and “for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event” in regulation 6(e) of the Election Regulations, 2004 promulgated in terms of section 100 of the Electoral Act 73 of 1998 (published under GN R12 in GG 25894 of 7 January 2004, as amended) are declared to be inconsistent with the Constitution and invalid.
 - (e) The word “temporary” in the subtitle to regulation 11 of the Election Regulations, 2004 is declared to be inconsistent with the Constitution and invalid.
 - (f) The word “temporary” as it appears in the subtitle to regulations 12 and 13 of the Election Regulations, 2004 is declared to be inconsistent with the Constitution and invalid.
 - (g) The words “temporary” and “for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event” in regulation 12(2) of the Election Regulations, 2004 are declared to be inconsistent with the Constitution and invalid.
 - (h) The words “for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event” in regulation 13(2) of the Election Regulations, 2004 are declared to be inconsistent with the Constitution and invalid.
 - (i) It is declared that any registered voter who, in terms of paragraphs (c)-(h) of this order qualifies for a special vote in terms of section 33(1)(e) of the Electoral Act 73 of 1998 may within fifteen (15) days of the date of this order notify the Chief Electoral Officer of his or her intention to apply for a special vote as contemplated in section 33(1)(e) of the Electoral Act 73 of 1998, read with regulation 11(1) of the Election Regulations, 2004.
 - (j) The application for direct access in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* insofar as it relates to the challenges to sections 7(2), 7(3)(a), 8(3), 9(1) and 60(1) of the Electoral Act 73 of 1998 is dismissed.
 - (k) The application for direct access in *The AParty and Another v Minister for Home Affairs and Others CCT*

06/09 insofar as it relates to the challenges to regulations 2 and 11 of the Voter Registration Regulations, 1998 promulgated in terms of section 100 of the Electoral Act 73 of 1998 (published under GN R1340 in GG 19388 of 16 October 1998, as amended) is dismissed.

- (l) The application for direct access in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* insofar as it relates to the challenge to regulation 17 of the Election Regulations, 2004 is dismissed.
- (m) The application for direct access in *Moloko and Others v Minister for Home Affairs and Another CCT 10/09* insofar as it relates to the challenge to sections 7 and 8(3) of the Electoral Act 73 of 1998 is dismissed.
- (n) The Minister for Home Affairs is directed to pay one half of the applicants' costs in *The AParty and Another v Minister for Home Affairs and Others CCT 06/09* including the costs of two counsel.
- (o) The Minister for Home Affairs is directed to pay one half of the applicants' costs in *Moloko and Others v Minister for Home Affairs and Another CCT 10/09* in this Court including the costs of two counsel.

These costs shall be limited to the disbursements, which shall include fees for counsel.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

*Doctors for Life International v The Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC)**

Decided on: 17 August 2006

1 Introduction

NGCOBO J:

- [1] This case concerns an important question relating to the role of the public in the law-making process. This issue lies at the heart of our constitutional democracy. The Court is required to answer three related questions. The first question concerns the nature and the scope of the constitutional obligation of a legislative organ of the state to facilitate public involvement in its legislative processes and those of its committees and the consequences of the failure to comply with that obligation. The second question concerns the extent to which this Court may interfere in the processes of a legislative body in order to enforce the obligation to facilitate public involvement in law-making processes. In particular, whether it is competent for this Court to interfere during the legislative process before a parliamentary or provincial bill is signed into law. The third question concerns the issue whether this Court is the only court that may consider the questions raised in this case.
- [2] These issues arise out of a constitutional complaint brought directly to this Court by Doctors for Life International, the applicant. Its complaint is that the National Council of Provinces (“NCOP”), in passing certain health bills, failed to invite written submissions and conduct public hearings on these Bills as required by its duty to facilitate public involvement in its legislative processes and those of its committees.
- [3] Following a brief review of the facts, I will identify the issues for determination in this case.

2 Factual background

Parliament has enacted four health statutes, namely, the Choice on Termination of Pregnancy Amendment Act 38 of 2004 (“the CTOP Amendment Act”); the Sterilisation Amendment Act 3 of 2005; the Traditional Health Practitioners Act 35 of 2004 (“the THP Act”); and the Dental Technicians Amendment Act 24 of 2004. The constitutional challenge relates to these statutes, which I shall collectively call the health legislation. The applicant’s complaint is that during the legislative process leading to the enactment of these statutes, the NCOP and the provincial legislatures did not comply with their

* All footnotes are omitted.

constitutional obligations to facilitate public involvement in their legislative processes as required by the provisions of sections 72(1)(a) and 118(1)(a) of the Constitution, respectively. In terms of section 72(1)(a), the NCOP “must . . . facilitate public involvement in [its] legislative and other processes . . . and [those of] its committees.” Section 118(1)(a) contains a similar provision relating to a provincial legislature.

- [5] The applicant accepts that the National Assembly has fulfilled its constitutional obligation to facilitate public involvement in connection with the health legislation. This, the applicant says, was done by the National Assembly by inviting members of the public to make written submissions to the National Portfolio Committee on Health and also by holding public hearings on the legislation. That process, the applicant maintains, complied with section 59(1)(a) of the Constitution (all footnotes have been omitted). The applicant alleges that the NCOP and the various provincial legislatures were likewise required to invite written submissions and hold public hearings on the health legislation. This is what the duty to facilitate public involvement required of them, the applicant maintains.
- [6] The constitutional challenge was initially directed at the Speaker of the National Assembly and the Chairperson of the NCOP only. The Speakers of the nine provincial legislatures and the Minister of Health were subsequently joined as further respondents because of their interest in the issues raised in these proceedings. I shall refer to all respondents collectively as the respondents, unless the context requires otherwise.
- [7] The respondents deny the charge by the applicant. They maintain that both the NCOP and the various provincial legislatures complied with the duty to facilitate public involvement in their legislative processes. They also take issue with the scope of the duty to facilitate public involvement as asserted by the applicant. While conceding that the duty to facilitate public involvement requires public participation in the law-making process, they contend that what is required is the opportunity to make either written or oral submissions at some point in the national legislative process.
- [8] The applicant has approached this Court directly. It alleges that this Court is the only court that has jurisdiction over the present dispute because it is one which concerns the question whether Parliament has fulfilled its constitutional obligations. The jurisdiction of this Court to consider such disputes is conferred by section 167(4)(e) of the Constitution. That section provides that “[o]nly the Constitutional Court may . . . decide that Parliament... has failed to fulfil a constitutional obligation”. The respondents did not contest any of this. There is therefore no dispute between the parties as to whether this Court has exclusive jurisdiction in this matter under section 167(4)(e).

[9] But the question whether this Court has exclusive jurisdiction in this matter is too important to be resolved by concession.

[10] When the applicant launched the present proceedings it was under the mistaken belief that all the health legislation was still in bill form. But, as it turned out, all of the legislation except the Sterilisation Amendment Act had been promulgated when these proceedings were launched on 25 February 2005. This fact was readily ascertainable all along. The challenge relating to the Sterilisation Amendment Act would have required this Court to intervene during the legislative process. This raised the question of the competence of this Court to intervene in the legislative process. Given the importance of this question, the Chief Justice placed it squarely on our agenda by issuing directions. The parties were thus invited to submit written argument on the question, and it was fully debated.

2.1 *Issues presented*

[11] The issues that will be considered in this judgment are therefore these:

- (a) Does this Court have exclusive jurisdiction over the present dispute under section 167(4)(e) of the Constitution?
- (b) Is it competent under our constitutional order for declaratory relief to be granted by a court in respect of the proceedings of Parliament?
- (c) What is the nature and the scope of the duty to facilitate public involvement comprehended in sections 72(1)(a) and 118(1)(a) of the Constitution?
- (d) Did the NCOP and the provincial legislatures comply with their constitutional obligations to facilitate public involvement as contemplated in section 72(1)(a) and section 118(1)(a)?
- (e) If the process followed by the NCOP and the provincial legislatures fell short of that required by the Constitution, what is the appropriate relief?

[12] I now turn to consider these issues.

...

[31] What falls to be considered next is whether it is competent under our constitutional order for declaratory relief to be granted by this Court in respect of the proceedings of Parliament.

2.2 *Is it competent for this Court to grant declaratory relief in respect of proceedings of Parliament?*

[32] The obligation of Parliament to facilitate public involvement in its legislative and other processes, including those of its committees,

raises the question of the competence of this Court to grant relief in respect of the proceedings of Parliament. The enforcement of the obligation to facilitate public involvement in the legislative processes of Parliament invariably requires this Court to interfere with the autonomy of the principal legislative organ of the state. This interference infringes upon the principle of the separation of powers. Yet, as will appear later in this judgment, the enforcement of the obligation to facilitate public involvement in the law-making process is crucial to our constitutional democracy.

[33] In the light of this, it is important to resolve the question when this Court can and should intervene to enforce the obligation to facilitate public involvement in the law-making process. Apart from this, as pointed out earlier, when these proceedings were launched on 25 February 2005, the Sterilisation Amendment Act was still in its bill form. Parliament had passed the Bill but it had not yet been signed by the President. It is therefore necessary to consider whether this Court had jurisdiction to consider the constitutional challenge relating to parliamentary proceedings in connection with the Sterilisation Amendment Act at the time when the constitutional challenge was launched.

[34] It was against this background that the parties were called upon to submit argument on whether it is competent for this Court under our constitutional order to grant declaratory relief in respect of the proceedings of Parliament:

- (a) before Parliament has concluded its deliberations on a bill;
- (b) after Parliament has passed the bill, but before the bill has been signed by the President; or
- (c) after it has been signed by the President but before it has been brought into force.

[35] The national legislative process is set out in sections 73 to 82 of the Constitution. Broadly speaking it commences with the introduction of a bill in the National Assembly, consideration and passing of the bill by the National Assembly, consideration and passing of the bill by the NCOP, and consideration and signing of the bill by the President. The specific question presented in this case is whether this Court has jurisdiction to intervene in this legislative process and to grant declaratory relief to the effect that Parliament has failed to facilitate public involvement in relation to a bill.

[36] Parliament has a very special role to play in our constitutional democracy – it is the principal legislative organ of the state. With due regard to that role, it must be free to carry out its functions without interference. To this extent, it has the power to “determine and control its internal arrangements, proceedings and procedures”. The business of Parliament might well be stalled while the question of what relief

should be granted is argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers.

- [37] The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle “has important consequences for the way in which and the institutions by which power can be exercised.” Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.
- [38] But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament “must act in accordance with, and within the limits of, the Constitution”, and the supremacy of the Constitution requires that “the obligations imposed by it must be fulfilled.” Courts are required by the Constitution “to ensure that all branches of government act within the law” and fulfil their constitutional obligations. This Court “has been given the responsibility of being the ultimate guardian of the Constitution and its values.” Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that “the obligations imposed by [the Constitution] must be fulfilled.” It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.
- [39] The question is whether the Constitution precludes this Court from intervening during any or all of the stages of the law-making process in order to enforce the obligation to facilitate public involvement.
- [40] There are three identifiable stages in the law-making process, and these are foreshadowed in the questions on which the parties were called upon to submit argument: first, the deliberative stage, when Parliament is deliberating on a bill before passing it; second, the Presidential stage, that is, after the bill has been passed by Parliament but while it is under consideration by the President; and third, the period after the President has signed the bill into law but before the enacted law comes into force. The applicants contended that section 167(4)(e) empowers this Court to intervene during all three stages.

What must be emphasised at the outset is that in this case we are concerned with a constitutional challenge based on an alleged failure to facilitate public involvement in the legislative processes of Parliament as required by section 72(1)(a) of the Constitution. [41] The questions posed by the Chief Justice must therefore be answered with reference to this specific challenge to the extent required by the facts of this case. It will be convenient to consider, first, whether this Court can interfere with the legislative process when the bill is before the President; second, after the President has signed the bill into law but before it comes into force; and third, during the deliberative process.

2.3 *Is it competent for this Court to grant declaratory relief after a bill has been passed by Parliament but before it is signed by the President?*

[42] The express provision of the Constitution that is relevant in this context and which limits the jurisdiction of this Court is section 167(4)(b). That section provides:

- (4) Only the Constitutional Court may:
 - ...
 - (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121".

[43] Section 167(4)(b) confers exclusive jurisdiction on this Court to decide the constitutionality of any parliamentary or provincial bill. However, this power is expressly limited in that this Court "may do so only in the circumstances anticipated in section 79 or 121". Thus while the section confers exclusive jurisdiction on this Court to consider the constitutional validity of a national or provincial bill, this power is expressly limited to a challenge brought by the President or a Premier and in circumstances contemplated in section 79 or 121 of the Constitution. The provisions of these sections are too clear to admit of any other construction. In the *UDM* case, this Court held that the Constitution "contains clear and express provisions which preclude any court from considering the constitutionality of a Bill save in the limited circumstances referred to in sections 79 and 121 of the Constitution, respectively."

[44] Counsel for the applicant nevertheless submitted that it is competent for this Court to grant relief after Parliament has passed a bill but before the President has signed the bill. To surmount the hurdle presented by the limited power of this Court to decide the constitutionality of a parliamentary or provincial bill under section 167(4)(b), counsel for the applicant advanced two propositions. First, there was a conflict between the provisions of sub-sections 167(4)(b) and 167(4)(e). This conflict arises because section 167(4)(b) permits only the President or the Premier to approach this Court in respect of a passed bill. By contrast, it was submitted, section 167(4)(e) is concerned with failure to fulfil a constitutional obligation, and it imposes

no restriction on the identity of the applicant or the stage of the challenge. Second, this conflict, which is more apparent than real, can be removed by construing the word “constitutionality” in section 167(4)(b) as limited to the contents of the bill and not to the procedure required by the Constitution.

[45] But the narrow meaning that counsel sought to assign to the word “constitutionality” in section 167(4)(b) is neither supported by the plain meaning of that word nor by the constitutional scheme of which it is part. The submission by counsel ignores the provisions of section 79 of the Constitution to which section 167(4)(b) refers. The provisions of section 167(4)(b) must be read with section 79 in order to determine the scope of the jurisdiction of this Court to decide the constitutionality of a bill. It is plain from the provisions of section 79(3) that the President has the authority to raise the constitutionality of a bill on both procedural and substantive grounds. It provides that the NCOP must participate in the reconsideration of the bill “if the President’s reservations about the constitutionality of the Bill relate to a procedural matter that involves the [NCOP]”. Nothing could be clearer. The President may raise as the source of his or her reservation a procedural matter.

[46] It is necessary to stress here that a complaint relating to failure by Parliament to facilitate public involvement in its legislative processes after Parliament has passed the bill will invariably require a court to consider the validity of the resulting bill. If the Court should find that Parliament has not fulfilled its obligation to facilitate public involvement in its legislative processes, the Court will be obliged under section 172(1)(a) to declare that the conduct of Parliament is inconsistent with the Constitution and therefore invalid. This would have an impact on the constitutionality of the bill that is a product of that process. The purpose and effect of litigation that is brought in relation to a bill after it has been passed by Parliament is therefore to render the bill passed by Parliament invalid. This is precluded by the express provisions of section 167(4)(b).

[47] The question that falls to be determined is whether the provisions of section 167(4)(e) can be invoked while the bill is under consideration by the President. It is here that the interrelation between the provisions of section 167(4)(e) and section 167(4)(b) becomes relevant. There are two principles of interpretation that are relevant in this regard.

[48] The first is that where there are provisions in the Constitution that appear to be in conflict with each other, the proper approach is to examine them to ascertain whether they can reasonably be reconciled. And they must be construed in a manner that gives full effect to each. Provisions in the Constitution should not be construed in a manner that results in them being in conflict with each other. Rather, they should be construed in a manner that harmonises them. In *S v Rens*, this Court held that “[i]t was not to be assumed that provisions in the same

constitution are contradictory” and that “[t]he two provisions ought, if possible, to be construed in such a way as to harmonise with one another.”⁴⁴

- [49] The other principle of construction to keep in mind in this regard is that where there are two provisions in the Constitution dealing with the same subject, with one provision being general and the other being specific, the general provision must ordinarily yield to the specific provision. In *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996*, this Court held that a “general provision . . . would not normally prevail over the specific and unambiguous provisions”. The specific provision must be construed as limiting the scope of the application of the more general provision. Therefore, if a general provision is capable of more than one interpretation and one of the interpretations results in that provision applying to a special field which is dealt with by a special provision, in the absence of clear language to the contrary, the special provision must prevail should there be a conflict.
- [50] The question then is whether the provisions of sections 167(4)(b) and 167(4)(e) are capable of being reconciled.
- [51] Although both these provisions deal with the exclusive jurisdiction of this Court, each deals with a specific subject matter. The subject matter of section 167(4)(e) is “a constitutional obligation”. It confers jurisdiction on this Court to decide whether Parliament or the President has failed to fulfil a constitutional obligation. It regulates constitutional challenges that seek to enforce the fulfilment of constitutional obligations and contains no restrictions as to the person or the stage at which a challenge may be launched. By contrast, section 167(4)(b) confers exclusive jurisdiction on this Court to decide the constitutional validity of any parliamentary or provincial bill but expressly limits such jurisdiction to the specific instances set out in sections 79 and 121 of the Constitution. The provisions of section 167(4)(b) therefore specifically deal with challenges to a bill that has been passed by Parliament or a provincial legislature.
- [52] Now I think it can fairly be accepted that section 167(4)(e) covers a wider field in that a constitutional obligation may relate to the process that Parliament is required to follow before passing a bill, such as the obligation to facilitate public involvement in its processes as contended by the applicants. By contrast, the provisions of section 167(4)(b) are specifically limited to constitutional challenges to parliamentary or provincial bills. It seems to me therefore that a constitutional challenge under section 167(4)(e) whose purpose and effect is to render invalid a bill will be barred by section 167(4)(b). In this sense, the scope of the provisions of section 167(4)(e) is circumscribed by the specific provisions of section 167(4)(b), which limit a constitutional challenge to a bill to the more specific circumstances contemplated in section 79 or

121. It follows therefore that the provisions of section 167(4)(b) and section 167(4)(e) can be harmonised by understanding the provisions of section 167(4)(b) as limiting the scope of section 167(4)(e) when the purpose and effect of a constitutional challenge under section 167(4)(e) is to render a bill invalid.

[53] This construction of section 167(4)(e) is consistent with the scheme of the Constitution. This scheme entrusts the President with the power to raise with this Court the constitutionality of a parliamentary bill. The decision to provide the President with the power to decline to assent to a bill and to challenge its constitutionality was based on the conviction that the power to make laws must be carefully circumscribed. It is a power to be shared by the National Assembly, the NCOP, the President and the provinces. The President's role in the law-making process reflects a careful effort to ensure that the law-making process is kept under check consistent with the principle of checks and balances. The scheme is founded on the trust that our system has for the role of the President, namely, the responsibility it vests in the President to "uphold, defend and respect the Constitution as the supreme law", and thus to ensure that laws that he or she assents to and signs, conform to the Constitution.

[54] In addition, the constitutional scheme contemplates that challenges to the constitutional validity of a bill passed by Parliament must await the completion of the legislative process. During this process, the rights of the public are safeguarded by the President who has the authority to challenge the constitutionality of a bill consistent with his or her duty to uphold, defend and respect the Constitution. Once the process is complete, the public and interested groups may challenge the resulting statute. This scheme seeks to ensure that judicial intervention in the law-making process is kept to the minimum; hence it is limited to challenges by the President.

[55] Counsel for the applicant contended that by its nature the duty to facilitate public involvement in the law-making process requires that it be enforced there and then. Its delay is its denial. The argument does not take sufficient account of the role of Parliament and the President in the law-making process. As pointed out earlier, the President has a constitutional duty to uphold, defend and respect the Constitution. The role of the President in the law-making process is to guard against unconstitutional legislation. To this end, the President is given the power to challenge the constitutionality of the bill. The President represents the people in this process. The members of the National Assembly perform a similar task and have a similar obligation. Thus during the entire process, the rights of the public are protected. The public can always exercise their rights once the legislative process is completed. If Parliament and the President allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at great cost. The rights of

the public are therefore delayed while the political process is underway. They are not taken away.

[56] I conclude therefore that after Parliament has passed a bill and before the President has assented to and signed the bill, it is not competent for this Court to grant any relief in relation to the bill, save at the instance of the President and in the limited circumstances contemplated in section 79.

[57] In its notice of motion the applicant sought an order declaring that the conduct of the NCOP and the provincial legislatures was invalid and any other consequential relief. The effect of a successful constitutional challenge to the Sterilisation Amendment Bill would be to render that Bill invalid. This Court would have been precluded by the provisions of section 167(4)(b) read with section 79 from making an order declaring the Sterilisation Amendment Bill invalid. The fact that the Bill has since been enacted into law and this Court has jurisdiction to pronounce on the constitutional validity of the Sterilisation Amendment Act matters not. The question whether this Court has jurisdiction must be determined as at the time when the present proceedings were instituted and not at the time when the Court considers the matter. The crucial time for determining whether a court has jurisdiction is when the proceedings commenced.

[58] It follows therefore that the challenge to the Sterilisation Amendment Bill as enacted into law must be dismissed. Nothing further need be said about it.

[59] That brings us to the question whether it is competent for this Court to grant relief once the President has signed a bill into law but before it has been brought into operation. This was the position with regard to the remaining legislation when the present challenge was launched.

2.4 *Is it competent for this Court to grant relief in respect of an Act of Parliament that has not yet been brought into force?*

[60] The express provision of the Constitution which caters for this eventuality is contained in section 80, which provides:

- (1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.
- (2) An application:
 - (a) must be supported by at least one third of the members of the National Assembly; and
 - (b) must be made within 30 days of the date on which the President assented to and signed the Act.
- (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if:

- (a) the interests of justice require this; and
 - (b) the application has a reasonable prospect of success.
- (4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

- [61] This provision must be construed in the light of the powers of this Court under section 172(2)(a), which empowers this Court to make an order concerning the constitutional validity of an Act of Parliament. These are very wide powers indeed.
- [62] In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*, this Court was concerned with, among other issues, whether it could consider a provision which had not yet been brought into operation. The Court held that it has jurisdiction to consider provisions in a statute that have not yet been brought into operation. For its holding, the Court relied upon the provisions of section 172(2)(a). The basic reasoning of the Court was that section 172(2)(a), which empowers the Court to declare Acts of Parliament invalid, does not distinguish between Acts of Parliament that have been brought into force and those which have not. It added that in the case of a provision that has not yet been brought into force, the legislative process is complete and there is a duly enacted Act of Parliament. In my view, this reasoning applies equally to a statute which has not yet been brought into force.
- [63] It is true, in *Khosa*, this Court did not consider the provisions of section 80. The purpose of section 80 is to make provision for abstract review at the instance of members of the National Assembly. It merely regulates the conditions under which members of the National Assembly may challenge an Act of Parliament. It does not preclude a member of the public from challenging a provision of an Act of Parliament that has been promulgated during the period of thirty days within which members of the National Assembly are required to approach this Court to challenge all or part of the Act of Parliament.
- [64] In terms of section 81, “[a] Bill assented to and signed by the President becomes an Act of Parliament”. The fact that the statute may not have been brought into operation cannot deprive this Court of its jurisdiction. There is nothing in the wording of section 80 that precludes this Court or any other court from considering the validity of an Act of Parliament at the instance of the public. Nor is there anything in the scheme for the exercise of jurisdiction by this Court that precludes it from considering the constitutional validity of a statute that has not yet been brought into operation. The legislative process is complete, and there can be no question of interference in such a process. Once a bill is enacted into law, this Court should consider its constitutionality.

[65] I conclude therefore that it is competent for this Court to grant relief in respect of the proceedings of Parliament after the bill has been enacted into law but before it has been brought into force. It follows therefore that this Court has the jurisdiction to consider the constitutional challenge to the Dental Technicians Amendment Act, the CTOP Amendment Act and the THP Act.

[66] It now remains to consider the last question posed in the directions, namely, whether it is competent for this Court to grant relief in relation to the proceedings of Parliament before Parliament has passed the bill.

2.5 *Is it competent for this Court to issue a declaratory relief in respect of parliamentary proceedings before Parliament has concluded its deliberations on a bill?*

[67] The question whether it is competent for this Court to grant a declaratory relief to the effect that Parliament has failed to comply with its constitutional obligation to facilitate public involvement in the legislative process before the parliamentary legislative process is completed is more complex. There is no express constitutional provision that precludes this Court from doing so. On the one hand, it raises the question of the competence of this Court to interfere with the autonomy of Parliament to regulate its internal proceedings, and on the other, it raises the question of the duty of this Court to enforce the Constitution, in particular, to ensure that the law-making process conforms to the Constitution.

[68] Courts in other jurisdictions, notably in the Commonwealth jurisdictions, have confronted this question.⁵ Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a “settled practice” or general rule of jurisdiction that governs judicial intervention in the legislative process.

[69] The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or “settled practice”. Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief

once the process is completed because the underlying conduct would have achieved its object.

[70] The primary duty of the courts in this country is to uphold the Constitution and the law “which they must apply impartially and without fear, favour or prejudice.” And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.

[71] That said, however, it is not necessary to reach any firm conclusion on whether it is competent for this Court to interfere in the deliberative process of Parliament to enforce the duty to facilitate public involvement. Although the parties were called upon to address this question, none of the statutes involved in this case were at a deliberative stage of Parliament when this litigation commenced. Notwithstanding the importance of this question, I consider that it is not desirable to answer it in these proceedings. It is a question that must be answered with regard to a specific challenge raising it pertinently. This is not such a case. It is better to leave it open for consideration when an occasion to consider it arises.

[72] It now remains to consider the main item on our agenda, namely, whether the NCOP and the provincial legislatures have fulfilled their obligation to facilitate public involvement in their respective legislative processes as required by the Constitution. I have already concluded that this complaint, so far as it relates to the Sterilisation Amendment Act, must be dismissed. This leaves the Dental Technicians Amendment Act, the CTOP Amendment Act and the THP Act

...

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Glenister v President of the Republic of South Africa 2009 (2) BCLR 136 (CC)*

Decided on: 22 October 2008

1 Introduction

LANGA CJ:

- [1] The Directorate of Special Operations (DSO), commonly known as the Scorpions, was established in terms of section 7(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act), and came into existence in 2001. Its purpose is to deal with national priority crimes and to supplement the efforts of existing law enforcement agencies in tackling serious crime. It is located within the National Prosecuting Authority (NPA) and, as a specialist unit, is vested with powers of investigation, including the power to gather, keep and analyse information, and the power to institute criminal proceedings, where appropriate, relating to organised crime or other specified offences. In April 2008, Cabinet approved draft legislation which, among other things, proposed to relocate the DSO and amalgamate it with the South African Police Service (SAPS).
- [2] The applicant has chosen to challenge Cabinet's decision to initiate this legislation in the courts. He approached the Pretoria High Court (High Court) as a matter of urgency on 18 March 2008 for a final order, alternatively for an interim order, interdicting and restraining the President, the Minister of Safety and Security and the Minister for Justice and Constitutional Development (first, second and third respondents respectively) from initiating legislation that seeks to disestablish the DSO. Subsequently, once Cabinet had in fact approved draft legislation to be introduced in Parliament, the applicant amended his notice of motion to seek an order interdicting the respondents "from persisting with the passage of legislation" that seeks to disestablish the DSO. In his judgment handed down on 27 May 2008, Van der Merwe J held that the High Court had no jurisdiction to hear the application in the circumstances and struck it from the roll. He held that the Constitutional Court might have jurisdiction to consider the matter.
- [3] The applicant now applies to this Court on two bases. In Part A of his notice of motion he seeks leave to appeal, on an urgent basis, against the judgment and order of the High Court. Part B contains an application for direct access and seeks, on an urgent basis, an order:

* All footnotes are omitted.

(1) declaring that the decision taken by Cabinet on or about 30 April 2008 to initiate legislation disestablishing the DSO (to which I will refer as the decision) is unconstitutional and invalid; and (2) directing the relevant ministers to withdraw the National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) and the South African Police Service Amendment Bill of 2008 (SAPSA Bill) (collectively referred to as the Bills) from the National Assembly.

- [4] By the time this Court heard argument in this matter, the Bills were before Parliament. Parliament's Portfolio Committees on Justice and Constitutional Development and on Safety and Security had called for comment on the Bills and had held public hearings regarding their content.

1.2 *Directions of this Court*

- [9] In setting down the application for leave to appeal, the directions issued by the Chief Justice specify as the only issue to be decided:

...whether, in the light of the doctrine of the separation of powers, it is appropriate for this Court, in all the circumstances, to make any order setting aside the decision of the National Executive that is challenged in this case.

The sole question for decision is therefore whether it is appropriate for this Court to intervene at this stage of the legislative process. This question goes to the relief sought both in Part A, the application for leave to appeal, and Part B, the application for direct access. If judicial intervention is inappropriate, both applications must fail.

2 **Factual background**

- [10] The application relies upon the following background facts, which are either common cause or undisputed. Since its establishment in 2001, the DSO has undertaken a number of high-profile investigations, some of which have involved prominent members of the African National Congress (ANC). On 1 April 2005, the first respondent appointed Judge Sisi Khampepe to chair a commission of inquiry (Khampepe Commission) to investigate and report on certain aspects of the DSO. The issues to be considered by the Khampepe Commission included the rationale for the establishment of the DSO, its mandate, the question whether the DSO should be located within the NPA or the SAPS, and the systems for coordination and cooperation between the SAPS and the intelligence agencies on the one hand and the DSO on the other. The Khampepe Commission's report (Khampepe Report) was signed on 3 February 2006, presented to the first respondent on 22 May 2006, and published on 5 May 2008. It recommended that the DSO should continue to be located within the NPA and under the Minister for Justice and Constitutional Development,⁵ albeit with certain adjustments. Other recommendations related to the President's power

to transfer oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and Security and the need to tackle the evidently unhealthy relationship between the DSO and the SAPS.

- [11] Although Judge Khampepe made a number of recommendations for change, she approved of the work of the DSO in general. She found that there was nothing unconstitutional in the DSO and the SAPS sharing a mandate, nor in the DSO's methodology, which combines the skills of prosecutors to direct investigations, analysts to interpret information, and investigators to collate information for successful prosecutions. She regarded the combination of these skills as an effective tool in addressing complex and organised crime.
- [12] Cabinet appeared to approve the Khampepe Report. A Cabinet statement of 29 June 2006 reveals that Cabinet endorsed the National Security Council's decision to accept, in principle, the recommendations of the Khampepe Commission, including the retention of the DSO within the NPA. A further statement of 7 December 2006 stated that, at its meeting of the previous day, Cabinet had reviewed progress in implementing the recommendations of the Khampepe Commission, noted the tension between the DSO and the SAPS, and decided that legal instruments must be put in place to ensure greater coordination and cooperation between the two agencies.
- [13] However, the Minister of Safety and Security, Mr Charles Nqakula, speaking during the debate on the President's State of the Nation Address in the National Assembly on 12 February 2008, made the following statement:
- We want to place on the table, therefore, a proposal for the creation of a better crime fighting unit, to deal with organised crime, where the best experiences of the Scorpions and the police's Organised Crime Unit will be merged. The best investigators from the two units will be put together, under the South African Police Service, as a reconstructed organised crime fighting unit. The Scorpions, in the circumstances, will be dissolved and the Organised Crime Unit of the police will be phased out and a new amalgamated unit will be created.
- [14] A draft resolution proposing that the DSO be moved from the jurisdiction of the NPA to the SAPS was prepared at the ANC's national policy conference in June 2007. Six months later, in December 2007, the ANC adopted a resolution calling for a single police service and the dissolution of the DSO at its 52nd national conference held in Polokwane (Polokwane Resolution). The relevant part of the Polokwane Resolution, under the heading "Peace and Stability", reads as follows:

- 6 The constitutional imperative that there be a Single Police Service should be implemented.
- 8 The Directorate of Special Operations (Scorpions) be dissolved.
- 9 Members of the DSO performing policing functions must fall under the South African Police Services.
- 10 The relevant legislative changes be effected as a matter of urgency to give effect to the foregoing resolution”.

[15] Following the conference in Polokwane, the acting NDPP, Advocate Mokotedi Mpshe, in a communiqué to staff, reported to members of the DSO that “a decision [had] been taken” about the investigative unit of the DSO. Amplification of this is to be found in the February-March edition of *Khasho*, the newsletter for NPA staff, where Advocate Mpshe wrote:

You should be aware by now that the government has officially announced that the DSO will be merged with the SAPS’s Organised Crime Unit to form a new crime-fighting body.

Then, during a radio interview in February 2008, the Director-General of the Department of Justice and Constitutional Development stated that the DSO would be amalgamated with the SAPS. The legislative programme of the Department of Safety and Security for 2008 also indicated that laws dealing with the DSO would be placed before Parliament during the year.

[16] Subsequent to a Cabinet meeting on 30 April 2008, the Government Communication and Information System issued a statement to the effect that Cabinet had approved the NPAA Bill and the General Law Amendment Bill (later renamed the SAPSA Bill) and that the Bills would be tabled in Parliament. The stated aim of the Bills was to strengthen the country’s capacity to fight organised crime and to give effect to the decision to relocate the DSO from the NPA to the SAPS. The Bills were published in the Government Gazette on 8 May 2008 and 9 May 2008 respectively.

2.1 *Submissions of the parties in this Court*

[18] As set out in paragraph 9 above, the only issue in this Court is whether, in the light of the doctrine of the separation of powers, it is appropriate for this Court to make any order setting aside the decision of the National Executive that is challenged in this case. The parties lodged written argument directed at this issue.

[19] The applicant submits that “it is a necessary component of the doctrine of separation of powers that the courts have a constitutional obligation to ensure that the executive acts within the boundaries of legality.” The applicant relied on the following statement of Ngcobo J speaking for the majority of this Court in *Doctors for Life*:

Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, Courts have developed a 'settled practice' or general rule of jurisdiction that governs judicial intervention in the legislative process.

The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, Courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or 'settled practice'. Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.

[20] The applicant contends, on the basis of the above dictum and foreign case-law, that there are exceptional cases in which an aggrieved litigant cannot be expected to wait for Parliament to enact a statute before he or she challenges it in court. The important question, according to the applicant, is "whether effective redress could be given after the legislation [has been] enacted. If the answer to that question is 'no', then the courts are obliged to intervene at an earlier stage." The applicant contends that in the present matter the DSO will have been destroyed long before the enactment of the legislation. In making this assertion, he points to the evidence of Advocate Mpshe indicating that many of the employees within the DSO have already resigned, or plan to resign, as a result of the decision. Even if an application challenging the resulting legislation were to be successful, the applicant submits, it would not be possible to reconstruct the institution. The damage would have been done – with the consequential harm to the ability to fight crime – and would be irreversible. It is for these reasons that the applicant submits that the Court should intervene at this stage of the legislative process.

[25] The second and third respondents argue against judicial intervention at this stage. In their analysis of the separation of powers doctrine, they highlight the duty of Cabinet to account to the legislature for policies, decisions and actions, and the concomitant powers of Parliament to ensure the accountability of the executive. They submit that the Constitution has created checks and balances to maintain the delicate

balance in the power wielded by the executive, legislature and judiciary. They argue further that intervention with the executive's initiation of legislation would upset this balance – it is neither necessary nor warranted.

[26] In advancing this argument, the respondents do not take issue with the submission that pre-enactment relief should be granted where an exceptional case has been made out, the basis for this exception being that the courts are duty-bound to enforce compliance with the Constitution and the rule of law. However, because Bills, such as those in this case, may be amended, adopted or rejected by Parliament, they cannot create, detract from or extinguish rights; they only do so once they become law. Therefore, exceptional cases must be established on proof of immediate and irreversible harm caused by the conduct in question. Relief would be appropriate in those circumstances, the respondents submit, because the constitutional power of the Court to deal effectively with the legislation once enacted would otherwise be rendered nugatory.

[27] The respondents contend that these circumstances are not present in this case. They argue that the statistics relating to the number of resignations of DSO employees, upon which the applicant relies, are not sufficient proof of the employees having left as a result of the decision; one should not speculate about the reasons why employees might have left the institution. Moreover, alternative remedies are open to the applicant in the event that the enactments ultimately prove to be unconstitutional. The respondents argue that the existence of alternative remedies is a major and relevant factor in the exercise of a court's discretion to interfere. Currently, however, the deliberative process of Parliament is under way, the political party respondents are fully participating in it, no decision has been taken regarding the final form of the enactment, and the DSO continues to carry out its mandate as contemplated in the NPA Act. They contend that in light of these circumstances it is not appropriate for this Court to make the order sought by the applicant.

2.2 *The legal issues*

[28] The directions specify only one issue for determination and that is whether, in the light of the doctrine of separation of powers implicit in our Constitution, and considering all the circumstances of this case, it is appropriate for this Court to set aside the decision of the National Executive or to interdict the respondents from pursuing the passage of the Bills through Parliament. In considering this question, it will be useful to commence with a discussion of the principle of separation of powers under our constitutional order.

3 The principle of separation of powers

[29] It is by now axiomatic that the doctrine of separation of powers is part of our constitutional design. Its inception in our constitutional jurisprudence can be traced back to Constitutional Principle VI, which is one of the principles which governed the drafting of our Constitution. It proclaimed that:

[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

[30] There is no express mention of the separation of powers doctrine in the text of the 1996 Constitution. In the First Certification judgment, *In re: Certification of the Constitution of the Republic of South Africa, 1996*, this Court held that the text of the new Constitution did comply with Constitutional Principle VI. The Court stated:

There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.

It continued—

“[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation”.

[31] In a subsequent case, *De Lange v Smuts NO and Others*, Ackermann J repeated that there is no universal model of separation of powers. He continued with the following remarks:

I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

[32] The starting point in an understanding of the model of separation of powers upon which our Constitution is based, must be the text of our Constitution.. Section 85 of the Constitution vests the executive authority in the President acting with the Cabinet. In terms of section 85(2)(d), the Cabinet has the constitutional authority to prepare and

initiate legislation. Section 73(2) gives a Cabinet member the authority to introduce a Bill in the National Assembly. Thus the ministers had the constitutional authority to initiate the legislation in issue here. One of the issues the Cabinet will consider is whether the proposed legislation that it approves and initiates conforms to the Constitution.

[33] In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.

[34] In *Doctors for Life*, the Court made these points:

The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.

[35] Whether this Court should intervene at this stage must therefore be guided by the principle of separation of powers. The principle of checks

and balances focuses on the desirability that the constitutional order, as a totality, prevent the branches of government from usurping power from one another. The system of checks and balances operates as a safeguard to ensure that each branch of government performs its constitutionally allocated function and that it does so consistently with the Constitution. Against this background, I turn now to the question that needs to be considered.

[36] As pointed out above, the sole question in this case is whether it can ever be appropriate for this Court to intervene when draft legislation is being considered by Parliament, to set aside the decision of the executive to initiate the legislative process. This question can be divided into the following three sub-questions:

- (i) can courts ever intervene at this stage of the legislative process;
- (ii) if the answer to (i) is “yes”, what are the circumstances that would warrant intervention; and
- (iii) are these circumstances present in this case?

3.1 *Are there ever circumstances in which a court may intervene to decide whether a decision by the executive to initiate legislation is unlawful?*

[37] The applicant seeks to impugn the conduct of the executive in preparing legislation before the legislation has been enacted by Parliament. Clearly, if the legislation had been enacted, the applicant’s remedy would have been to challenge its constitutionality. However, the applicant has not waited for this to happen. Instead, he complains of a very specific form of executive conduct – the initiation of legislation – which is a part of the legislative process. As the Bills concerned are now before Parliament, the judiciary is being asked to consider a matter that is presently within the sphere of responsibility of Parliament. It is Parliament that is vested with the primary oversight function of the executive. The Court is thus being asked to intervene before Parliament has concluded its work. In considering whether the Court can and should intervene at this stage, the starting point should be the respective roles of this Court and of Parliament as provided for by the Constitution.

[38] Judges (and thus the courts) in our constitutional order have the duty to uphold and protect the Constitution. Section 38 of the Constitution provides that people may approach competent courts for appropriate relief in relation to the actual or threatened infringement of rights. This Court has held that relief will not be appropriate unless it is effective. Courts therefore are guardians of the Constitution. It is this role which we must bear in mind in addressing the question of whether this Court may intervene before Parliament has concluded its work.

[39] However, the Constitution is replete with provisions that make it plain that ordinarily a court will not interfere with the functioning

of Parliament. For example, section 167(4)(b) restricts the ability of all courts to pronounce on the constitutionality of parliamentary or provincial Bills by providing that only the Constitutional Court may:

“decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121”.

[40] In *Doctors for Life*, this Court held that section 167(4)(b) must be understood to mean that, where a challenge to a Bill is levelled in order to render it invalid, the only circumstances in which this Court may entertain the challenge are those provided for in sections 79 or 121. Sections 79 and 121 permit the President or a Premier, as the case may be, prior to signing a Bill into law, to refer it to this Court and not to any other court and, even then, only if he or she has reservations as to whether the Bill is constitutional or not. These provisions preserve the autonomy of both Parliament and the provincial legislatures to pursue their law-making responsibilities without undue interference by courts. In this case, the applicant has not sought to attack the validity of the Bill. Indeed, counsel for the applicant specifically stated that the Court need not look at particular provisions of the Bills, but merely at their general design, to determine whether the Court’s jurisdiction should be exercised. What he urges us to consider is the impact of a decision of the executive, not the constitutionality of a Bill.

[41] There may however be exceptions to the principle that a court may not intervene in the legislative process. In *Doctors for Life*, this Court acknowledged that there is no express constitutional provision that precludes this Court from intervening in parliamentary proceedings before Parliament has concluded its deliberations on a Bill. Ngcobo J noted that the question of whether the Court had this power raised two important, and potentially conflicting, constitutional principles:

“On the one hand, it raises the question of the competence of this Court to interfere with the autonomy of Parliament to regulate its internal proceedings and, on the other, it raises the question of the duty of this Court to enforce the Constitution, in particular, to ensure that the law-making process conforms to the Constitution”.

However, the Court reached no firm conclusion on this question. In my view, as will become clear from what follows, I do not find it necessary to decide the question in this case either. I am prepared to accept, for the purposes of argument that a court may intervene in parliamentary proceedings. The question that arises next is the circumstances in which it may do so.

3.2 *What are the circumstances that would permit judicial intervention?*

- [42] In considering this question, we should bear in mind the following two principles: On the one hand, the Constitution requires the courts to ensure that all branches of government act within the law; on the other, it requires courts to refrain from interfering with the autonomy of the legislature and the executive in the legislative process.
- [43] In *Doctors for Life*, this Court considered jurisprudence from other jurisdictions concerning the question of when it would be appropriate for a court to intervene in the legislative process before it is complete. The Court noted that the ordinary rule under the jurisprudence, notably of the Privy Council, is that courts will ordinarily not intervene until the process is complete. However, in *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another*, the Privy Council held that a court in Hong Kong may intervene if there is “no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object”.
- [44] In my view, having regard to the doctrine of separation of powers under our constitutional order, this test would be the appropriate test to apply. Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible. Such an approach takes account of the proper role of the courts in our constitutional order: While duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature. This is a formidable burden facing the applicant.
- [45] We were referred to the decision in *Trinidad and Tobago Civil Rights Association v The Attorney-General of Trinidad and Tobago*, in which the High Court did intervene to prevent the enactment of a Bill. The impugned Bill proposed to abolish the jurisdiction of the court to consider public interest applications for judicial review. The High Court in that case held that the legislation would have impaired the rights of the public to challenge legislation, causing immediate prejudice and affecting the powers of the judiciary. The circumstances were thus, according to the High Court, sufficiently exceptional to warrant interference by the courts.
- [46] On appeal, however, the Court of Appeal of Trinidad and Tobago agreed with the views expressed in the Privy Council decisions that courts should as far as possible avoid interfering with pre-enactment legislative process. The test it formulated is whether it has been shown that, if a Bill is enacted, an applicant will not be able to access relief because the Bill’s object would have been achieved. It held that if the Bill in question were enacted, the courts would have the power to declare it void if it offended the constitution. The High Court had erred

in holding this was an exceptional case because it had not been shown that irreversible consequences, damage or prejudice would result.

[47] Cases that would warrant intervention on this approach will be extremely rare. As acknowledged in an Australian case, *Cormack v Cope*, it is not the introduction of a Bill that affects rights; it is the making of a law that does that. Thus, before the law has been enacted, it would be extremely unusual to be able to demonstrate harm. In my view, it is not necessary in this case to attempt to identify with precision what would constitute “exceptional circumstances” or to formulate in advance in what circumstances they may arise. The question whether exceptional circumstances exist depends on the facts of each case and is a matter to be considered on a case-by-case basis. In this particular case, for the reasons given below, it is not appropriate for the judiciary to intervene.

3.3 *Do the circumstances of this case warrant judicial intervention?*

[48] All three parties arguing for judicial intervention in this case sought to demonstrate that the executive’s decision to introduce the Bills constituted a gross violation of the Constitution. The arguments were presented with a great deal of passion, no doubt because of the important and emotive debates in the country about the unacceptable levels of crime, its prevention and the measures that are being, or should be, employed to combat it.

[49] The reasons advanced, however, require close examination. We are dealing with the constitutionally mandated power of the executive to initiate legislation and the power of the legislature to enact it. While I do not find it necessary to circumscribe with precision the exact circumstances that would warrant judicial interference of this nature, I am of the view that the reasons advanced to justify intervention by the Court must, at the very least, demonstrate material and irreversible harm that could not be remedied once the legislation has been enacted. With this in mind, I turn now to consider the arguments made by the applicant, the UDM and the CFCR.

[50] The main argument by the applicant is that judicial intervention is appropriate at this stage because of the negative effect the draft legislation is exerting on the daily operations of the DSO. In particular, the applicant’s counsel points to the information provided by the acting NDPP in his affidavit that many DSO employees have left their employment. Counsel argues that this must be occurring because of the plan to disestablish the DSO, which would allegedly have a material and irreversible effect on the DSO, undermine the state’s capacity to render basic security and cause harm to the constitutional order itself. He argues that there would be no remedy in the future because by then it would be too late.

- [51] This argument must fail. First, it is not clear at this stage what Parliament will decide to do. The applicant's case regarding material and substantive harm is premised on the assumption that the legislation will be enacted without material change. However, Parliament may choose to make significant and substantial amendments to the draft legislation or it may choose not to enact the legislation at all. Until the content of the legislation has been determined by Parliament, the effect of the legislation cannot be determined.
- [52] Second, it is not clear that the members of the DSO are leaving because of the decision to initiate legislation to disestablish the DSO. The respondents state that there could well be other reasons for this depletion in numbers. The causal relationship, therefore, between the executive decision to introduce the legislation and the fact that many members have left has not been clearly established. Nevertheless, even were it to be established that some of them, indeed perhaps all of them, had left because of the decision to introduce the legislation, it cannot be said that this will necessarily constitute irreversible harm sufficient to warrant intervention by this Court at this stage. Institutions often experience times of change and uncertainty. Often too, they experience high levels of staff turnover. The level of staff turnover described by the acting NDPP in this case, while high, cannot be said to be so high as to constitute material and irreversible harm sufficient to warrant intervention. In reaching this conclusion, it is important to bear in mind that this is a particularly high threshold to meet.
- [53] The applicant further argues that the President and Cabinet seek to disestablish the DSO and place its members in a dysfunctional unit (the SAPS) because a number of members of the ANC are (or have been) subject to the unwelcome attentions of the DSO. Again if this argument has any foundation, something which need not be decided in this case, appropriate relief can be sought in due course.
- [54] The UDM argues that, because the decision to initiate the legislation arose as a result of the Polokwane Resolution, Cabinet acted under dictation in making the decision to initiate the legislation to disestablish the DSO. It suggests further that the executive followed the dictates of the ruling party rather than its responsibilities in terms of the Constitution. In my view, there is nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party. Quite clearly, in so doing, Cabinet must observe its constitutional obligations and may not breach the Constitution. However, if in this case, once the legislation is enacted, it is established that the legislation does breach the Constitution, relief will be available and the legislation may be declared invalid. In my view, this argument does not establish that material and irreversible harm will result if the Court does not intervene at this stage. The argument cannot succeed.

[55] The UDM also argues that, having regard to what it refers to as “the relative marginalisation of the legislature” and the dangers of one-party domination, the Court should act because no-one else will. I cannot agree. The role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it. Moreover, the considerations raised by the UDM do not establish that irreversible and material harm will eventuate should the Court not intervene at this stage.

[56] The CFR argues that the draft legislation poses a significant threat to the independence of the NPA and will cause harm to the structure of our Constitution, such that intervention is necessary. The first difficulty with this argument is that it assumes that the content of the draft legislation will remain unchanged during its passage through Parliament. The Court cannot make this assumption. I must proceed on the basis that Parliament will observe its constitutional duties rigorously. If it is correct that the draft legislation does threaten structural harm to the Constitution or the institution of the NPA, something which I expressly refrain from deciding, then Parliament will be under a duty to prevent that harm. It would be institutionally inappropriate for this Court to intervene in the process of law-making on the assumption that Parliament would not observe its constitutional obligations. Again, should the legislation as enacted be unconstitutional for the reasons proffered by the CFR, appropriate relief can be obtained thereafter. This argument must thus also fail.

4 Conclusion

[57] In conclusion, then, I find that the applicant has not established that it is appropriate for the Court to intervene in the affairs of Parliament in this case. He has not shown that material and irreversible harm will result if the Court does not intervene. In the circumstances, both the application for leave to appeal (in Part A) and the application for direct access (in Part B) must be refused as it is not in the interests of justice for the applications to be granted.

4.1 Costs

[58] The applicant has raised important constitutional issues and there is great public interest in the matter. It accordingly seems to me that this is a matter in which this Court should make no order as to costs.

4.2 Order

[59] It is ordered that:

- (a) The applications for condonation are granted.
- (b) The applications for leave to appeal and for direct access are dismissed.
- (c) There is no order as to costs in this Court.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/99

Ex Parte the President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC)*

Decided on: 11 November 1999

1 Introduction

CAMERONN AJ:

[1] The legislation before us is inchoate. Parliament has passed a Bill, but it has not received the assent of the President, who referred it to this Court for a decision on its constitutionality. This is the first time that the provisions of the 1996 Constitution (“the Constitution”) allowing for such a referral have been invoked, and our decision requires consideration of what that procedure entails as well as of the questions raised concerning the Bill’s constitutionality.

[2] The Liquor Bill was introduced in the National Assembly on 31 August 1998. It passed through various legislative stages in terms of section 76(1) of the Constitution before Parliament approved it on 2 November 1998. When the Bill was sent to the President for his assent, he declined to grant it. Instead, because he had reservations about its constitutionality, he referred it back to the National Assembly on 22 January 1999 for reconsideration. On 3 March 1999, the National Assembly resolved that “the House, having reconsidered the Liquor Bill [B 131B-98], returns it to the President”. No amendments had been effected. On 8 March 1999, the President referred it to this Court for a decision on its constitutionality. In doing so, he invoked his power pursuant to section 84(2)(c) of the Constitution, which provides that the President is responsible for “referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality”.

...

2 Presidential Referral Under Section 79

[6] Our decision requires us to consider first what the referral to this Court by the President for a decision on a Bill’s constitutionality entails. The constitution, which subjects all legislation to review for its constitutionality, and makes any law inconsistent with it invalid, embodies three routes to judicial consideration of the constitutionality of legislation passed by Parliament. One is a challenge by an interested party in a competent Court under one or more provisions of the Constitution. Another is an application by at least one third of the members of the National Assembly to the Constitutional Court for an

* All footnotes are omitted.

order declaring all or part of an Act of Parliament unconstitutional. The third is that invoked in the present case, namely referral by the President before a Bill becomes a statute.

...

- [10] The procedure the President must follow when referring a Bill to this Court is set out in section 79. In terms of section 79(1) the President must either assent to and sign a Bill passed by Parliament, or, if he has reservations about its constitutionality, refer it back to the National Assembly for reconsideration. Section 79(4) then provides:

If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either:

- (a) assent to and sign the Bill; or
- (b) refer it to the Constitutional Court for a decision on its constitutionality.

- [12] Section 79(5) requires a decision from this Court as to whether "the Bill is constitutional". In terms of section 167(4)(b), only the Constitutional Court may decide on the constitutionality of any parliamentary Bill, but may do so only in the circumstances anticipated in section 79. The general powers of the courts in dealing with constitutional matters are set out in section 172. That section requires that a Court

- [13] The terms of section 79 contrast with those of section 80, which empowers members of the National Assembly to seek an order that "all or part" of an Act of Parliament is unconstitutional. The contrasting wording of section 79 may seem to suggest that this Court is obliged to audit the whole of a Bill so as to determine its constitutionality comprehensively and conclusively. But this impression is countered by the fact that section 79 clearly envisages that the President's "reservations" must be specified when he refers a Bill back to Parliament. Section 79(3)(a) requires that the National Council of Provinces participate in the reconsideration of the Bill if the President's reservations are of a specific kind — namely if they relate to "a procedural matter that involves the Council"; while section 79(4) requires the President to assent to and sign the Bill if after reconsideration it "fully accommodates" his reservations. Both provisions entail that the President must itemise his reservations in relation to a Bill.

- [14] It is moreover clear that the President is empowered to refer a matter to this Court in terms of section 79 only if his reservations concerning the constitutionality of the Bill are not fully accommodated by Parliament. If the President has no reservations concerning the constitutionality of the Bill, or if his reservations have been fully accommodated by Parliament, the referral would be incompetent. In the circumstances, the presidential power is limited under section 79(4)(b) to the power to refer a Bill to the Constitutional Court "for a

decision on its constitutionality” with respect to his reservations. Section 79(5) must thus be read as subject to a comparable limitation, empowering the Court to make a decision regarding the Bill’s constitutionality only in relation to the President’s reservations.

[15] This makes it clear, in answer to the first question posed in para 11 above, that the Court considers only the President’s reservations. Whether it may ever be appropriate for the Court upon a presidential referral to consider other provisions which are manifestly unconstitutional, but which are not included in the President’s reservations, need not be decided now.

[16] By corollary (as Mr Wallis, who appeared with Mr Govindsamy for the Minister, submitted) section 79 does not entail a “mini-certification” process. The specificity required of the President in spelling out his reservations plainly negatives the notion that this Court’s function is to determine, once and for all, whether a Bill accords in its entirety with the Constitution. What section 79 entails is that in deciding on the constitutionality of the Bill this Court must in the first instance consider the reservations the President specified when he invoked the section 79 procedure. This contrasts with the function the interim Constitution required this Court to fulfil at the time of the adoption of the 1996 Constitution. There its task was to render a “final and binding” decision on whether “all” the provisions of the 1996 Constitution conformed with the Constitutional Principles enumerated in the interim Constitution. The answer to the second question posed in para 11 above is therefore No.

...

[20] The referral procedure in my view requires this Court to give a decision in terms of section 79(5) relating to the President’s reservations, and the submissions regarding those reservations made by parties represented in the National Assembly, and thereby to decide on a Bill’s constitutionality. However, regarding the third question posed in paragraph 11 above, even if this Court does decide that the Bill is constitutional, supervening constitutional challenges after it has been enacted are not excluded, save to the extent that this Court has in deciding the questions the President placed before it in the section 79 proceedings already determined them. In this regard, the well-established principle that a Court of final appeal will not depart from its previous decisions unless they are shown to have been clearly wrong has obvious relevance.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/99

Executive Council of the Western Cape v minister of Provincial Affairs and Another; Executive Council of KwaZulu-Natal v President of the Republic of South Africa 1999 (12) BCLR 1353 (CC)*

Decided on: 15 October 1999

NGCOBO J:

1 Introduction

[1] These two cases raise important questions relating to the authority to establish municipalities and their internal structures. They arise out of a dispute between the governments of the Western Cape and KwaZulu-Natal, on the one hand, and the national government on the other. The dispute concerns the constitutionality of certain provisions of the Local Government: Municipal Structures Act, No 117 of 1998 (“the Structures Act”) ...

2 The constitutional challenge

[22] The constitutional challenges can be divided into two main groups. First, it was contended that the provisions of the Structures Act encroach on the powers of the provinces. This challenge concerned in particular the provincial power to establish municipalities in terms of section 155(6) of the Constitution. Second, it was contended that the Structures Act encroaches on the constitutional powers of municipalities. This challenge related in particular to a municipal council’s power to elect executive committees or other committees in violation of section 160(1)(c) of the Constitution and their power to regulate their internal affairs in terms of section 160(6) of the Constitution.

[23] In regard to both these complaints, the national government contended that although the Constitution allocates powers to provinces and municipalities in Chapter 7, it does not deprive Parliament of legislating in relation to the same matters. The broad contention advanced by the national government was that, in terms of section 44(1)(a)(ii) of the Constitution, Parliament has legislative capacity in all fields other than the exclusive powers referred to in Schedule 5. The powers vested in the provinces and municipalities in Chapter 7 of the Constitution are accordingly concurrent with those of the national government, so it was argued. This broad contention shall be considered before I turn to the specific challenges themselves.

* All footnotes are omitted.

3 The concurrency argument

- [24] In order to set the stage on which the constitutional challenges will be considered, it is necessary first to consider the contention by the national government that in terms of section 44(1)(a)(ii) it has, except for matters falling within Schedule 5, concurrent powers with the provinces and municipalities.
- [25] The legislative power vested in Parliament by section 44(1)(a)(ii) “to pass legislation with regard to any matter . . . excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5” must be exercised, in terms of subsection (4), “in accordance with, and within the limits of, the Constitution”. Thus, where on a proper construction of the Constitution such limits exist, they constrain the residual power of Parliament.
- [26] There are a number of such constraints in the Constitution. The most obvious example is the power to pass or amend a provincial constitution which, on a proper construction of section 104(1) of the Constitution, is clearly an exclusive provincial competence. Other provisions of the Constitution also place constraints on the powers of Parliament. A few examples are: the provisions of Chapter 2, the “manner and form” procedures prescribed by the Constitution for the passing of legislation, the entrenchment of the judicial power in the courts by Chapter 8, the protection given to state institutions protecting democracy by Chapter 9, legislation sanctioning the withdrawal of money from a provincial revenue fund which, apart from the provisions of the Constitution, is an exclusive provincial competence, and the fiscal powers of provinces and municipalities which in terms of Chapter 13 are subject to regulation, but not repeal, by Parliament.
- [27] The question then is whether, on a proper construction of Chapter 7 of the Constitution dealing with local government, the provinces are correct in contending that there are certain constraints upon Parliament’s powers. If regard is had to the plan for local government set out in Chapter 7, we see that there is indeed a comprehensive scheme set out in the Chapter for the allocation of powers between the national, provincial and local levels of government. That is apparent not only from the way the Chapter is drafted, with the allocation of specific powers and functions to different spheres of government, but also from the provisions of section 164 that:
- Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.
- [28] The submission that Parliament has concurrent power with the other spheres of government in respect of all powers vested in such spheres by Chapter 7 is inconsistent with the language of the provisions of Chapter 7 itself, and cannot be reconciled with the terms of section

164. If Parliament indeed had full residual power in respect of all matters referred to in Chapter 7, there would have been no need for the reference in section 164 to “any matter not dealt with in the Constitution”. The only explanation that Mr Trengove could offer for this conundrum was that the provision was necessary because national legislation includes subordinate legislation. But this is no answer. If subordinate legislation was contemplated one would expect that to have been referred to specifically. In any event, if Parliament has residual powers in respect of all matters dealt with in Chapter 7, that would include the power to pass laws dealing with such matters and to sanction the making of subordinate legislation if that should be necessary. The power to sanction subordinate legislation is an incident of the legislative power, and does not require a provision such as section 164. It is necessary, therefore, to consider the allocation of powers made in Chapter 7 and to decide whether, on a proper construction of each of those provisions, they constrain Parliament in the manner contended for by the provinces.

[29] Municipalities have the fiscal and budgetary powers vested in them by Chapter 13 of the Constitution, and a general power to “govern” local government affairs. This general power is “subject to national and provincial legislation”. The powers and functions of municipalities are set out in section 156 but it is clear from sections 155(7) and 151(3) that these powers are subject to supervision by national and provincial governments, and that national and provincial legislation has precedence over municipal legislation. The powers of municipalities must, however, be respected by the national and provincial governments which may not use their powers to “compromise or impede a municipality’s ability or *right* to exercise its powers or perform its functions” (emphasis supplied). There is also a duty on national and provincial governments “by legislative and other measures” to support and strengthen the capacity of municipalities to manage their own affairs⁴⁸ and an obligation imposed by section 41(1)(g) of the Constitution on all spheres of government to “exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”. The Constitution therefore protects the role of local government, and places certain constraints upon the powers of Parliament to interfere with local government decisions. It is neither necessary nor desirable to attempt to define these constraints in any detail. It is sufficient to say that the constraints exist, and if an Act of Parliament is inconsistent with such constraints it would to that extent be invalid.

[30] Chapter 7 of the Constitution also allocates powers and functions to national and provincial governments in relation to the establishment and supervision of local governments. These provisions also place constraints upon the power that Parliament has under section 44. For example, the provision of section 155(5) that “[p]rovincial legislation must determine the different types of municipality to be established in

the province” is the allocation of a specific power to the provincial level of government. National legislation inconsistent with such provisions would also be inconsistent with the Constitution and to that extent invalid.

4 Establishment powers

[Ngcobo J then inquired into the constitutionality of certain provisions of the Structures Act. He found, inter alia, that section 4 and 5 were unconstitutional. These provisions vested certain powers in the Minister which, upon Ngcobo J’s interpretation of the Constitution, had to be vested in an independent authority (i.e. the Demarcation Board). The majority of the Court agreed with Ngcobo J’s interpretation. However, in a dissenting judgement, O’Regan J found that the Constitution does not specify by whom these powers must be exercised, and that Parliament may therefore, in terms of section 164, regulate these matters. The Court then considered the constitutionality of section 13 of the Act.]

[77] Section 13 provides:

- (1) The Minister, by notice in the *Government Gazette*, may determine guidelines to:
 - (a) assist MECs for local government to decide which type of municipality would be appropriate for a particular area.
- (2) An MEC for local government must take these guidelines into account when establishing a municipality in terms of section 12 or changing the type of a municipality in terms of section 16(1)(a).

[78] The provinces contended that Parliament has no powers to prescribe to the provinces guidelines which they must take into account in the exercise of their legislative power to determine the types of municipality that may be established in the provinces.

[79] On its face, the issue raised by the provinces may appear to be insignificant. However, upon a proper consideration, the issue is not a trivial one. It goes to the fundamental principle of the allocation of powers between the national government and the provincial governments. This principle is entrenched, for instance, in section 41(1)(e) of the Constitution (all spheres of government must respect the constitutional status, institutions, powers and functions of government in the other spheres); section 41(1)(g) (spheres of government must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere); and section 44(4) (when exercising its legislative authority, Parliament must act in accordance with, and within the limits of, the Constitution). These provisions must be understood in the light of the supremacy of the Constitution, set out in section 2 of the Constitution, which provides:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid . . .

[80] All these provisions underscore the significance of recognising the principle of the allocation of powers between national government and the provincial governments. The Constitution therefore sets out limits within which each sphere of government must exercise its constitutional powers. Beyond these limits, conduct becomes unconstitutional. This principle was given effect to by this Court in *Fedsure* when it said:

It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.

[81] Limits on the powers and functions on each sphere of government must therefore be observed. The enquiry, therefore, is whether the impugned provisions deal with a matter which falls within the powers conferred upon the sphere of government enacting the challenged provision. If it does not fall within its powers, that sphere of government has acted outside its powers and the impugned legislation cannot stand. The importance or otherwise of the matter in issue is not relevant. It is the principle that is relevant and which must be given effect to.

[82] The question, therefore, is whether what section 13 purports to do falls within the powers conferred upon the national government. Section 155(5) confers on the provinces the power to determine the different types of municipalities which may be established within a province. This power must necessarily include the legislative and executive power to establish the types in the provinces and to determine in which areas the types are to be established. Section 155(5) must be read with section 155(6), which deals with the establishment of municipalities. Read together, these two provisions mean that in relation to the establishment of categories of municipality in the province, the provincial governments have executive powers only, while in relation to the establishment of the types of municipalities, provincial governments have both the legislative and executive powers.

[83] Section 13 of the Structures Act, in peremptory terms, tells the provinces how they must set about exercising a power in respect of a matter which falls outside the competence of the national government. It is true that the MEC is only required to take the guidelines into account, and is not obliged to implement them. That the MEC, having taken the guidelines into account, is not obliged to follow them, matters not. Nor is the fact that the Minister may decide not to lay down any guidelines, of any moment. What matters is that the national government has legislated on a matter which falls outside of its competence.

[84] Section 13 deals with a matter which section 155(5) of the Constitution vests in provincial legislatures, namely the determination of “the different types of municipality to be established in the province”. The section is, therefore, inconsistent with section 155(5) of the Constitution.

...

[120] Section 159(1) of the Constitution provides:

The term of a Municipal Council may be no more than five years, as determined by national legislation.

[121] The constitutional attack on section 24 is premised on the proposition that it constitutes an impermissible assignment of plenary legislative power to the Minister, and that it does not constitute “subordinate legislation” within the meaning of section 239 of the Constitution.¹⁰⁷ Section 24 provides:

- (1) The term of municipal councils is no more than five years as determined by the Minister by notice in the *Government Gazette*, calculated from the day following the date or dates set for the previous election of all municipal councils in terms of subsection (2).
- (2) Whenever necessary, the Minister, after consulting the Electoral Commission must, by notice in the *Government Gazette*, call and set a date or dates for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils...

[122] The authority of Parliament to delegate its law-making functions is subject to the Constitution, and the authority to make subordinate legislation must be exercised within the framework of the statute under which the authority is delegated.

[123] The competence of Parliament to delegate its law-making function was recognised by this Court in *Executive Council, Western Cape*. The Court held:

The legislative authority vested in Parliament under s37 of the Constitution is expressed in wide terms - 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including... the power to amend the Act under which the assignment is made.

[124] Although the Court was concerned with the interim Constitution, it seems to me that the same principle applies to the present

Constitution. It is a principle of universal application which is recognised in many countries. This authority is, of course, subject to the Constitution. The enquiry is whether the Constitution authorises the delegation of the power in question. Whether there is constitutional authority to delegate is therefore a matter of constitutional interpretation. The language used in the Constitution and the context in which the provisions being construed occur are important considerations in that process.

- [125] The Constitution uses a range of expressions when it confers legislative power upon the national legislature in Chapter 7. Sometimes it states that “national legislation must”; at other times it states that something will be dealt with “as determined by national legislation”; and at other times it uses the formulation “national legislation may”. Where one of the first two formulations is used, it seems to me to be a strong indication that the legislative power may not be delegated by the legislature, although this will of course also depend upon context.
- [126] Section 159(1) of the Constitution makes it clear that all municipal councils will have a uniform term of office, subject to a maximum of five years. It requires national legislation to determine such term of office by using the expression “as determined by legislation”. The term so established is subject to the prescribed maximum of five years. Section 159(2) requires that a municipal election be held within 90 days of the date that the previous council was dissolved or its term expired. The term of office of an elected legislative body such as a municipal council is a crucial aspect of the functioning of that council. In the case of the National Assembly, section 49(1) of the Constitution determines the term, and in the case of the provincial legislatures, section 108(1) of the Constitution determines the terms. Given its importance in the democratic political process, and given the language of section 159(1), the conclusion that section 159(1) does not permit this matter to be delegated by Parliament, but requires the term of office to be determined by Parliament itself, is unavoidable. In addition to the importance of this matter, I also take cognizance of the fact that it is one which Parliament could easily have determined itself for it is not a matter which requires the different circumstances of each municipal council to be taken into consideration. All that is required is to fix a term which will apply to all councils. In my view, this is not a matter which the Constitution permits to be delegated. The delegation was, therefore, impermissible and section 24(1) must be held to be inconsistent with section 159(1) of the Constitution.

Chaskalson & Klaaren 'National Government' in Chaskalson *et al* (eds)
Constitutional Law of South Africa (1996) 3-22/3-25

There are no expressly stated substantive limits on the power of Parliament to amend the final Constitution. It might be argued that the Constitutional Principles contained in Schedule IV to the interim Constitution places such limits on Parliament's amending power. The Constitutional Principles bound the Constitutional Assembly when it drew up the final Constitution. The final Constitution could not take effect until the Constitutional Court had certified that it complied with all the Principles contained in Schedule IV. Indeed, the first constitutional text adopted by the Constitutional Assembly on 8 May 1996 did not become the final Constitution because the Constitutional Court was unable to certify that it complied with all the Constitutional Principles. It would appear anomalous to allow Parliament now to amend the final Constitution so as to introduce provisions which do not comply with the Constitutional Principles, and which thus could not have formed part of the original text of the final Constitution. This anomaly, however, appears to be a necessary product of the two-stage process by which South Africa travelled from apartheid to constitutional democracy. The Constitutional Principles provided a framework designed for transition and thus were a crucial component of the interim Constitution. Now that the transitional process has been completed, however, the instrument for which they derive their authority has been repealed and has no immediate constitutional status. This appears to have been recognised in the Principles themselves. Principle II, for example, which requires that the Bill of Rights be *entrenched* and justiciable, presupposes that amendments to the final Constitution will not necessarily have to comply with the principles. If this was not case, Principle II (like all the other Principles) would be self-entrenching, and there would be no need specifically to provide that the Bill of rights must be entrenched. This is not simply an issue of legal logic- it is a political necessity. The Constitutional Principles reflected particular concerns of the negotiating parties who drafted the interim Constitution in 1993. The constitutional development of South African law cannot forever be limited by those historically specific concerns.

While the Constitutional Principles do not limit Parliament in the manner in which they limit the power of the Constitutional Assembly to draft the final Constitution, they may continue to exercise some indirect effect on the power of Parliament to amend the Constitution if the "basic structure" doctrine of constitutional amendment is adopted in South African law. This doctrine originates in India, where the Supreme Court has held that there are certain

implied substantive limitations on the power of Parliament to amend the Constitution. Article 368 of the Indian Constitution states the following:

(1) Notwithstanding anything in the Constitution, Parliament may in the exercise of its constituent power, amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds majority of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon, the Constitution shall stand amended in accordance with the terms of the Bill.

Although art 368 appears to confer an unlimited power of amendment on the Indian Parliament, the Indian Supreme Court has read into the article an implied limitation on the power of conferred by art 368 did not extend to any amendment which would alter the basic structure of the Constitution. Khanna J stated the following:

we may now deal with the question as to what is the scope of amendment under Article 368. This would depend upon the connotation of the word 'amendment'. Question has been posed during argument as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative ... Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirement of changing conditions, it is not permissible to touch the foundation or alter the basic institutional pattern.

The basic structure doctrine has been confirmed by the Indian Supreme Court in later cases. The doctrine is, however, applied with caution. For the most part it has been invoked by the Supreme Court to strike down only those constitutional amendments which affect the rule of law and the separation of powers between the judiciary and the legislature. Outside of this domain the court has allowed Parliament an almost unfettered power of amendment. Even the repeal of particular fundamental rights has been held not to affect the basic structure of the Constitution.

In Premier, KwaZulu-Natal v President of the Republic of South Africa the Constitutional Court left open the possibility that it might subsequently incorporate the basic structure doctrine into South African constitutional law, but held that the specific constitutional amendments which were being challenged could not possibly be described as the amendments which violated the basic structure of the interim Constitution. If the basic structure doctrine is incorporated into South African law, it is likely that for the foreseeable future at least, the Constitutional Principles are likely to play a role in shaping judicial conceptions of the basic structure of the South African Constitution.

One potential barrier to the adoption of the basic structure doctrine under the final Constitution is s 74(1), which expressly contemplates the amendment of s 1, the provision which sets out the founding values of the Republic of South Africa. If the founding values of s 1 are amendable, albeit only by a vote with the support of 75 per cent of the House of Assembly and the support of six provinces in the NCOP, it is difficult to argue that other provisions of the final Constitution are unamendable because such other amendments could implicate the basic structure of the Constitution. However, it may be possible to reconcile s 74(1) with the basic structure doctrine by reading s 1 as shaping the operation of that doctrine. If s 1 (possibly informed by the Constitutional Principles) is interpreted to delimit the basic structure of the Constitution, amendments inconsistent with the values of s 1 would be impermissible under the basic structure doctrine unless s 1 itself was amended by the special provisions of s74(1).

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 16/98

President of the Republic of South Africa v South Africa Rugby Football Union and Others 1999 (10) BCLR 1059 (CC)*

Decided on: 10 September 1999

1 Introduction

[1] This case raises important questions of legal principle concerning the basis on which the courts may review the exercise of presidential powers. It also touches on the circumstances in which the President can be called upon to testify in a court of law. ...

[2] At issue is the constitutional validity of two presidential notices that appeared in the Government Gazette on 26 September 1997. One announced the appointment of a commission of inquiry, under the chairmanship of Mr Acting Justice Browde, into the administration of rugby in the country. The other declared the provisions of the Commissions Act 8 of 1947 applicable to the commission and promulgated regulations for its operation. The South African Rugby Football Union (SARFU), two of its constituent unions and Dr Luyt, at that time the president of both SARFU and one of the unions, applied on notice of motion to the Transvaal High Court for an order against the President setting aside the two notices. The Minister of Sport and Recreation (the Minister) and the Director-General of the Department of Sport and Recreation (the DG) were also cited, although no relief was sought against them. The matter was heard by De Villiers J who set the two notices aside with costs and in his reasons, subsequently furnished, made adverse credibility findings against the President, the Minister and the DG. They appealed against that order and a number of ancillary orders. By the time the appeal came to be argued, Dr Luyt and the Gauteng Lions Rugby Union were the only remaining respondents and we shall refer to them as 'the respondents' in the course of this judgment.

...

[24] The judgment of the High Court is prolix, running to 1159 typewritten pages. The Judge concluded that the appointment of the commission and the decision to afford it powers in terms of the Commissions Act were invalid. He based this conclusion on three grounds: first, that the President had irrevocably abdicated his responsibility to exercise these powers to the Minister; secondly, that if he was wrong in his decision regarding abdication, that the President's exercise of the powers was invalid because the respondents were not afforded a hearing by the

* All footnotes are omitted.

President prior to his decision to appoint the commission; and thirdly, that in exercising his powers, the President had failed to apply his mind to the relevant issues. The Judge did not find it necessary to consider the other arguments raised by SARFU and the other applicants.

...

2 Summary of findings in this judgment

[33] The appeal is upheld. In part B of the judgment, in paras 37 - 125 below, we deal with the question of abdication of responsibility.

- (a) We hold that the Judge erred in concluding that at the meeting between the President and the Minister of 5 August 1997, the President irrevocably abdicated his responsibility to appoint a commission to the Minister. In our view, the words of the press statement of 7 August 1997 are not sufficient, in themselves, to establish that an abdication took place.
- (b) More importantly, even if the words of the press statement warrant such a conclusion, the purported abdication would, as a matter of law, have been invalid and therefore void. It could never, therefore, have been irrevocable.
- (c) Accordingly, the Judge's finding that the subsequent evidence relating to the President's consideration of the matter between 12 and 26 September 1997 was irrelevant and could have no effect on the determination of the issue was a material misdirection.
- (d) We consider all the oral and written evidence relating to the President's consideration of the appointment of a commission of inquiry and conclude that there is no basis for finding that the President abdicated his responsibility. The President's and the Minister's evidence in this regard is corroborated in material respects by the evidence of Professor Katz which was accepted by the High Court.
- (e) We consider the grounds upon which the Judge made adverse credibility findings against the President and find them to be wrong and that such findings constitute a material misdirection by him. The respondents argued that the President's testimony concerning his consideration, in the period between 12 and 26 September 1997, of whether a commission should be appointed was false and should be rejected. They argued that the evidence was false on the ground that the consideration of the matter by the President was merely a charade, and alternatively that, despite his evidence to the contrary, he gave no consideration to the matter whatsoever. In our view, there was no basis in the evidence for the imputation of such dishonesty to the President.

- (f) In addition, we find that the imputation of perjury in relation to the events of 12 to 26 September 1997 was never put to the President in cross-examination. This failure contravened the principles governing the practice of cross-examination. A witness is entitled to an opportunity to defend himself or herself against an allegation of mendacity. Such an opportunity was never afforded to the President.

[34] In part C of this judgment, at paras 126 - 222 below, we consider whether SARFU and the other respondents were entitled to a hearing prior to the President deciding to appoint a commission of inquiry:

- (a) We conclude that there are two distinct legal decisions under challenge: the decision to appoint a commission of inquiry in terms of the Constitution; and the decision to make the powers of subpoena afforded by the Commissions Act applicable to that commission. We consider whether each of these decisions constitute 'administrative action' as contemplated by section 33 of the Constitution.
- (b) We hold that in order to determine whether an act or decision constitutes administrative action, it is necessary to consider the function being performed. After a consideration of the nature of the President's power to appoint a commission of inquiry, we conclude that it does not constitute administrative action and that, therefore, the procedural fairness requirement for just administrative action demanded by section 33 of the Constitution is not necessary for the decision to appoint a commission of inquiry.
- (c) There are, however, other constraints on the exercise of that power. The doctrine of legality applies, as it does to all power exercised in terms of the Constitution. The President must also act in good faith and must not misconstrue the nature of his or her powers. In this case, we conclude that the President acted in accordance with those constraints when he appointed the commission of inquiry in terms of his constitutional powers. We also point out that the commission, upon appointment, must discharge its duties in accordance with the duty to act fairly.
- (d) We find that the subject matter to be investigated by the commission constitutes a matter of public concern as required by the Commissions Act. We find that the demands of procedural fairness did not require the respondents to be afforded a hearing prior to the President's decision to confer the Commissions Act powers upon the commission. Accordingly, we do not find it necessary to decide whether the decision to make the

provisions of the Commissions Act applicable to the commission constituted administrative action or not.

[35] In part D of the judgment, at paras 223 - 232 below, we reject the respondents' argument that the President failed to apply his mind properly to the appointment of a commission and hold that the terms of reference of the commission were sufficiently certain to determine the ambit of the commission's investigation.

[36] In part E, at paras 233 B 259 below, we hold that:

...

- (c) the decision to require the President himself to give evidence was fundamentally flawed; courts should be aware that the President is not in the same position as any other witness; the doctrine of separation of powers requires a court to seek to protect the status, dignity and efficiency of the office of the President and the President should be required to give evidence orally in open court in civil matters relating to the performance of his official duties only in exceptional circumstances.

3 Abdication of responsibility

[37] One of the central findings in the judgment is that concerning what the Judge referred to as 'the abdication of responsibility issue'. The Judge's line of reasoning is the following: (a) the press statement of 7 August 1997 shows that, on 5 August 1997, at his meeting with the Minister, the President abdicated his responsibility in regard to the appointment of a commission of inquiry to the Minister and the press reports of 17 August 1997 show that the Minister had purported to exercise the President's power by appointing a commission of inquiry; (b) as a matter of law, a decision to appoint a commission of inquiry is invalid if the President abdicates his responsibility relating to the making of the decision; (c) as a matter of law, the President's abdication was irrevocable; and (d) therefore the events subsequent to the abdication were irrelevant to determine whether the decisions taken by the President were valid.

[38] It is clear that under our new constitutional order the exercise of all public power, including the exercise of the President's powers under section 84(2), is subject to the provisions of the Constitution which is the supreme law. If this is not done, the exercise of the power can be reviewed and set aside by the Court. That is what this Court held in *President of the Republic of South Africa and Another v Hugo*. It is clear also that section 84(2)(f) of the Constitution confers the power to appoint commissions of inquiry upon the President alone. The Commissions Act also confers the power to declare its provisions applicable to a commission of inquiry upon the President alone. The Judge was, therefore, correct in law when he held that, if the President had indeed abdicated either of these powers to another person, that abdication would have been invalid.

[39] What would constitute an 'abdication' of the presidential power to appoint a commission of inquiry need not be precisely determined in this judgment. The Judge relied on the discussion of 'unlawful abdication of power' in Baxter's Administrative Law. Baxter identifies the following three ways in which power can unlawfully be abdicated: when an office-bearer unlawfully delegates a power conferred upon him or her; when an office-bearer acts under dictation; and when an office-bearer 'passes the buck'. The Judge found it unnecessary to decide in which of these three ways the President had abdicated his responsibility. He held simply that if the President had uttered the words reported in the press statement of 7 August 1997, he had unlawfully abdicated his responsibility.

[40] The first category of 'abdication' referred to by Baxter occurs where a functionary in whom a power has been vested delegates that power to someone else. Whether such delegation is valid depends upon whether the recipient of the power is lawfully entitled to delegate that power to someone else. There can be no doubt that when the Constitution vests the power to appoint commissions of inquiry in the President, the President may not delegate that authority to a third party. The President himself must exercise the power. Any delegation to a third party would be invalid. The second category referred to by Baxter deals with cases where a functionary vested with a power does not of his or her own accord decide to exercise the power, but does so on the instructions of another. The third category, 'passing the buck', contemplates a situation in which the functionary may refer the decision to someone else. However, as Baxter points out, if the final decision is taken by the properly empowered authority, there is no objection to taking the advice of other officials.

[41] When contemplating the exercise of presidential powers, there can be no doubt that it is appropriate and desirable for the President to consult with and take the advice of Ministers and advisors. Indeed, it is clear from the Constitution itself that the exercise of executive authority, in terms of section 85, is a collaborative venture in terms of which the President acts together with the other members of Cabinet. Similarly, where the President acts as head of state, it is not inappropriate for him or her to act upon the advice of the Cabinet and advisors. What is important is that the President should take the final decision.

[The Court considered all the evidence, and found that there had been no abdication of the President's responsibility in the present instance. Even though the initiation for the appointment of a commission of enquiry came from the Minister, the President discussed the matter with both his legal advisor and the director-general in his office, and seemingly made up his own mind that there was good reason for the appointment of such a commission.]

...

4 Remaining procedural and interlocutory matters and costs

4.1 *Order compelling the President to give evidence*

[240] This conclusion does not, however, end the enquiry in relation to the correctness of the order of referral made by the Judge. It was a term of the Judge's order that the President himself give oral evidence. There was no special order concerning the circumstances in, and the place at which, the President was to testify. The effect of the order of the Judge was therefore that the President was ordered to (and did) testify in open court. We have already held that the circumstances of this case did not warrant any issue being referred to evidence. The question that remains to be considered is whether the order was correct in so far as it required the President to give evidence in a civil matter in relation to the performance of his official duties. This is a question of considerable constitutional significance going to the heart of the separation of powers under our Constitution. It is also relevant to another aspect of this appeal concerning the correctness of the Judge's dismissal of appellants' application for an order revoking the order in terms of which the President was compelled to testify.

[241] The appellants, relying on the law of several foreign jurisdictions, submitted that the order requiring the President to testify was wrong in law. They submitted that the doctrine of the separation of powers requires that the President not be treated as if he or she were any other witness. They pointed to the important constitutional role of the President as head of state and head of the national executive and submitted that the separation of powers required the courts to be astute to protect the dignity and status of the office of the President under the Constitution as well as the efficiency of that office.

[242] A review of the law of foreign jurisdictions fails to reveal a case in which a head of state has been compelled to give oral evidence before a court in relation to the performance of official duties. Even where a head of state may be called as a witness, special arrangements are often provided for the way in which the evidence is given. There is no doubt that courts are obliged to ensure that the status, dignity and efficiency of the office of the President is protected. At the same time, however, the administration of justice cannot and should not be impeded by a court's desire to ensure that the dignity of the President is safeguarded.

[243] We are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must

therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice.

[244] The Judge says that he earnestly considered whether the President ought to be ordered to subject himself to cross-examination in the light of his constitutional status. But nowhere in the judgment is there any indication of the factors which were taken into account by him in giving the matter that consideration. Moreover, there is nothing on the papers or in the evidence from which we can conclude that the administration of justice would have been injured in any way if the President had not been ordered to submit himself to cross-examination but, instead, the decision to do so or not had been left to him. In the circumstances, we conclude that the Judge erred in making that order.

[245] Even when exceptional circumstances require the President to give evidence, the special dignity and status of the President together with his busy schedule and the importance of his work must be taken into account. In a private suit involving the President of, the United States of America, the Supreme Court held in *Clinton v Jones*:

We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so.

Later, Stevens J said:

Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.

We are of the view that in all cases in which a President is called upon to testify, respect for the office, the need to preserve the dignity and status of that office and an understanding of the implications of his busy schedule must be sensitively and carefully considered.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27/00

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC)*

1 The background

CHASKALSON:

- [5] In March 1997 the President, acting under the provisions of the Act, established a special investigating unit (SIU), which is the second respondent in this appeal. The head of the SIU is the first respondent who is a judge of the High Court. I will deal later with the role of the head of the SIU and with the powers vested in the SIU by the Act. For the moment, it is sufficient to say that the SIU has extensive powers including powers to investigate allegations of corruption, maladministration and unlawful or improper conduct which is damaging to State institutions, or which may cause serious harm to the interests of the public or any category thereof and to take proceedings to recover losses that the state may have suffered in consequence thereof.
- [6] On 26 March 1999 an allegation was referred to the second respondent for investigation in terms of the Act. The allegation was that there had been ‘a failure by attorneys, acting on behalf of any person with regard to a claim for compensation from the Road Accident Fund, to pay over to such persons the total nett amount received in respect of compensation from the Road Accident Fund after deduction of a reasonable and/or taxed amount in respect of attorney-client costs . . .’
- [7] The appellant is a voluntary association whose members are attorneys and advocates whose practices involve personal injury litigation. It contends that the investigative powers vested in the second respondent by the Act are highly intrusive, that the exercise of such powers against any of its attorney members would constitute an invasion of their privacy, and would cause irreparable damage to their professional reputation. Although the appellant denies that any of its members has ever acted unlawfully or improperly in connection with amounts received by them on behalf of their clients in respect of compensation from the Road Accident Fund (RAF), it says that it has ascertained that the SIU is soliciting complaints against some of its members to enable the unit to investigate the way they deal with RAF claims.

* All footnotes are omitted.

[8] It was in these circumstances that the appellant brought proceedings in the Transvaal High Court. It asked for an order declaring certain provisions of the Act to be inconsistent with the Constitution. Further, the appellant asked for orders reviewing and setting aside the proclamation under which the first respondent was appointed and the proclamation under which allegations concerning personal injury lawyers were referred to the second respondent for investigation. Other relief not relevant to this appeal was also claimed.

[9] The application was dismissed by Coetzee AJ in the High Court and, with leave granted in terms of rule 18, the appellant has appealed directly to this Court against that order. The first and second respondents indicated in the High Court that they took a neutral stand in the matter, and that they would abide the decision of that Court. They have made no representations to this Court. The third and fourth respondents opposed the appeal.

2 The issues

...

[11] Three separate issues are raised by the appellant in the appeal. It contends that:

- (a) section 3(1) of the Act and the appointment of the first respondent as head of the SIU are inconsistent with the Constitution because they undermine the independence of the judiciary and the separation of powers that the Constitution requires;
- (b) the Proclamation referring the allegation concerning the conduct of attorneys dealing with RAF claims was in any event beyond the scope of the Act and accordingly invalid; and
- (c) the powers of search vested in the second respondent by the Act are contrary to the right to privacy which everyone has under section 14 of the Constitution, and are accordingly invalid.

...

[18] Coetzee AJ held that the functions that the first respondent is required to perform under the Act as head of the SIU are not inconsistent with the independence of the judiciary. He held that under our Constitution there is no express provision dealing with the separation of powers, and that it was not competent for a court to set aside a legislative provision on the basis that it violates what, at best for the appellant, is no more than a 'tacit' principle of the Constitution. He held further that United States and Australian authorities relied upon by the appellant were not relevant, because the constitutions of those countries provide for a rigid separation of powers, whereas our Constitution does not do so".

[20] Coetzee AJ cited no authority for his finding that a legislative provision cannot be set aside on the grounds that it is inconsistent with an

implied provision of the Constitution. Counsel was unable to refer us to any authority for such a proposition and Mr Marcus who appeared for the respondents placed no reliance on it. I cannot accept that an implicit provision of the Constitution has any less force than an express provision. In *Fedsure* this Court held that the principle of legality was implicit in the interim Constitution, and that legislation which violated that principle would be inconsistent with the Constitution and invalid.

[21] The constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the courts. The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different.

[22] In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers. In the Western Cape case it enforced that separation by setting aside a proclamation of the President on the grounds that the provision of the Local Government Transition Act, under which the President had acted in promulgating the Proclamation, was inconsistent with the separation of powers required by the Constitution, and accordingly invalid. It has also commented on the constitutional separation of powers in other decisions. There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard, are invalid.

[23] In the United States the President is head of government and head of state. The President is popularly elected, and neither the President nor the cabinet are members of Congress. The President is, however, vested with the power to veto legislation passed by Congress. In South Africa the President is head of government and head of state. The President is elected by parliament from amongst its members but ceases to be a member of parliament after having been elected. Cabinet Ministers are appointed by the President from amongst members of parliament, remain members of parliament after their appointment, and are directly answerable to it. There is accordingly not the same separation between the legislature and the executive as there is in the United States. In this respect, the South African system of separation of powers is closer to the Australian system. There, the head of state is the Queen, represented in Australia by the Governor General. The Commonwealth government is headed by the Prime Minister, and the Prime Minister and cabinet are members of parliament. Under this system of 'responsible government' the separation between the legislature and the executive is not as strict as it is in the United States. In all three countries, however, there is a clear though not absolute separation between the legislature and the

executive on the one hand, and the courts on the other: it is that separation that is in issue in the present case.

- [24] The practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied. In *De Lange v Smuts Ackermann J* said:

I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided. For the moment, however, it suffices to say that, whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here C i.e. the power to commit an unco-operative witness to prison C is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.

The present case is concerned not with the intrusion of the executive into the judicial domain, but with the assignment to a member of the judiciary by the executive, with the concurrence of the legislature, of functions close to the 'heartland' of executive power.

- [25] The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although parliament has a wide power to delegate legislative authority to the executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.

- [26] The separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the state to ensure that this is done. It provides that courts are independent and subject only to the

Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of state or other person may interfere with the functioning of the courts, and all organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

- [27] Mr Marcus submitted that the principle of separation of powers is not necessarily compromised whenever a particular judge is required to perform non-judicial functions. He accepted, however, that the performance of functions incompatible with judicial office would not be permissible. This is consistent with what this Court said in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*⁵² where it stated that ‘judicial officers may, from time to time, carry out administrative tasks’ but noted that ‘[t]here may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers.’
- [28] It is also consistent with the United States and Australian cases referred to by Mr Trengove, who appeared for the appellant. No precise criteria are set in those decisions for establishing whether or not a particular assignment is permissible. The courts in both these countries determine this in the light of relevant considerations referred to in the judgments.
- [29] Mr Trengove sought to distill from these authorities certain criteria, which he submitted are relevant to considering whether or not under our Constitution it is permissible to assign a non-judicial function to a judge. They are whether the performance of the function:
- (a) is more usual or appropriate to another branch of government;
 - (b) is subject to executive control or direction;
 - (c) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law;
 - (d) creates the risk of judicial entanglement in matters of political controversy;
 - (e) involves the judge in the process of law enforcement;
 - (f) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.

To this may be added Blackmun J's summary of the American jurisprudence as showing that:

Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogative of another Branch and that are appropriate to the central mission of the Judiciary.

- [30] These considerations seem to me to be relevant to the way our law of separation of powers should be developed. Mr Marcus did not dispute their relevance, but submitted that they must be seen in the context of each particular case. They should be given a weight appropriate to the

nature of the function that the judge is required to perform, and the need for that function to be performed by a person of undoubted independence and integrity.

- [31] It is undesirable, particularly at this stage of the development of our jurisprudence concerning the separation of powers, to lay down rigid tests for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office. The question in each case must turn upon considerations such as those referred to by Mr Trengove, and possibly others, which come to the fore because of the nature of the particular function under consideration. Ultimately the question is one calling for a judgement to be made as to whether or not the functions that the judge is expected to perform are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary, or materially breach the line that has to be kept between the judiciary and the other branches of government in order to maintain the independence of the judiciary. In making such judgement, the court may have regard to the views of the legislature and executive, but ultimately, the judgement is one that it must make itself.

...

- [34] In dealing with the question of judges presiding over commissions of inquiry, or sanctioning the issuing of search warrants, much may depend on the subject matter of the commission and the legislation regulating the issue of warrants. In appropriate circumstances judicial officers can no doubt preside over commissions of inquiry without infringing the separation of powers contemplated by our Constitution. The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions - independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the sanctioning of search warrants, where the judge is required to determine whether grounds exist for the invasion of privacy resulting from searches.

- [35] The fact that it may be permissible for judges to perform certain functions other than their judicial functions does not mean that any function can be vested in them by the legislature. There are limits to what is permissible. Certain functions are so far removed from the judicial function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government. For instance under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not 'appropriate to the central mission of the judiciary'. They are functions central to the mission of the legislature and

executive and must be performed by members of those branches of government.

[36] The first respondent has not intruded into the affairs of the executive at his own instance. The legislature made provision for the appointment in the Act and the executive, through the President, requested the first respondent to accept the appointment. I have no doubt that in accepting the appointment the first respondent acted in what he perceived to be the national interest. The fact, however, that all involved acted in good faith and in what they perceived to be the interests of the country, does not make lawful, legislation or conduct that is inconsistent with the separation of powers required by the Constitution.

[37] The respondents contend that the position of head of the SIU is not incompatible with judicial office. They stress the importance of the SIU in the fight against corruption, and support the appointment of a judge as head of the SIU on the ground that it is important that the unit be headed by a person whose integrity is beyond reproach. This, said the Minister,

was especially important given the nature and ambit of the tasks which the Unit would be required to perform. It was for this reason that it was thought desirable that these tasks should be supervised by a judge or acting judge of the High Court. Not only was the view taken that a judge or acting judge would be possessed of the necessary integrity, but it was also believed that a judge or acting judge would have the requisite skills and expertise to perform the functions envisaged by the Act.

[38] I accept that it is important that the head of the SIU should be a person of integrity. But judges are not the only persons with that attribute. The functions that the head of the SIU has to perform are executive functions, that under our system of government are ordinarily performed by the police, members of the staff of the National Prosecuting Authority or the state attorney. They are inconsistent with judicial functions as ordinarily understood in South Africa.

[39] I have already referred to the functions that the head of the SIU has to perform. They include not only the undertaking of intrusive investigations, but litigating on behalf of the state to recover losses that it has suffered as a result of corrupt or other unlawful practices. Judges who perform functions such as presiding over a commission of inquiry, or sanctioning search warrants, may also become involved in litigation. But that is an unwanted though possibly unavoidable incident of the discharge of what are essentially judicial functions. One of the purposes of the Act is to provide special measures for the recovery of money lost by the state, and in the case of the head of the SIU therefore, litigation on behalf of the state is an essential part of the job.

[40] The functions a judge who heads the SIU has to perform are all related to the purpose of recovering money for the state, if necessary through

litigation. By their very nature, such functions are partisan. The judge cannot distance himself or herself from the actions of the SIU's investigators. The evidence in this case provides illustrations of partisan conduct on the part of investigators of the SIU, which are inconsistent with the judicial office.

- [41] The first respondent has not been able to perform his judicial duties for a period of more than 3 years. His appointment is indefinite, and will continue unless he resigns, or is requested by the President, with the consent of the Judicial Service Commission, to resign. Given the workload of the SIU and the indefinite nature of his appointment, he might never return to his judicial duties, yet he remains a judge.
- [42] Mr Marcus contended that the fact that the head of the unit has been unable to perform his judicial duties for a long period of time, and will continue to be unable to do so for as long as he remains head of the unit, is not relevant. If the functions of head of the SIU and judge are incompatible, that incompatibility existed on the day of the appointment. If they are not incompatible, they do not become so because the appointment is for a long period of time.
- [43] Whilst the length of the appointment is not necessarily decisive in the determination of the question whether the functions a judge is expected to perform are incompatible with the judicial office, it is, as indicated above, a relevant factor. There may be cases where as a matter of urgency a judge is required in the national interest to perform functions which go beyond the functions ordinarily performed by judicial officers. I express no opinion as to whether the performance of such functions for a limited period in such circumstances would be permissible under our Constitution. The present case, however, is not such a case. The Act contemplates that the head of the Unit will be appointed indefinitely, and the nature of the functions that have to be performed, require that this should be so. The unit could not function effectively if the appointment of its head were to be made on a temporary basis, calling for changes at regular intervals. That would be destructive of the work of the Unit which requires the continuity and control that comes from a permanent appointment, or at least an appointment for an indefinite but long term.
- [44] In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* the Australian High Court reviewed the Australian authorities dealing with the separation of powers. The case concerned the question whether the constitution permitted the Minister to appoint Justice Mathews to prepare a report about the declaration for preservation and protection from injury or desecration of land of particular significance to Aboriginals, and whether it permitted Justice Mathews to accept such appointment. The report was to be used as an aid to the exercise of the Minister's discretionary power to make a declaration with regard to land in relation to which a group had sought protection. Under the Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 the Minister

was required to commission a report from a person nominated by him. The majority held that the nomination and appointment of Justice Mathews was not effective as the performance of the reporting function would be inconsistent with the separation of powers required by the Constitution. Kirby J dissented. Notwithstanding his dissent, he expressed sympathy for the view taken by Mc Hugh J in *Grollo's* case in words that seem to me to be of particular relevance to the present case:

it is not compatible with the holding of federal judicial office in Australia for such an office holder to become involved as 'part of the criminal investigative process', closely engaged in work that may be characterised as an adjunct to the investigatory and prosecutory functions. Such activities could 'sap and undermine' both the reality and the appearance of the independence of the judicature which is made up of the courts' constituted by individual judges. They could impermissibly merge the judiciary and the other branches of government. The constitutional prohibition is expressed so that the executive may not borrow a federal judge to cloak actions proper to its own functions with the neutral colours of judicial action.

[45] The functions that the head of the SIU is required to perform are far removed from 'the central mission of the judiciary'. They are determined by the President, who formulates and can amend the allegations to be investigated. If regard is had to all the circumstances including the intrusive quality of the investigations that are carried out by the SIU, the inextricable link between the SIU as investigator and the SIU as litigator on behalf of the state, and the indefinite nature of the appointment which precludes the head of the unit from performing his judicial functions, the first respondent's position as head of the SIU is in my view incompatible with his judicial office and contrary to the separation of powers required by our Constitution.

[46] Under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions, which are not appropriate to the 'central mission of the judiciary'. Were this to happen the public may well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive's power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by our Constitution. The decision, therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order. It follows that section 3(1) of the Act and Proclamation R24 of 1997, appointing the first respondent as head of the SIU, must be declared to be invalid.

...

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
Case CCT 12/99

Ex Parte The President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC); 2000 1 SA 732 (CC)

Decided on: 11 November 1999

1 Introduction

CAMERONN AJ:

[1] The legislation before us is inchoate. Parliament has passed a Bill, but it has not received the assent of the President, who referred it to this Court for a decision on its constitutionality. This is the first time that the provisions of the 1996 Constitution (“the Constitution”) allowing for such a referral have been invoked, and our decision requires consideration of what that procedure entails as well as of the questions raised concerning the Bill’s constitutionality.

[2] The Liquor Bill was introduced in the National Assembly on 31 August 1998. It passed through various legislative stages in terms of section 76(1) of the Constitution before Parliament approved it on 2 November 1998. When the Bill was sent to the President for his assent, he declined to grant it. Instead, because he had reservations about its constitutionality, he referred it back to the National Assembly on 22 January 1999 for reconsideration. On 3 March 1999, the National Assembly resolved that “the House, having reconsidered the Liquor Bill [B 131B-98], returns it to the President”. No amendments had been effected. On 8 March 1999, the President referred it to this Court for a decision on its constitutionality. In doing so, he invoked his power pursuant to section 84(2)(c) of the Constitution, which provides that the President is responsible for “referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality”.

...

The President’s Referral

[21] The President stated the basis of his referral thus:

“The long title of the Bill summarises the objectives of the Bill as follows:

‘To maintain economic unity and essential national standards in the liquor trade and industry; to regulate the manufacture, distribution and sale of liquor on a uniform basis; to facilitate the entry and empowerment of new entrants into the liquor trade; and to address and reduce the economic and social

* All footnotes are omitted.

costs of excessive alcohol consumption; and to provide for matters connected therewith.’

I have reservations about the Constitutionality of the Bill to the extent that the Bill deals with the registration for the manufacture, wholesale distribution and retail sale of liquor...

Part A of Schedule 5 of the Constitution, 1996 lists the functional areas of exclusive provincial legislative competence. The fifth item thereof is ‘liquor licences’. The implication of the inclusion of an item, or more properly, a functional area in Schedule 5 is that Parliament may, in terms of section 44(2) of the Constitution, 1996 only ‘intervene by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary –

- (a) ...
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interest of another province or to the country as a whole.’

If the legislation is not so necessary then Parliament may not enact legislation dealing with matters falling within a functional area listed in Schedule 5. The question as to whether this legislation is “**necessary**” within the meaning of this section and for the purpose set out in section 44(2)(b) - (e) is a question I am unable to answer with certainty even though I am satisfied that the purposes the legislation seeks to achieve are commendable...”

The Challenge to the Constitutionality of the Liquor Bill

[34] First, the Bill divides economic activity within the liquor industry into three categories: production (which it terms “manufacturing”), distribution, and retail sales...

[35] Second, the Bill divides responsibility for these tiers between national and provincial government by effecting a division between manufacture and distribution of liquor on the one hand and retail sale, on the other. The Bill treats manufacture and distribution of liquor as national issues, to be dealt with by the national liquor authority and appeal tribunal, whose members are appointed by the Minister. Retail sales (including sales of liquor at special events) are treated as provincial issues, and are to be dealt with by provincial liquor authorities and provincial panels of appeal. For the establishment of the latter, the Bill imposes an obligation upon the provincial legislature of each province to pass legislation. The national liquor authority is charged with considering whether the statutorily prescribed requirements for registration as a wholesaler or distributor have been met, and with considering the “merits” of an application, and determining the terms and conditions applicable to the registration that conform with prescribed criteria, norms and standards pertaining, inter alia, to limiting vertical integration, encouraging diversity of ownership and facilitating the entry of new participants into the industry.

Provision is made for objections to applications for registration. The provincial liquor authorities are obliged to consider applications for retail and special event registrations. The public must be enabled to lodge objections.

[36] The Western Cape government launches two main attacks on the constitutionality of the Bill. These are directed on the one hand against the exclusion of provincial governments from any role in the licensing of liquor manufacturers and distributors; and, on the other, against the extent of national intervention the Bill permits in the provinces' powers to regulate retail licensing. The Province contends that it is evident from the detail and sweep of the Bill that its main aim is comprehensively to regulate the activities of persons involved in the manufacture, wholesale distribution and retail sale of liquor, and consequently that the Bill's system of "registration" regarding all three tiers of the industry falls squarely within the exclusive functional area of "liquor licences" in Schedule 5A. The limited and strictly enumerated powers the Bill confers on provincial organs of state, which the Bill obliges the provinces to establish, do not detract from this.

[37] The province's complaint is in essence that the Bill exhaustively regulates the activities of persons involved in the manufacture, wholesale distribution and retail sale of liquor; and that even in the retail sphere the structures the Bill seeks to create reduce the provinces, in an area in which they would (subject to section 44(2)) have exclusive legislative and executive competence, to the role of funders and administrators. The province asserts that the Bill thereby intrudes into its area of exclusive legislative competence.

[38] The Minister for the first time in his affidavit disputes the province's characterisation of the Bill as a liquor licensing measure. Instead, he asserts, the Bill is directed at trade, economic and competition issues on the one hand and health and social welfare issues on the other. He emphasises the national importance of having a properly structured and regulated liquor industry: "The fact that one aspect of the mechanism for implementing the Government's national policies in this regard is a system of registration of participants in the liquor industry does not", he contends, "mean that it constitutes an impermissible trespass upon the legislative powers of provincial legislatures."

[39] The terms of the President's referral, and the conflicting contentions of the Province and of the Minister, require this Court to consider the ambit of national and provincial powers conferred by the Constitution and their interrelation where, as here, the national legislature is said to encroach on an exclusive provincial competence. That requires a determination of the scope of the exclusive provincial legislative competence within the functional area of "liquor licences", which in turn requires consideration of the national and provincial context against which that exclusive competence is afforded. Whether the Bill, or parts of it, should properly be characterised as a liquor licensing measure must also be considered.

...

[41] Governmental power is thus at source distributed between the national, provincial and local spheres of government, each of which is subject to the Constitution, and each of which is subordinated to the constitutional obligation to respect the requirements of cooperative governance. The latter include the duty, imposed equally on each sphere of government, “not [to] assume any power or function except those conferred on them in terms of the Constitution”. ...

[42] In terms of section 44(1)(a), the national legislative authority as vested in Parliament confers on the National Assembly the power inter alia —

“(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5”.

Sections 44(2) and 44(3) provide:

“(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.”

[43] The provision vesting the provincial legislatures with legislative competence is also of significance. In terms of section 104(1), the legislative authority of a province is vested in its provincial legislature, “and confers on the provincial legislature the power” amongst others⁸⁰ to pass legislation for its province with regard to —

- “(i) any matter within a functional area listed in Schedule 4;
- (ii) any matter within a functional area listed in Schedule 5.”

[46] By contrast with Schedule 5, the Constitution contains no express itemisation of the exclusive competences of the national legislature. These may be gleaned from individual provisions requiring or authorising “national legislation” regarding specific matters. They may also be derived by converse inference from the fact that specified concurrent and exclusive legislative competences are conferred upon the provinces, read together with the residual power of the national Parliament, in terms of section 44(1)(a)(ii), to pass legislation with regard to “any matter”. This is subject only to the exclusive competences of Schedule 5 which are in turn subordinated to the “override” provision in section 44(2). An obvious instance of exclusive national legislative competence to which the Constitution makes no express allusion is foreign affairs.

[47] The list of exclusive competences in Schedule 5 must therefore be given meaning within the context of the constitutional scheme that accords Parliament extensive power encompassing “any matter” excluding only the provincial exclusive competences. The wide ambit of the functional competences concurrently accorded the national legislature by Schedule 4 creates the potential for overlap, not merely with the provinces’ concurrent legislative powers in Schedule 4, but with their exclusive competences set out in Schedule 5. Examples of concurrent Schedule 4 competences which could overlap with Schedule 5 competences include “trade” and “liquor licences”; “environment” and “provincial planning”; “cultural matters” and “provincial cultural matters” as well as “libraries other than national libraries”; and “road traffic regulation” and “provincial roads and traffic.”

[48] Whereas the Constitution makes provision for conflicts between national and provincial legislation falling within a functional area in Schedule 4,⁸² and between national legislation and a provincial constitution,⁸³ the sole provision made for conflicts between national legislation and provincial legislation within the exclusive provincial terrain of Schedule 5 is in section 147(2), which provides that national legislation referred to in section 44(2) prevails over Schedule 5 provincial legislation. This suggests that the Constitution contemplates that Schedule 5 competences must be interpreted so as to be distinct from Schedule 4 competences, and that conflict will ordinarily arise between Schedule 5 provincial legislation and national legislation only where the national legislature is entitled to intervene under section 44(2).

[49] As pointed out in the first *Certification Judgment*, the introduction into the 1996 Constitution of a category of exclusive powers gave the provinces “more powers” than they had enjoyed under the interim Constitution. This Court found that Parliament’s power of intervention in the field of these exclusive powers was “defined and limited” by section 44(2): “Outside that limit the exclusive provincial power remains intact and beyond the legislative competence of Parliament.” This Court also held that, if regard is had to the nature of the exclusive competences in Schedule 5 and the requirements of section 44(2), “the occasion for intervention by Parliament is likely to be limited”.

[50] It follows that, in order to give effect to the constitutional scheme, which allows for exclusivity subject to the intervention justifiable under section 44(2), and possibly to incidental intrusion only under section 44(3),⁸⁷ the Schedule 4 functional competences should be interpreted as being distinct from, and as excluding, Schedule 5 competences. That the division could never have been contemplated as being absolute is a point to which I return in due course.

[51] The constitution-makers’ allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere, and accordingly the competences itemised in Schedules 4 and 5 are referred to as being in respect of “functional areas”. The ambit of the provinces’ exclusive powers must in my view be determined in the light of that vision. It is significant that section 104(1)(b) confers power on each province to pass legislation “for its province” within a “functional

area". It is thus clear from the outset that the Schedule 5 competences must be interpreted as conferring power on each province to legislate in the exclusive domain only "for its province". From the provisions of section 44(2) it is evident that the national government is entrusted with overriding powers where necessary to maintain national security, economic unity and essential national standards, to establish minimum standards required for the rendering of services, and to prevent unreasonable action by provinces which is prejudicial to the interests of another province or to the country as a whole. From section 146 it is evident that national legislation within the concurrent terrain of Schedule 4 that applies uniformly to the country takes precedence over provincial legislation in the circumstances contemplated in section 44(2), as well as when it —

- (a) deals with a matter that cannot be regulated effectively by provincial legislation;
- (b) provides necessary uniformity by establishing norms and standards, frameworks or national policy;
- (c) is necessary for the protection of the common market in respect of the mobility of goods, services, capital and labour, for the promotion of economic activities across provincial boundaries, the promotion of equal opportunity or equal access to government services, or the protection of the environment.

[52] From this it is evident that where a matter requires regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by section 44(2). The corollary is that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.

[53] It is in the light of this vision of the allocation of provincial and national legislative powers that the inclusion of the functional area "liquor licences" in Schedule 5A must in my view be given meaning. That backdrop includes the express concurrency of national and provincial legislative power in respect of the functional area of "trade" and "industrial promotion" created by Schedule 4.

[54] According to the New Shorter Oxford Dictionary, "trade" in its ordinary signification means the "[b]uying and selling or exchange of commodities for profit, *spec.* between nations; commerce, trading, orig. conducted by passage or travel between trading parties".⁸⁸ Nothing in Schedule 4 suggests that the term should be restricted in any way, and the Western Cape government did not contend that Parliament's concurrent competence in regard to "trade" should be limited to cross-border or inter-provincial trade. It follows that in its ordinary signification, the concurrent national legislative power with regard to "trade" includes the power not only to legislate intra-provincially in respect of the liquor trade, but to do so at all three levels of manufacturing, distribution and sale.

[55] The concurrent legislative competence in regard to "industrial promotion" should in my view be given a similarly full meaning as conferring on the national legislature and the provinces the power to initiate, advance and

encourage all branches of trade and manufacture. But the exclusive provincial competence to legislate in respect of “liquor licences” must also be given meaningful content, and, as suggested earlier, the constitutional scheme requires that this be done by defining its ambit in a way that leaves it ordinarily distinct and separate from the potentially overlapping concurrent competences set out in Schedule 4.

[57] The Western Cape government contended that liquor licences are never an end in themselves, but control and regulate the production, distribution and sale of liquor in pursuit “of yet further social, economic and financial objectives”. Accordingly, the Province contended, the authors of the Constitution must have intended the term “liquor licences” in Schedule 5A to encompass all legislative means and ends appurtenant to the liquor trade at all levels of production, manufacture and sale, and that these were intended to be reserved, outside the circumstances envisaged by section 44(2), for the exclusive competence of the provinces. This submission cannot in my view be accepted. In the first place, the field of “liquor licences” is narrower than the liquor trade. The Schedule does not refer simply to “liquor” or the “liquor trade” or the “liquor industry”. Instead it uses the phrase “liquor licences”. There is a range of legislation in South Africa regulating the liquor trade. Production, marketing, export and import of wine and spirits is regulated in terms of two important statutes, the Wine and Spirit Control Act, 47 of 1970 and the Liquor Products Act, 60 of 1989. These are primarily concerned with aspects of the liquor trade and industry, and not with liquor licensing itself. Legislation concerning the production of liquor products, including quality control, marketing and import and export of such products would fall within the concurrent competence of trade and/or industrial promotion, rather than within the exclusive competence of liquor licences.

[58] The structure of the Constitution in my view suggests that the national government enjoys the power to regulate the liquor trade in all respects other than liquor licensing. For the reasons given earlier, this in my view includes matters pertaining to the determination of national economic policies, the promotion of inter-provincial commerce and the protection of the common market in respect of goods, services, capital and labour mobility.

[61] ...[A]lthough our Constitution creates exclusive provincial legislative competences, the separation of the functional areas in Schedules 4 and 5 can never be absolute...

[62] That Schedule 4 legislation may impact on a Schedule 5 functional area finds recognition on one reading of section 44(3). Whatever its true reading⁹³ this provision was not designed to undermine the Schedule 5 competences. They retain their full meaning and effect, except where encroachment by national legislation would in fact be “reasonably necessary for, or incidental to” the effective exercise of a Schedule 4 power. Since however no national legislative scheme can ever be entirely water-tight in respecting the excluded provincial competences, and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation, and hence to ascertain in what field of competence its substance falls; and,

this having been done, what it incidentally accomplishes. This entails that a Court determining compliance by a legislative scheme with the competences enumerated in Schedules 4 and 5 must at some stage determine the character of the legislation. It seems apparent that the substance of a particular piece of legislation may not be capable of a single characterization only, and that a single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence.

...

[64] The question therefore is whether the substance of the Liquor Bill, which depends not only on its form but also on its purpose and effect, is within the legislative competence of Parliament.

...

[68] The question is whether the substance of this legislation falls within the excluded field of "liquor licences", in which case the justifications itemised in section 44(2) will have to be shown; or whether it falls within a permitted competence of Parliament even without such justification. In answering this question, as indicated above, it does not seem to me that the objective should be to subject the Bill to a uniform analysis directed at yielding a single characterization.

[69] The true substance of the Bill is in my view directed at three objectives. These are: (a) the prohibition on cross-holdings between the three tiers involved in the liquor trade, namely producers, distributors and retailers; (b) the establishment of uniform conditions, in a single system, for the national registration of liquor manufacturers and distributors; and, in a further attempt at establishing national uniformity within the liquor trade, (c) the prescription of detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

[70] Regarding (a): In my view the Bill's prohibition of cross-holdings falls within the national legislature's competence to regulate trade. On any approach, the vertical and horizontal regulation of the liquor trade, and the promotion of racial equity within the trade, are legislative ends which fall within the functional competence Schedule 4 accords the national Parliament under the headings of trade and industrial promotion. I did not understand counsel for the Western Cape government to contest this. The Bill, however, attains this objective by employing a specific means, namely a system of registration which is in all material respects identical to a licensing system. In addition, the Bill accords to national government regulatory functions in regard to liquor licensing in the production and distribution sphere. That the ends the national legislature so seeks to attain fall within its power does not automatically entail that the means it has chosen, namely a system of liquor licensing, are competent. For that conclusion to be reached, the national government must show that the means is "necessary" for one of the purposes specified in

section 44(2), or, on one reading of section 44(3),¹⁰³ that they are reasonably necessary for, or incidental to the effective exercise of a Schedule 4 power.

[71] Regarding (b) (the national system of registration for producers and wholesalers):

Persuasive justification for understanding “liquor licences” more narrowly than the reading advanced by the Western Cape government appears, as indicated earlier, from the scheme of the Constitution. These suggest that the primary purport of the exclusive competences, including “liquor licences”, lies in activities that take place within or can be regulated in a manner that has a direct effect upon the inhabitants of the province alone. In relation to “liquor licences”, it is obvious that the retail sale of liquor will, except for a probably negligible minority of sales that are effected across provincial borders, occur solely within the province. The primary and most obvious signification of the exclusive competence therefore seems to me to lie in the licensing of retail sale of liquor.

[72] As far as the Bill’s “three-tier” structure is concerned, the same considerations suggest that manufacturing or production of liquor was not intended to be the primary field of “liquor licences”. The manufacturing and wholesale trades in liquor have a national and also international dimension. Manufacturers and wholesalers ordinarily trade across the nation, and some trade both nationally and internationally. Little, if any, liquor production is directed to an intra-provincial market only.

[73] The same considerations in my view apply in general to the distribution of liquor, where the scale of distribution is likely, in almost all cases, to be inter-as opposed to intra-provincial. The regulation and control of liquor distribution, on this approach, therefore falls outside the primary signification of the exclusive competence. If production and distribution of liquor were to be regulated by each province, manufacturers and distributors would require licences from each province for the purpose of conducting national trading, and possibly a national licence for export.

[74] These considerations point to the conclusion that the provincial exclusive power in relation to “liquor licences” was in the first instance not intended to encompass manufacturing and distribution of liquor. The exclusive competences in Schedule 5 all point to intra-provincial activities and concerns only, and exclude those with a national dimension. Of the twelve exclusive competences itemised in Schedule 5A, nine contain express terms confining their ambit to provincial or non-national issues. This obviously signifies that “liquor licences”, too, must mean intra-provincial liquor licences.

[75] But it is unnecessary to conclude that the competence in regard to “liquor licences” does not extend to intra-provincial production and distribution activities since the national government has in my view in any event shown that, if the exclusive provincial legislative competence in respect of “liquor licences” extends to licensing production and distribution, its interest in maintaining economic unity authorises it to intervene in these areas under section 44(2). “Economic unity” as envisaged in section 44(2) must be

understood in the context of our Constitution, which calls for a system of co-operative government, in which provinces are involved largely in the delivery of services and have concurrent legislative authority in everyday matters such as health, housing and primary and secondary education. They are entitled to an equitable share of the national revenue, but may not levy any of the primary taxes, and may not impose any tax which may “materially and unreasonably” prejudice national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour. Our constitutional structure does not contemplate that provinces will compete with each other. It is one in which there is to be a single economy and in which all levels of government are to co-operate with one another. In the context of trade, economic unity must in my view therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intraprovincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level.

[76] Given the history of the liquor trade, the need for vertical and horizontal regulation, the need for racial equity, and the need to avoid the possibility of multiple regulatory systems affecting the manufacturing and wholesale trades in different parts of the country, in my view the “economic unity” requirement of section 44(2) has been satisfied. Indeed, many of the considerations mentioned earlier in relation to the primary signification of the term “liquor licences” suggest the conclusion that manufacture and distribution of liquor require national, as opposed to provincial, regulation.

[77] The Minister’s affidavit states in this regard that duplicated or varying provincial licensing requirements would be “unduly burdensome” for manufacturers and that it was therefore “economically imperative that control over the activities of manufacturers should take place at national level”. He states that major industries, including the liquor industry “as a single integrated industry” should not have to “run the risk of fragmentation arising out of a variety of differing regulatory regimes being imposed upon their operations in different provinces”, including what he described as the deleterious effects of “cross-border arbitrage” between competing provinces. He avers that “[w]ithout a national system of regulation and a national standard to which wholesalers will have to adhere the results would be chaotic”: “The spectre arises of a single business operation having to be separately licensed on differing terms and conditions in different parts of South Africa.”

[78] For the reasons given earlier, the Constitution entrusts the legislative regulation of just such concerns to the national Parliament, and I am of the view that the Minister has shown, at least in regard to manufacturing and distribution of liquor, that the maintenance of economic unity necessitates for the purposes of section 44(2)(b) the national legislature’s intervention in requiring a national system of registration in these two areas. The manufacturing and wholesale distribution of liquor (national and international

sales) are important industries, which provide employment for a substantial number of persons. They also generate foreign income. That these trades require control is obvious, and the most effective way of doing so is through a national regulatory system. This enables the government to regulate the trade vertically and horizontally, to set common standards for all traders concerned, and enables traders to conduct their activities with a single licence, according to a single regulatory system. The Western Cape government's denial of the Minister's averment that the production and distribution tiers necessitate a national approach can thus not be sustained.

[79] The provisions of section 30, however, require different consideration. They deal with the award of retail licences, and do so by prescribing in some detail to the provincial legislatures what structures should be set up, and how those structures should go about considering and awarding liquor licences. I will accept in the Minister's favour, as contended by Mr Wallis, that the provincial liquor boards are entrusted with considerable leeway in applying what the Bill calls "community considerations"¹⁰⁵ on the registration of retail premises. Nevertheless, on the analysis advanced above, the licensing competence in respect of retail sales of liquor falls squarely within the exclusive provincial legislative power afforded by Schedule 5. Section 30 and its attendant apparatus can therefore be justified only if it is established that they are "necessary" under section 44(2), or, on one reading of section 44(3), that they are reasonably necessary for, or incidental to the justified substance of the Bill.

[80] While the Minister's evidence in my view shows that the national interest necessitated legislating a unified and comprehensive national system of registration for the manufacture and distribution of liquor, it failed to do so in respect of its retail sale. There, he averred only that "consistency of approach" is "important". This may be true. But importance does not amount to necessity, and the desirability from the national government's point of view of consistency in this field cannot warrant national legislative intrusion into the exclusive provincial competence, and no other sufficient grounds for such an intrusion were advanced.

[81] It was not suggested by the Minister, nor raised in argument by Mr Wallis on his behalf, that the intrusion into the exclusive provincial competence of "liquor licences" was permissible in terms of section 44(3). Nor was this issue raised by the President in his referral to this Court. In the circumstances it is not necessary to deal with this question. If section 44(3) applies to national legislative intrusions into the exclusive provincial competences, I am inclined to the view that the phrase "reasonably necessary for, or incidental to" should be interpreted as meaning "reasonably necessary for and reasonably incidental to". Whatever meaning is to be assigned to this formulation, and I prefer to express no opinion on it, the scale of the intrusion the Bill envisages upon the provinces' exclusive competence in regard to retail liquor licences cannot be justified.

[82] The deponent on behalf of the Western Cape government emphasised the "positive features of provincial differentiation", and contended that the

Constitution envisaged that the provincial system of government with its attendant exclusive legislative powers would lead, over time, to “differences between provinces’ approaches to the matters within their legislative and executive competence”. The overall constitutional scheme, as indicated earlier, in my view provides warrant for this view in the field of retail liquor sales. The national government has accordingly not shown that the retail structures sought to be erected by the Bill are reasonably necessary for or incidental to the national system created for producers (manufacturers) and distributors.

...

[87] To summarise: I conclude that if the exclusive provincial legislative competence regarding “liquor licences” in Schedule 5 applies to all liquor licences, the national government has made out a case in terms of section 44(2) justifying its intervention in creating a national system of registration for manufacturers and wholesale distributors of liquor and in prohibiting cross-holdings between the three tiers in the liquor trade. No case has however been made out in regard to retail sales of liquor, whether by retailers or by manufacturers, nor for micro-manufacturers whose operations are essentially provincial. The Minister has to this extent failed to establish that Parliament had the competence to enact the Liquor Bill and it is therefore unconstitutional.

...

Conclusion and Order

[89] The decision of this Court is that to the extent indicated in this judgment the Liquor Bill [B 131B-98] is unconstitutional.

Chaskalson P, Langa DP, Ackermann, Goldstone, Madala, Mokgoro, Ngcobo, O’Regan, Sachs and Yacoob JJ concur in the judgment of Cameron AJ.

Current judicial trends pertaining to devolution and assignment of powers to local government

WIECHERS AND BUDHU

Introduction

Aristotle believed that it was essential for human welfare to encourage the flourishing incommensurable values and that local autonomy was a means of achieving this (for a discussion on judicial review of local government powers see Alder 2001 PL 721). Aristotle further believed that each of the smaller communities that together make up the *polis*, such as families, villages, etc, should have autonomy appropriate to its functions (Alder 2001 PL 721). This participatory function would facilitate the education of participants and councillors, act as a check on the central executive, result in the harnessing of local knowledge and ultimately contribute to the efficient delivery of local services. It would further prevent any single group from dominating the community.

Within the South African context, it would be unrealistic to assess whether these goals have been fully realized given the recent birth of our constitutional dispensation. However, what is clear is that the drafters of the 1996 Constitution and Parliament have clearly recognised the importance of local government and consequently created the necessary infrastructure for the promotion of local autonomy.

Current judicial trends as gleaned from the cases

Under the Constitution, South Africa is 'one, democratic state' (s 1 of the 1996 Constitution). The constitution does not define the nature of the State, and more particularly, whether it is a unitary or a federal state. However, in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC) para 7, the Constitutional Court pointed out that, in addition to establishing a constitutional state based on respect for human rights, the provisions of the interim Constitution make it clear that South Africa is a decentralised state with three tiers of government on national, provincial and local levels. These characteristics of the South African state were embodied in Constitutional Principle XVI read with CP XXII, XXIV and XXVI, and enacted in the 1996 Constitution.

At the functional level, the Constitution clearly demarcates concurrent national and provincial legislative competence (Sch 4) and exclusive provincial legislative competence (Sch 5). In each case, legislative competences pertaining to local government matters are included, for concurrent legislative competences, in Schedule 4, Part B, and for exclusive legislative competences, in Schedule 5, Part B.

Judicial trends pertaining to the devolution and assignment of powers and functions to local government must be gleaned from the decisions of the South African courts since the coming into operation of the 1994 interim

Constitution and the ensuing 1996 final Constitution. Judicial precedent prior to 1994 would be of little assistance, since the previous constitutional dispensation differed fundamentally from the present state of affairs. It is envisaged that the only judicial precedents which could have any relevance for the new dispensation, would be court decisions on the nature and extend of ancillary powers of provincial legislatures and local government.

It must be immediately stated that, since 1994, there were no court cases which dealt explicitly with matters of devolution and assignment of powers to local governments. Having said this, it must also be confirmed that there were some very important judicial pronouncements on matters pertaining to local government which clearly indicate certain trends the court will no doubt follow should some definite cases on such devolution and assignment occur (see the observations by Sachs J in the *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) at 297 para 101). An examination of these trends will not concentrate primarily on the specific legal issues involved, but rather on the underlying and abiding attitude of the courts *vis-a-vis* local government. Four trends can be discerned:

- (i) *A clear acknowledgement of the fact that local government is not only a cornerstone in our system of government, but also constitute an important vehicle to bring development to the people*

In all cases since 1994, whether they deal with the restructuring of local government, provincial and national powers *vis-a-vis* local government, etc, there is a golden thread, namely, an acknowledgement and appreciation of the eminent place of local governments in the structure of government, especially as regards the delivery of services and development. For example, in *Executive Council of the Western Cape Legislature v Minister for the Provincial Affairs and Constitutional Development of the RSA* 1999 12 BCLR 1360 (CC) 1377 para 44, the Constitutional Court stated:

Local government is the closest government can get to the people. That is where the delivery must be seen to be taking place. The challenge facing the government at local level is profound.

In the *Walker* case the Constitutional Court reaffirmed:

Local government is as important a tier of public administration as any.

In a later decision, the Constitutional Court reiterated:

The transformation of South Africa from a society deeply rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality posed, and continues to pose, particularly profound challenges at local level. It is here that the acute imbalances in personal wealth, physical infrastructure and the provision of services were and often are most patent.

Further in the same decision, it was stated:

We are all in agreement that it is the legitimate aim and function of local government to eliminate disparities and disadvantages that are the

consequences of the policies of the past and to ensure, as rapidly as possible, the upgrading of services in the previously disadvantaged areas that equal services will be provided to all residents. (*Fedsure Life Assurance LTD v Greater Johannesburg Metropolitan Council* 1998 12 BCLR 1458 (CC) 1464 para 80).

The reason why it is important to stress this underlying attitude of the courts *vis-a-vis* local government is obvious. It gives evidence to the fact that should evidence on local government powers and functions come before the court, there is every reason to believe that the courts will adopt a purposive approach and, instead of interpreting these powers and functions narrowly, will adopt an interpretation that will ensure that the goal of social security, economic advancement, etc, are well served. Stated shortly, there is every reason to believe that the courts, in accordance with the manifested approach, will endeavour to give as much scope as possible to local government powers and functions.

(ii) *In judging the restructuring and role of local governments, the courts adopt a flexible and pragmatic approach*

Most of the cases since 1994 dealing with local government matters, concerned the scope and application of the Local Government Transition Act, 1994, and the Local Government Municipal Structures Act 117 of 1998. In all these cases, a clear trend can be discerned, namely, a profound understanding of the difficulties involved in transforming a deeply divided segment of government into a coherent government system, and also the need to establish local government structures which will be of benefit to the whole country and its people. In essence, what these Acts achieved, was to lay the foundations for representative democracy in the local sphere of government in the whole country.

The courts instead of adopting a narrow and more legalistic approach, constantly interpreted these Acts in such a manner that the process of restructuring local government and the installation of new local government structures are not frustrated. Instead a flexible and programmatic approach was adopted. In *Uitvoerende Raad van die Wes-Kaapse Wetgewer v President van die Republic van Suid-Afrika* 1995 9 BCLR 1251 (C) 1253, the court acknowledged that the orderly transition to restructured local government was of paramount importance to lead to trouble free elections. In recognition of the fact that the restructuring of local government is currently in a state of *continuous metamorphosis*, court cases decided after 1995 have reiterated that the process of restructuring of urban existence of racially based unrepresented local government bodies and disparities in wealth and available resources in the rural and urban areas (see *ANC v Minister of Local Government and Housing* 1997 3 BCLR 295 (N) 301 B-C; *ANC v Minister of Local Government and Housing, Kwazulu-Natal* 1998 4 BCLR (CC) 403 para 4; *Fedsure Life Assurance LTD v Greater JHB Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC) 1501 para 125; and *Member of the Executive Council for Local Government and Development Planning, Western*

Cape v Paarl Poultry Enterprise CC t/a Rosendal Poultry Farm 2002 3 SA 1 15 para 22).

The reason why it is necessary to point to this trend in judicial pronouncements on local government, is the fact that courts, in adjudicating the devolution and assignment of powers and functions to local government, will no doubt adopt a flexible, pragmatic approach and judge such devolution according to particular circumstances and needs. In plain language, it is clear from this trend in judicial reasoning that the courts, and especially the Constitutional Court, are set on the idea of supporting the establishment of viable and successful local government.

(iii) *Local government under the new Constitution is afforded greater autonomy at the expense of both Parliament and provincial legislatures*

In the Certification judgment 1996 10 BCLR 1253 (CC), the Constitutional Court pointed out that the source of national and provincial legislative powers in relation to local government is to be found in section 55. The Court, at the same time, was convinced that that section places a substantial constraint upon the general provisions of the Constitution regarding the legislative authority of Parliament and the legislative authority of the provinces (see s 43(b) and s 104(1)(b) of the Constitution in this regard).

In a subsequent decision, the court reiterated this view and stressed the fact that powers of the municipalities must be respected by the national and provincial governments which may not use their powers 'to compromise or impede a municipality's ability or right to exercise its powers and or perform its functions' (see *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa*; *Executive Council of KwaZulu-Natal v President of the Republic of South Africa* 1999 12 BCLR 1360 (CC) 1373 para 29 and s 151(4) of the Constitution).

In addition, there is a duty on national and provincial governments by 'legislative and other means' to support and strengthen the capacity of the municipalities to manage their own affairs. Furthermore, there is an obligation under section 41(1)(g) of the Constitution on all spheres of government to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere'. Section 155(6) of the Constitution enjoins provincial governments to provide for the monitoring and support of local governments in their provinces and to promote the development of local government capacities to enable municipalities to perform their functions and manage their own affairs.

Judicial trends in recognising an increased level of autonomy of local government *vis-a-vis* the national and provincial governments, although closely related to and indeed a part of the other trends which are indicated in this paper, has to be emphasised. Should a controversy arise between national and/or provincial measures on the one hand and local government

measures on the other side, it is not to say that the courts will automatically opt for the local government measures. The court's decision will ultimately depend on the provisions of the Constitution. It does not mean, however, that in arriving at a solution, the courts will certainly endeavour to give as much cognizance to local government autonomy as possible.

(iv) *Recognition of local government autonomy*

It is reasonable to say that the most significant trend in judicial findings in relation to local government powers and functions over the past years, concerns the recognition of local government autonomy. All the other trends indicated above, are intrinsically connected and derive their inspiration from this dominating trend.

In *Fedsure supra* 1477 para 38, the Constitutional Court ruled:

The constitutional status of a local government is thus materially different to what it was when parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.

In *Uthukela District Municipality v President of the RSA* 2002 5 BCLR 479 (N) 485G-H and 487D-H the court pronounced:

It will be noted that the expression 'local sphere of government' used in section 239 echoes use of a similar term introduced in section 40(1) and also referred to in section 151(1) of the Constitution. This terminology is suggestive of equality between national, provincial and local government structures, as opposed to the more hierarchical levels of power and importance.

After an examination of a number of constitutional provisions, for instance, section 156, 230 and 227(3), the Court concluded that the 'clear intention is that local government structures should not be penalised for showing industry and initiative in revenue gathering'. (see *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 11 BCLR 1229 (C) at 1255 para 115 for a discussion of the conventional approach adopted by a court).

Recognition of local government autonomy within a defined and constitutionally protected order, has important consequences. First and foremost, it means that the very existence of local government with their powers and functions as enumerated in Schedule 4 and 5, can only be changed by constitutional amendment. The effect of the Constitution, in constituting a higher legal order within which all organs of state find their predetermined places, has the effect of breaking down old hierarchies and to position national, provincial and local

governments on a horizontal plane under the overall supremacy of the Constitution. Seen in this light, the wording of section 40(1) makes eminent sense: 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'.

Local government autonomy as entrenched in the Constitution and confirmed in the above judicial pronouncements has important consequences:

- First, it makes the mechanisms and prescriptions of the Constitution as regards co-operative government of the utmost importance (ch 3). The Importance of chapter 3 is self-evident, since in their constitutional position of equal status, spheres of government have the obligation to consult each other and to co-operate.
- Second, local authority autonomy explains why local government in terms of section 156(5) of the Constitution, has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. By this section, constitutional authorisation is given to local governments to exercise ancillary powers to perform their functions. Ancillary powers emanate from the fact that local government powers, as contained in the Constitution, constitute original power to allow the repository to assume all those additional powers which are necessary and incidental to the exercise of such powers.
- Third, local government autonomy also explains the embodiment of the principle of subsidiarity contained in section 156(4) of the Constitution which reads:

The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if:

- (a) The matter would most effectively be administered locally, and
- (b) The municipality has the capacity to administer it.

Conclusion

Judicial trends during the recent years manifest a clear understanding on the part of the courts of the important role local government fulfil not only in establishing a democratic foundation for the whole country, but also in performing most important developmental tasks.

Courts are not law-makers, they have the task to interpret and apply the laws of the country. On the other hand, it has long been recognised in legal and jurisprudential theory that the courts do not play an entirely passive role when

interpreting and applying the law. Their decisions often give direction and new meaning to existing legal norms and principles. More specifically, under section 39(2) of the 1996 Constitution, every court, tribunal or forum, when interpreting any legislation and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights.

Courts, on their own cannot assign additional functions and powers to local authorities. Should it become necessary to expand matters pertaining to local governments, Parliament, through constitutional amendment, will have to change Schedule 4 and 5. On the other hand, given the judicial trends, explained above, it is reasonable to presume that the courts, will not adopt a narrow or literal approach, but judge these powers and functions in the light of the developmental needs of the communities which are served by these local governments. This does not mean, of course, that in adopting such a lenient, more purposive approach in the case of local government matters, the courts will ignore or go against the express provisions of the Constitution or other laws.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/04

The City of Cape Town and Another v Robertson and Another 2005 (2) SA 323 (CC)*

Decided on 29 November 2004.

1 Introduction

MOSENEKE J:

- [1] Mrs and Mr Robertson sought and obtained declaratory and interdictory relief from the Cape High Court (High Court) restraining the City of Cape Town (the City) from levying and recovering property rates based on property valuations contained in a provisional valuation roll. The High Court also granted a declarator to the effect that section 21 of the Local Government Laws Amendment Act, 2002 Amendment Act) is inconsistent with the Constitution and to that extent invalid. It suspended the orders for a year from the date of the conclusion of proceedings in this Court to allow the competent authorities to correct the defects in the law.
- [2] As required by subsection 172(2)(a) of the Constitution, the High Court has referred its order of constitutional invalidity to this Court for confirmation. Also before us is an appeal. The City, as first appellant, and the Minister of Provincial and Local Government (Minister), as second appellant, are aggrieved by the decision of the High Court. Their appeal against the order of constitutional invalidity lies directly to this Court in terms of subsection 172(2)(d) of the Constitution and rule 16(2) of the rules of this Court. The City appeals also against the other orders of the High Court that are not subject to confirmation. There was however no objection to this procedure. It is not necessary to decide whether that appeal lies as of right to this Court in terms of subsection 172(2)(d). Even if we were to treat the appeal as an application for leave to appeal directly to this Court, it would clearly be in the interests of justice to grant the application, which would concern constitutional matters.
- [3] The appeal concerns the validity of the provisional valuation roll of property within the area of jurisdiction of the City, compiled and advertised for inspection and objection on 21 May 2002 and the validity of the decision of the City to levy in effect property rates on the basis of that roll as determined by its budget resolution for the 2002/2003 municipal financial year.³ The appeal also raises the question whether, if the City's principal grounds of appeal are resolved in its favour, it remains necessary to reach the constitutional challenge against the

* All footnotes are omitted.

Amendment Act. And if so, whether the declaration of constitutional invalidity ought to be confirmed by this Court.

- [4] The City is a municipality with legal personality constituted as such in terms of Chapter 2 of the provisions of the Local Government: Municipal Structures Act, 117 of 1998 (Structures Act). Its power to value property and to levy property rates is under challenge. On the other hand, the Minister sponsored the enactment of the impugned national legislation and is the member of cabinet responsible for its implementation. For that reason, his interest in the appeal is confined to the orders of the High Court that declared section 21 of the Amendment Act inconsistent with the Constitution and invalid; suspended the declaration of invalidity and directed him together with the City to pay the costs of the application.

2 Facts

- [5] The Robertson's are an elderly couple. They live in a house owned by Mrs Robertson, the first respondent, situated on erf 1829, Camps Bay. In 1969 the Robertson's purchased the erf as a vacant and unimproved lot for R7 250. Soon thereafter they built a house on it at a cost of some R15 000. Although registered in her name, she and her husband, the second respondent, consider the house to be their joint property.
- [6] The residential area of Camps Bay, nestled on the shores of the Atlantic Ocean, has become one of the most desirable and expensive residential areas in South Africa. In the last applicable general valuation of the property conducted in 1979, the property was valued at R52 510, comprising land value of R8 600 and improvements value of R43 910. A little over two decades later, the City valued the property at R1, 7 million. The valuation is made up of land value of R460 000 and building value of R1 240 000. Premised on this valuation, for purposes of the 2002/2003 municipal financial year, Mrs Robertson is liable for R16 321.80 in property rates for the year. This assessment translates to R1 360.15 in property rates per month. In addition, the City has estimated her liability for a sewerage rate of R588.12 and a refuse rate of R718.56 for a year.
- [7] The total rates liability of the Robertson's appears to have more than doubled. Before 1 July 2002 their rates bill was R8 203.44 over a year and R683.62 every month. The Robertson's are unhappy. They say they cannot afford the increased rates, which they describe as exorbitant in relation to their overall budget. They seek relief from what they regard as unfair and onerous property rates. This they hope to do by impugning the legal validity of the property valuation roll and the resultant property rates.
- [8] It is now convenient to turn to a brief account of the background events, which gave rise to the predicament of the Robertson's over escalated property valuation and rates. These facts are by and large

common cause between the parties and are most helpfully rendered in the judgment of the High Court. Accordingly, a brief sketch of the events should suffice.

3 Local government transition

- [9] On 5 December 2000 the City was established as a municipality in terms of the provisions of sections 12, 14 and 16 of the Structures Act. This event marked the final phase in the long and intricate process of transforming racially based municipalities into democratically determined local government in the Cape Metropolitan Area (CMA). The process entailed the integration of 60 local authorities into a single municipality – the City of Cape Town.
- [10] Preceding the final phase, there were two earlier stages of transition governed by the Local Government Transition Act, 209 of 1993 (Transition Act). The terms of this legislation were negotiated as part of the political and constitutional settlement ahead of the commencement of the interim Constitution in April 1994. The text of the Transition Act had been agreed upon and adopted on 18 November 1993. The legislation commenced on 2 February 1994. That signalled the start of the first phase known as the pre-interim phase, which ran until the first democratic local government elections held for all municipalities on 29 May 1996. The second phase, known as the interim phase, started from the local government elections until 5 December 2000 when the Structures Act took effect in respect of municipal areas determined under the Local Government: Municipal Demarcation Act, 27 of 1998 (Demarcation Act).
- [11] Ahead of the inception of the final phase, and by mid-1999, municipalities in the CMA namely, the Cape Metropolitan Council (CMC) and the 6 metropolitan transitional local councils found it pressing to compile a metropolitan-wide general valuation of property. Until then local authorities within the CMA had been saddled with different valuation rolls and divergent base dates. Some valuation rolls were outdated and even more than 20 years old. There were discrepancies between “rates values” and actual values of property. Moreover, in some metropolitan transitional local councils, across the board uniform property rates increases were imposed. This did not help matters. These increases led to complaints of an unfair distribution of the rates burden and a perception and complaint, in some quarters, of unfair discrimination.
- [12] An additional and not insignificant integration challenge for the CMA was that value based property rates could not be charged in black residential areas previously administered under the Black Local Authorities Act, 1982. There had been no valuation of property in these segregated neighbourhoods.

- [13] In 1997 the Council of the previous City of Cape Town completed but did not implement a new valuation roll on a “land only” basis. The Council abandoned this plan because in 1998 subsection 159(1)15 of the Constitution was amended by extending the term of the municipal councils from four to five years. In the same year the Structures Act was enacted and provided in effect for the establishment of a single metropolitan municipality to replace the 6 metropolitan local councils in the CMA and the CMC. It became clear that a common valuation methodology based on land and improvements had to be followed in the CMA and that national legislation would impose a requirement of a single valuation roll for all property.
- [14] These cumulative considerations impelled the CMA towards a uniform and metropolitan wide valuation of property and ad valorem property rates, being assessment rates based on the value of the property within a municipal area. The practical purpose and effect of this approach is to create a single tax base and to require those with greater means, measured by the value of their immovable property, to make a proportionately larger contribution to the municipal purse. It is clear from the depositions of the City and applicable legislation¹⁸ that the principle of one tax base is integral to the effective transformation towards non-racial local governance. Otherwise very prolonged material neglect and exclusion of certain areas of the City would simply persist, if not be entrenched.
- [15] Between June 1999 and March 2000 individual metropolitan transitional local councils adopted resolutions authorising general valuations of property within their areas of jurisdiction. The date of the valuation also known as the base date was determined as 1 January 2000. The valuation would be on a “land and improvements” basis.
- [16] As a step to facilitate the transition process, the Unicity Commission (Unicom) was established on 25 November 1999. It was a multi-party transitional body authorised to act, immediately after the local government elections, as a midwife to a single municipality. In April 2000 the authority of the Unicom was extended to managing the general property valuation as at 1 January 2000. The envisaged implementation date was 1 July 2002. The valuation was conducted in terms of the Property Valuation Ordinance 1993 (C) (PVO) read with subsections 93(4) and (5) of the Structures Act. The valuation process was modernised and modified by the insertion of subsection 10G(6A) of the Transition Act, which permitted the use of computer-assisted mass appraisal techniques.
- [17] On 24 April 2002, the City resolved to continue with the general property valuation in terms of the PVO read with subsections 10G(6) and (6A) of the Transition Act and subsections 93(4) and (5)(a) of the Structures Act; that the valuation date would be 1 January 2000 and that all actions taken by its predecessors in law in relation to the general valuation of all property within the CMA were adopted and

ratified. The City caused the provisional valuation roll to be completed and submitted in terms of section 10 of the PVO. On 10 May 2002 the City advertised in terms of subsection 15(1) of the PVO in the Provincial Gazette and in the press, that the provisional valuation roll was open for inspection from 21 May 2002. The notice invited objections as required by subsection 15(1)(b) of the PVO.

[18] Importantly, on 29 May 2002, the City resolved that property rates and tariffs for the 2002/2003 municipal financial year would be levied in accordance with the 2000 general valuation roll prepared in terms of the PVO. During June 2002 the City manager published in the press, in isiXhosa, English and Afrikaans, the new rates and tariffs and a public guide to the new municipal account and budget.

[19] The decision of the City met with considerable opposition from some ratepayers and ratepayers' associations. The Robertsons were amongst the discontented property owners. As intimated earlier, the general valuation of their Camps Bay property by the City had shown a dramatic rise to R1, 7 million. The new rating system had led to a hefty 113% increase in their rates for the financial year ending 30 June 2003. The Robertsons objected to the valuation in terms of the PVO contending that the escalated value should be reduced to R380 000. This amount, they argued, should be made up of a land value of R120 000 and a buildings value of R260000.

...

4 Issues on appeal and confirmation

[33] The grounds of appeal advanced by the City and the Minister bring to the fore the following issues for determination by this Court:

- (1) Was the PVO a law "in force" at the commencement of the interim Constitution; and if not, is subsection 93(7) of the Structures Act necessary to cure the perceived lacuna?
- (2) Is the City a "local authority" for purposes of the PVO; and if not, absent subsection 93(8) of the Structures Act does it have the power to conduct a general valuation of property in terms of the PVO, to compile a provisional valuation roll and based on it, to impose property rates?
- (3) Does subsection 10G(6) of the Transition Act read with subsections 93(4) and
- (4) If so, is the impugned legislation inconsistent with the Constitution and therefore invalid?

It is now convenient to examine each of these issues.

4.1 *Was the PVO a law in force?*

[34] It will be recalled that though enacted on 8 December 1993, the PVO only came into operation on 1 July 1994. The respondents argued that the PVO had lapsed. It had not continued “in force” when the interim Constitution took effect on 27 April 1994. As it had not been preserved by the provisions of section 229 it could not be validly assigned to the Western Cape Province under the interim Constitution. The High Court dismissed the respondents’ contention and found that the PVO was a law in force within the meaning of section 229 of the interim Constitution³⁹ and that the provisions of subsection 93(7) of the Structures Act are in effect merely expository.

[35] In anticipation of the respondents’ argument in this Court, the appellants submitted written argument in support of the finding of the High Court that the PVO had not, in the constitutional transition, lapsed but continued in force. However, before this Court the respondents, wisely so, abandoned the contention. Moreover, before oral argument, attention of all counsel was drawn to the judgment of this Court in *Mashavha*⁴⁰ delivered after the High Court judgment.

[36] In *Mashavha* the Court held that legislation which, at the inception of the interim Constitution, had been enacted but not brought into operation was law “in force” within the meaning of sections 229 and 235(6) of the interim Constitution. Van der Westhuizen J, writing for the Court,⁴¹ explained this finding in the following terms:

Therefore the phrase “in force” should not be interpreted in section 235(6) to draw any distinction between laws which were actually being implemented, executed, or administered at a particular time and laws which had been enacted but not yet come into operation, or which were not being implemented actively. It simply refers to laws which existed (on the statute book, if one wishes to put it that way) immediately before 27 April 1994, and which would continue to exist in terms of section 229.

[37] The High Court correctly rejected the contention that the PVO had lapsed. It also held that the provision of subsection 93(7) of the Structures Act is a mere affirmation of the existing legal position. I agree. It must follow that the PVO was indeed a law in force at the time of the inception of the interim Constitution in 1994 and available to the City for purposes authorised by that Ordinance and that subsection 93(7) of the Structures Act is, in effect, merely expository.

4.2 *Is the City a “local authority” as defined by the PVO and is subsection 93(8) an indispensable amendment?*

[38] As I have intimated earlier, the City was established on 5 December 2000 as a municipality under sections 12, 14 and 16 of the Structures Act. It is a category A municipality envisaged in subsection 155(1)(a) of the Constitution. Unlike its predecessor, the City is not a metropolitan

local council and at first blush is not a “local authority” as defined in the PVO.⁴⁵ For that reason the High Court concluded that the City had no power to value property as conferred by the PVO. As a consequence, the High Court turned to other legislation in search for a possible source of the property rating power of the City. It concluded that neither section 14 nor subsections 93(4) and (5) of the Structures Act read with subsection 10G(6) of the Transition Act confers on the City the requisite authority to conduct property valuation and rating. The High Court found that “there was indeed a *casus omissus* by which the applicability of the PVO to the newly established municipalities was not reserved or saved.”⁴⁶ It held the omission to be one that a court cannot fill. It accordingly concluded that without the amending provision of subsection 93(8)⁴⁷ of the Structures Act the property valuation and rating by the City was invalid.

[39] In essence, the High Court found that the statutory transitional arrangements directed at transferring the property valuation and rating powers from existing to superseding municipalities is deficient. Clearly, this finding obliges us to scrutinize the transitional scheme, which may be gathered from the provisions of subsections 93(4) and (5) read with sections 12 and 14 of the Structures Act. Subsection 93(4) stipulates that despite anything contrary in any other law, from the date on which a municipal council has been elected⁴⁸ section 10G of the Transition Act applies to such a municipality. Subsection 93(5) in turn extends the reach of section 10G to superseding municipalities by providing that any reference in section 10G to “local council”, “metropolitan council”, “metropolitan local council” and “rural council” “must be construed as reference to a municipal council.” The import of this transitional provision is not obscure. On its face, the text simply means that when one reads the powers, functions and duties created or conferred by section 10G of the Transition Act, a new final phase municipal council must now take the place of the existing municipality or municipalities it is replacing. Therefore a final phase municipal council assumes the powers, authority and obligations of its predecessor under section 10G. At a purposive level this construction resonates with the broader transitional objectives of the Structures Act that was enacted to give effect to the constitutional imperative of reshaping a local sphere of government into municipalities established on a wall-to-wall basis for the whole of the territory of our country in the place of existing local authorities.

[40] Clearly, from 5 December 2000, the City became a municipality whose executive and legislative authority vested in a municipal council. Thus the regulatory framework of section 10G of the Transition Act as preserved by subsections 93(4) and (5) extended to and still applies to the City. The only residual question seems to be whether the preserved provisions of section 10G of the Transition Act pointedly or otherwise vest in a municipality the power to measure property and to levy property rates.

- [41] Section 10G regulates the financial matters of every municipality. The primary purpose of its extensive and mainly peremptory provisions is to ensure that every municipality conducts its financial affairs in an effective, economical and efficient manner with a view to optimising the use of its resources in addressing the needs of the community. Of immediate importance are the provisions of subsection 10G(6) as amended and subsection 10G(7)(a)(i). Read together, the provisions oblige a municipality, “subject to any other law”, to ensure that property within its jurisdiction is valued or measured “at intervals prescribed by law”; that a single valuation roll of all property is compiled and is open for public inspection and that all property valuation “procedures prescribed by law” are complied with. The provisions also stipulate that a municipality may by resolution levy and recover property rates provided that a common rating system is applicable throughout its area of jurisdiction.
- [42] The High Court held that the transitional scheme does not authorise a municipality to exercise powers derived from the PVO because the general power to measure or value property and to exact property rates is qualified by reference to “procedures” or “at intervals prescribed by law”. This, it reasoned, indicates that the valuation would be governed, subject to consistency with section 10G, by the terms of whatever other ordinance or statute that may be applicable.
- [43] I have considerable difficulty with this approach. In my view the transitional scheme confers in explicit terms substantive powers on municipalities to measure or value property and based on the valuation to impose property rates. It appropriately requires the exercise of the power to be in accordance with procedures prescribed by any other applicable law. I can find no reason why this trite qualification is inconsistent with or expunges the valuation and rating powers expressly conferred on a municipality by subsections 10G(6) and 10G(7)(a)(i) of the Transition Act as saved by subsections 93(4) and (5) of the Structures Act.
- [44] It seems to me the words “to any other law” in subsection 10G(6) must be taken to refer to property valuation legislation applicable to the predecessors of the City at the time of its enactment. There is no doubt that, in the legislative setting of the Western Cape province, the PVO is the law which regulates and defines the property valuation process by a municipality for rating purposes. It is indeed within this context that the phrase “prescribed by law” in subsection 10G(6) must be understood. Therefore the property measurement and rating powers conferred by subsections 10G(6) and 10G(7)(a)(i) are to be exercised within the procedural and other requirements of the PVO, provided that they are not inimical to the terms of subsections 10G(6) and (7)(a). The mere qualification, that the power to impose levies on property must be exercised subject to the procedural and other prescripts of another law, does not render the power ineffectual or nugatory. It simply provides for

the power to be supplemented and regulated by another compatible or complementary law.

- [45] I conclude that the savings provisions of subsections 93(4) and (5) properly preserve and extend to a superseding municipality established under the Structures Act, such as the City, the substantive power in its area of jurisdiction to impose and recover property rates based on property valuations. I also find that the PVO is available to the City and is the law that regulates the conduct of property valuation within its area of jurisdiction.

4.3 *Sections 12 and 14 of the Structures Act*

- [46] In alternative argument, the City urged the High Court to find that section 14 read with section 12 of the Structures Act affords another and independent source for the power of a municipality to measure property under the PVO and to exact property rates. The High Court dismissed the contention. I have already found that such power is conferred on a municipality by section 10G of the Transition Act read with the savings provisions of subsections 93(4) and (5) of the Structures Act and must be exercised subject to the procedural prescriptions of the PVO. However, the implication of the finding of the High Court on sections 12 and 14 of the Structures Act is potentially far-reaching and likely to have a deleterious effect on other legislative bequests to new municipalities.⁵⁴ For that reason I find it appropriate to reach this matter.

- [47] Section 12 empowers the MEC for local government in a province, by notice in the Provincial Gazette, to establish a municipality. The provisions of subsection 14(1)(a) state that a municipality established for a particular area under section 12 “supersedes the existing municipality or municipalities...within that area.” Subsection 14(1)(b) amplifies that the superseding municipality becomes the “successor in law of the existing municipality”.

- [48] The High Court faulted these provisions for failing to go “beyond the general statement of legal succession” and “to record what statutory powers or ordinances the newly established municipality would have at its disposal”. Moreover, it held, the provisions do not mention powers, statutory or otherwise, which appear to vest in the municipality the right to levy rates based on a provisional roll. It examined the section 12 notice establishing the City⁵⁷ and concluded that although the notice records that the City supersedes the disestablished municipalities and becomes their successor in law, and that existing valuation rolls shall continue until the introduction of a general valuation roll for the area of the municipality, it does not empower the City to compile the contested provisional valuation roll. The High Court concluded that subsection 14(1) is not a full savings provision and in fact omits to preserve or save pre-existing empowering legislation for use by new municipalities.

[49] It is so that the provisions of subsection 14(2) seem to limit matters to be regulated in a notice under section 12 to domestic agreements, matters that may be determined by by-laws, labour and other arrangements specific to the superseding municipality. It is also true that the section 12 establishment notice relating to the City preserves existing by-laws, resolutions, agreements and other domestic matters but does not contain general savings provisions of laws which were applicable to the disestablished municipalities. In my view subsections 14(1) and 14(2) regulate related but different matters. The first subsection lays down and establishes, in cryptic terms, the principle of legal succession and substitution. The second subsection regulates, in detailed terms, mainly but not exclusively, domestic transition. It would however be misplaced to reason that because the principle of succession is cast in terse terms it does not exist or that it is subsumed under domestic transitional arrangements. The wording of subsection 14(2) or the terms of the establishment notice of the City do not detract from or subvert the principle of legal succession and supersession. In other words there is no valid cause for concluding that a superseding municipality is launched into a legal vacuum, stripped of all laws that had governed its predecessors.

[50] The purpose of the provisions of subsection 14(1)(b) is clear. It is to regulate and facilitate effective and orderly transition from existing municipal structures to final phase municipalities established under section 12. The newly established municipalities take the place of or supplant or “supersede” disestablished ones and become their “successors in law”. I find no justification for a construction of subsection 14(1) that leads to a drastic truncation of all pre-existing laws regulating municipalities. At the point of transition, existing laws applicable remain in force and binding on superseding municipalities unless the context demands otherwise. It is clear from the statute read as a whole and within its appropriate context that a superseding municipality succeeds to the rights, functions and obligations of its predecessors, inclusive of those arising from pre-existing legislation. Nothing suggests otherwise.

[51] The proper construction of the provisions, and in particular the expressions “successor in law” and “supersede”, must therefore be informed by the history of local government,⁵⁹ the “protracted, difficult and challenging transition process” of preinterim, interim and final phases of local government, the broader transformative design discernible in the cluster of applicable legislation and the manifest object to establish the final phase as part of a vision of a “democratic and developmental local government”. The inexorable logic of the transition scheme is progression and not truncation. The manifest object of section 14 is to vest the powers and obligations of existing municipalities as defined in the interim phase in the new superseding municipalities established under enactment required by Chapter 7 of the Constitution.

4.4 *Local government and the Constitution*

- [52] A central tenet of the judgment of the High Court is that there is an incurable *casus omissus* because there is no legislation empowering the City to levy rates on property. A finding of whether or not there is an omission is one of statutory interpretation of the provision in question. Implicit in the finding is that a court whose sole duty is to construe the legislation as it stands cannot fill the gap. The Constitution requires that, where plausible, legislation must now be interpreted in harmony with its objects and values.⁶³ Given the conclusion I have arrived at I refrain from expressing a view on the appropriateness of a finding of *casus omissus* in light of the interpretive duties of a court under the Constitution. I have construed the legislation in issue differently from the High Court. I have found that there is no legislative hiatus. The provisions of subsections 93(4) and (5) and of sections 12 and 14 of the Structures Act taken together with the PVO adequately empower the City to value property and to impose and recover property rates within its area of jurisdiction.
- [53] I now turn to a related matter of considerable importance. The High Court seems to have adopted the approach that, absent empowering legislation, a municipality has no power to act. Such an approach to powers, duties and status of local government is a relic of our pre-1994 past and no longer permissible in a setting underpinned by constitutional supremacy. Under our previous order, which embraced parliamentary sovereignty, municipalities were creatures of statute and enjoyed only delegated or subordinate legislative powers derived exclusively from ordinances or Acts of Parliament. It followed that municipal regulations or by-laws that went beyond the powers conferred, expressly or impliedly, by the enabling superior legislation, were *ultra vires* and invalid. Then local government was described as being mere local authorities entrusted to provincial councils to administer. Courts of the time confirmed this approach in various cases.
- [54] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*⁶⁸ this Court observed that when Parliament was supreme, the existence and powers of local government were entirely dependent upon superior legislation. The institution of local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments.
- [55] Matters however, became different under the interim Constitution. This Court noted that local government derived powers, functions and duties directly from the interim Constitution, although these powers were subject to definition and regulation by either the national or the provincial governments that were “competent authorities” for enacting such legislation.

- [56] Despite the powers of municipalities being subject to definition and regulation by a “competent authority”, the Court held that this does not mean that the powers exercised by local government are “delegated” powers. Rather, local government does exercise “original” powers.⁷² The Court then emphasised that the powers, functions and structures of local government provided for in the interim Constitution, “will be supplemented by the powers, functions and structures provided for in other laws made by a competent authority”.
- [57] The Court restated the principle of legality and in particular the rule that an entity can only act within the powers that are lawfully conferred upon it. In the context of local government, the Court stated that the powers of local government are conferred upon it either in terms of the Constitution or the laws of a competent authority.
- [58] The advent of the Constitution has enhanced rather than diminished the autonomy and status of local government that obtained under the interim Constitution. In the *First Certification Judgment*⁷⁵ this Court stated:
- [Local Government] structures are given more autonomy in the [New Text] than they have in the [interim Constitution] and this autonomy is sourced in the [New Text] and not derived from anything given to [Local Government] structures by the provinces.
- [59] Subsection 40(1) of the Constitution entrenches the institutions of local government as a sphere of government and pronounces all spheres of government to be distinctive, interdependent and interrelated. Subsections 41(e) and (g) articulate and preserve the geographical, functional and institutional integrity of local government. In turn, subsections 43(c) and 151(2) confer original legislative and executive authority on municipal councils. The Constitution expressly precludes the national or a provincial government from impeding the proper exercise of powers and functions of municipalities. Thus a municipality has the right to govern the local government affairs of its area and community. However the duties, powers and rights of municipalities have to be exercised subject to national or provincial legislation as provided for in the Constitution.
- [60] The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, “inviolable and possesses the constitutional latitude within which to define and express its unique character”⁸⁴ subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys “original” and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power

may derive from the Constitution or from legislation of a competent authority or from its own laws.

[61] It is indeed trite that when a court is seized with the delineation of the powers, functions, rights and duties of a sphere of government conceived and entrenched under the Constitution, the proper starting point of the enquiry must be the Constitution itself.⁸⁶ The nub of the challenge before the High Court was the constitutionality of the conduct of the City in valuing property and raising property rates. In that event, the inescapable point of departure must certainly be whether the Constitution contemplates municipal fiscal powers and functions. It does. Chapter 7 of the Constitution read with subsection 229(1)(a) are in this context of great import. Subsection 229(1)(a) of the Constitution expressly authorises a municipality to impose rates on property and subsection 229(2)(b) adds that the power to impose rates on property may be regulated by national legislation. The High Court disposed of the matter without any reference to the Constitution in this context.

[62] In conclusion, I am satisfied that the City, being a municipality established under Chapter 7 of the Constitution read with the Structures Act derives, in the first instance, its power to value property and impose rates on property from subsection 229(1) of the Constitution. Evidently, the power may be defined or regulated by legislation of a competent legislative authority. Secondly, I am satisfied that, to the extent that it may be necessary, in terms of subsections 93(4) and (5) of the Structures Act read with subsection 10G(6) of the Transition Act, from 5 December 2000 the City assumed the power and indeed the obligation to value property as was required of its predecessors, the metropolitan local councils, "subject to any law". The PVO is clearly such law. Thirdly, I hold that one of the consequences of the provisions of section 12 and subsection 14(1)(b) of the Structures Act is that all laws that applied to an existing municipality apply to the superseding municipality which, in the context of the present matter, is the City.

[63] I am unable to support the finding of the High Court that without amending the provisions of subsection 93(8) of the Structures Act the resolution of the City to compile a property valuation and to impose property rates based on the valuation roll is invalid. These provisions are dispensable and at best expository in nature as they purport to confer power that the City already has.

4.5 *Provisional valuation roll and subsection 93(9) of the Structures Act*

[64] On 29 May 2002 the City resolved to levy property rates for the 2002/2003 municipal financial year on the general valuation roll which was in effect a provisional valuation roll referred to in section 9 of the PVO and not a certified roll envisaged in subsection 18(3) of the PVO. Subsection 93(9) appears to have been enacted to rectify the

perceived lack of authority on the part of the City to utilise a provisional valuation roll in this way or to remove any doubt in that regard.

- [65] The High Court found that the City exceeded its authority in relying on the provisional valuation roll. It reasoned that no specific provision authorising such use can be found in the PVO. In contrast, subsection 86(1A) of the Municipal Ordinance, 1974 (C), specifically authorised the use of a provisional valuation roll. The High Court, however, concluded that the provisions of the Municipal Ordinance could not assist the City, as it is not a local authority within the meaning of that legislation. Before this Court the City urged us to find that the Municipal Ordinance was still effective and available to it as a source of the power to use a provisional roll of property valuations. Given the conclusion I have come to, it is unnecessary to decide the issue.
- [66] The City argued that section 10G of the Transition Act does not preclude it from utilising a provisional roll. The High Court concluded that section 10G does not deal exhaustively with the matter, but does not in itself authorise the use of a provisional roll. It held therefore, that the conduct of the City goes beyond its power and offends the principle of legality enunciated in *Fedsure*.⁸⁸ It concluded that in any event, the City represented to the public and property owners that it compiled a valuation roll under the PVO and must be held to the representation.
- [67] I have held on three separate but interrelated bases that a superseding municipality such as the City has the power to value property and levy rates on property within its area of jurisdiction. It will be remembered that subsection 10G(7)(a) permits a municipality to levy and recover rates in respect of immovable property. Subsection 10G(6) requires a single valuation roll of all property to be compiled and opened for public inspection. I cannot find anything in these provisions that restricts the power of a municipality to the use of a final and not a provisional valuation roll for the purpose of determining property rates. Secondly, as the High Court correctly observed, the PVO too is silent on this matter. It is not surprising. The PVO seems to regulate the process of property valuation including the compilation of valuation rolls, their certification and the related appeal and review processes. But it does not in itself vest in a municipality the power to impose property rates. As we have seen earlier, the property rating power derives from the Constitution and the Structures Act. Lastly, subsection 229(1)(a) of the Constitution does not regulate valuation rolls. But more importantly, it does not prohibit the use of a provisional valuation roll for purposes of imposing rates on property.
- [68] If anything, the valuation and certification scheme to be found in the PVO seems to anticipate and favour the use of a provisional roll. Many practical considerations dictate so. Once a provisional roll has been advertised it triggers an objection and appeal process inclusive of possible judicial reviews or appeals. All of these procedures are bound

to delay inordinately the final certification of any general valuation under section 18 of the PVO.

[69] The manifest object of a valuation roll of property in a municipality is to fix monetary rates destined for its coffers. If the assessment of rates were to await final certification of a provisional valuation roll, the time lapse will frustrate the fiscal object of the legislation. In my view, the provisions of the PVO read as a whole point to a transparent but responsive process open to adjustments of property values at any stage between the publication of the provisional roll for inspection and its final certification. To enhance flexibility the legislation envisages supplementary and interim valuation rolls. I agree with the submission by the City that the interim valuation procedures in the PVO are directed at enhancing a real time and current ratio of rates liability in a dynamic property climate. Otherwise changes in property valuation such as rezoning, subdivisions, improvements and new developments between general valuations would stay out of reckoning. This will be to the detriment or potential prejudice of the municipal treasury and property owners alike.

[70] It seems to me that the value of final certification may lie in bringing the curtain down on the objections and appeals and setting the stage for another general valuation. The requirement of final certification in the PVO should not be seen as precluding the imposition of property rates based on a provisional, supplementary or interim valuation roll. Lastly, a flexible and responsive valuation regime is well suited for the adjustment of rates liability upwards or downwards without any obvious prejudice to property owners or the municipality pending final certification of the roll.

[71] I am satisfied that the City was entitled to rely on the provisional valuation roll advertised on 21 May 2002 for imposing property rates in its area of jurisdiction. It must follow that whilst subsection 39(9) of the Structures Act was enacted at the request of the City, it is redundant and at best merely explanatory in effect.

4.6 *Enactment of section 21 of the Amendment Act*

[72] The City and the Minister suggested that should we find in their favour on the property rating power issues, as I have done, we need not decide the constitutional challenge against the manner in which the Amendment Act was enacted. These are confirmation proceedings coupled with an appeal by the Minister and the City under subsection 172(2)(d). The High Court has expressed itself on the validity of an Act of Parliament. The question is whether in these circumstances this Court must confirm, decline to confirm or vary the order of invalidity.

[73] In the *Court Martial* case, this Court held that subsection 172(2) does not require it in all circumstances to determine matters brought to it for confirmation under that subsection. The Court has discretion to decide

whether or not it should deal with a matter. In exercising the discretion it should consider whether any order it may make will have a practical effect either on the parties or on others⁹¹ or whether there are considerations of public policy that require a decision on the constitutional validity of the impugned legislation. “Factors that must be taken into account include the nature and extent of any practical effect the order may have, ‘the importance of the issue raised, its complexity and the fullness of the argument on the issue’.” A further factor may be added to that list, namely, the nature of the constitutional challenge.

- [74] In the constitutional challenge before us, the first narrow question is whether the draft provisions that became subsections 93(8) and 93(9) of the Structures Act were passed in accordance with the requirements of subsection 154(2) of the Constitution. The High Court found that since the two subsections were added to section 21 of the Amendment Act after its publication for public comment they were invalid. The appellants argued that the new subsections 93(8) and (9) of the Structures Act are unnecessary and have no effect in law. They say the new subsection 93(10) was merely an adjunct with no independent content of its own. They further argued that the Amendment Act as a whole was not legislation that affects the status, institutions, powers or functions of local government within the meaning of subsection 154(2). They submitted that re-publication of the draft legislation after it was introduced in Parliament is not required.
- [75] The second ground for constitutional challenge is that the FFC was not consulted on the draft legislation as required by subsection 229(5) of the Constitution. The Minister denied that the draft legislation was national legislation regulating the power of a municipality to impose rates on property and that in any event, as a matter of fact, the FFC was consulted. Nevertheless, the High Court found that in relation to subsection 93(9) the FFC was not consulted and that the amendment is inconsistent with the Constitution and invalid.
- [76] The High Court readily appreciated that if it had dismissed the principled grounds of the application before it, it would have been unnecessary to decide the constitutional challenge against section 21 of the Amendment Act. I agree. No practical benefit for the parties or any other person or body will flow from deciding the constitutionality of a statute, which I have found to serve only to clarify the law. I can find no compelling public policy consideration to decide the constitutionality of the impugned law. Moreover the facts are obscure. The issues arising from the constitutional challenge are complex and far-reaching and relate to the procedural validity of legislation. On the other hand, even if the challenge is decided in favour of the respondents, the decision will not alter the outcome of this case or vindicate the right of any party.
- [77] An additional and important consideration is that the challenge is against the manner and form in which the legislation was passed. It is

therefore different to a substantive challenge. Moreover, section 21 of the Amendment Act is part of an omnibus local government legislation related to matters not connected with those that arise in this case. Therefore it may well be that other parts of the legislation may attract different manner and form challenges. In my view, it is appropriate, in a manner and form challenge, to pay appropriate respect to the legislature in relation to the regulation of its own processes. Having had regard to all the relevant considerations, I decline to decide the constitutional challenge and therefore do not confirm the order of constitutional invalidity made by the High Court.

[78] The appeal should succeed. The orders of the High Court should be set aside and replaced with an order to the effect that the application before the High Court is dismissed.

...

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/99

Executive Council of the Western Cape v Minister for Provincial Affairs and another; Executive Council of KwaZulu Natal v President of the RSA and others (1999) (12) BCLR 1353 (CC)*

Decided on: 15 October 1999

1 Introduction

NGCOBO J:

[1] These two cases raise important questions relating to the authority to establish municipalities and their internal structures. They arise out of a dispute between the governments of the Western Cape and KwaZulu-Natal, on the one hand, and the national government on the other. The dispute concerns the constitutionality of certain provisions of the Local Government: Municipal Structures Act, No 117 of 1998 (“the Structures Act”). The Structures Act became law on 11 December 1998, but only came into operation on 1 February 1999. It is the second of the three statutes envisaged to transform local government, and establishes municipalities throughout the country **[all footnotes omitted]**. The first local government elections in respect of these new municipalities are scheduled for no later than 1 November 2000. There is accordingly some urgency in the matter.

...

2 The controlling provisions of the Constitution

[12] Chapter 7 of the Constitution deals with local government. It makes provision for the establishment of municipalities “for the whole of the territory of the Republic”. The objects of local government are, amongst other things, “to provide democratic and accountable government for local communities”; “to ensure the provision of services to communities in a sustainable manner”; and “to promote social and economic development”. The executive and legislative authority of municipalities to govern local government affairs of their communities are subject to national and provincial legislation. However, “[t]he national or a provincial government may not compromise or impede” the ability or right of the municipalities to exercise their powers or perform their functions. The national and provincial governments are moreover required to “support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions”.

* All footnotes are omitted.

- [13] Section 155 deals with the establishment of municipalities. It makes provision for three different categories of municipality, namely, category A, self-standing municipalities, category B, municipalities that form part of a comprehensive co-ordinating structure, and category C, municipalities that perform co-ordinating functions. In addition, it also makes provision for national legislation to define different types of municipality that may be established within each such category.¹⁴ It sets out a scheme for the allocation of powers and functions between the national government, provincial government and the Demarcation Board in relation to the establishment of municipalities. In terms of this scheme: (a) national legislation must establish criteria for determining which category of municipality should be established in a particular area,¹⁵ must define the types of municipality that may be established within each such category, must establish criteria and procedures for the determination of municipal boundaries by an independent authority (which is the Demarcation Board),¹⁷ and must make provision for the division of powers and functions between municipalities with shared powers; (b) the Demarcation Board must determine the municipal boundaries in accordance with the criteria and procedures established by such national legislation; and (c) provincial legislation must determine which types of municipality should be established in its province. In addition, provincial governments “must establish municipalities” in their provinces “in a manner consistent with the legislation enacted in terms of subsections (2) and (3)” of section 155.
- [14] In terms of section 156, municipalities have executive authority in respect matters listed in part B of Schedule 4 and part B of Schedule 5 and “any other matter assigned to [them] by national or provincial legislation”. They are empowered to make “by-laws for the effective administration of the matters” which they have the right to administer. However, subject to section 151(4), a by-law which is in conflict with national or provincial legislation is invalid.
- [15] The remaining provisions deal with the composition and election of municipal councils, membership of municipal councils, their term of office, and internal procedures. Municipal councils may elect an executive committee or other committee, but this power is subject to national legislation. National legislation may provide criteria for determining the size of a municipality, whether municipal councils may elect an executive committee or any other committee, and the size of an executive committee or any other committee of a municipal council. Municipal councils have the power to make by-laws which prescribe rules and orders for their internal arrangements, business and proceedings, and the establishment, composition, procedures, powers and functions of their committees. Finally, in terms of section 164 national or provincial legislation may deal with any matter relating to local government not dealt with in the Constitution.

3 The local government: municipal structures act

[16] The Structures Act represents the final phase in the long and extremely complex process of transforming racially determined local government into democratically determined local government. The process had its genesis in the Local Government Transition Act, 209 of 1993 (“the Transition Act”). This statute envisaged three phases for the transition. It commenced with the pre-interim phase, which ran from 2 February 1994 until the first democratic local government elections; the interim phase, which commenced with the first democratic local government elections, and which will run until “the implementation of final arrangements to be enacted by a competent legislative authority”; and the final phase, which will commence with the implementation of the provisions of the Structures Act.

[17] Mr Olver, the Deputy Director General for Local Government, who deposed to the answering affidavit on behalf of the national government in both applications, deals with the history of local government which, like so much of our history, was characterised by racial discrimination and segregation.³⁴ Those divisions have left deep scars on our society, and as Mr Olver points out, vast disparities still exist in different local government areas in relation to service infrastructure, tax bases and institutional capacity.

That was not and could not be disputed by the provinces.

[18] This history is referred to in the preamble to the Structures Act, which records that:

...past policies have bequeathed a legacy of massive poverty, gross inequalities in municipal services, and disrupted spatial, social and economic environments in which our people continue to live and work ...

[19] The preamble then goes on to set out a vision for local government:

...in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic development, [and] encourage a safe and healthy environment...

[20] The Structures Act provides a detailed framework for the final phase of the transition to democratic local government, which, according to the preamble, is “to be transformed in line with the vision of democratic and developmental local government”. Mr Olver explains why the various provisions of the Structures Act are considered by the government to be the best way of dealing with this. That, however, is not an issue before this Court. The means chosen must be consistent with the requirements of the Constitution. If they are, they are valid. If they are not, they are invalid, even if they are an effective way of dealing with the problems that exist.

[21] Broadly speaking, the Structures Act deals with the definition and creation of municipalities. It establishes the criteria for determining the different categories of municipality; assigns the application of these criteria; defines the types of municipalities that may be established within the different categories of municipality; provides guidelines for selecting types of municipalities; makes provision for the establishment of municipalities; makes provision for internal structures of municipalities, including various committees that may be established; sets out the functions and powers of municipalities; and deals with other miscellaneous matters such as transitional arrangements and regulations.

4 The constitutional challenge

[22] The constitutional challenges can be divided into two main groups. First, it was contended that the provisions of the Structures Act encroach on the powers of the provinces. This challenge concerned in particular the provincial power to establish municipalities in terms of section 155(6) of the Constitution. Second, it was contended that the Structures Act encroaches on the constitutional powers of municipalities. This challenge related in particular to a municipal council's power to elect executive committees or other committees in violation of section 160(1)(c) of the Constitution and their power to regulate their internal affairs in terms of section 160(6) of the Constitution.

...

5 The challenge to chapter 4 and related provisions

[96] The Western Cape contended that the provisions of Chapter 4, and sections 18(4), 29(1), 30(5) and 36 to 39 of the Structures Act are inconsistent with section 160(6) of the Constitution, which provides:

A Municipal Council may make by-laws which prescribe rules and orders for:

(a) its internal arrangements..

[97] The question for determination is whether Chapter 4 and the other provisions challenged are in conflict with section 160(6) of the Constitution. It is necessary first to determine the proper ambit of the power conferred upon municipalities by section 160(6).

[98] Section 160(6) comes into operation once a municipality has been established, its membership determined and its structures put in place. Section 160(6) confers on municipalities exclusive powers in relation to a narrow area. This relates to the power to make rules and orders for their "internal arrangements" and their "business and proceedings" as well as the "establishment, composition, procedures, powers and functions of [their] committees". This power, therefore, relates to internal domestic matters that are necessary for the effective

performance by the municipalities of their constitutional obligations. However, this power is subject to the provisions of the Constitution. Provisions of the Constitution to which this power is subject and which would therefore constrain its ambit include section 154(1) (national and provincial governments must support and strengthen the capacity of municipalities to manage their own affairs), section 155(7) (national and provincial governments have the power to ensure that municipalities perform their executive functions effectively), section 155(6)(a) (power of provincial government to monitor and support local governments and to promote their development to enhance their ability to manage their own affairs), section 160(1)(c) (power of municipalities to appoint committees is subject to national legislation) and section 160(8) (right of members of a municipal council to participate in its proceedings and those of its committees may be regulated by national legislation).

[99] To determine the proper ambit of the power conferred upon municipalities by section 160(6), it is useful to compare section 160(6) with other provisions in the Constitution which deal with “rules and orders” in relation to the national legislature and provincial legislatures....

[100] It is clear that this provision confers a power upon the National Assembly to regulate its internal proceedings, business and working committees. However, that power must be read in the context of the other provisions of the Constitution regulating the National Assembly, such as the regulation of the election and removal of the Speaker and Deputy-Speaker, the regulation of the voting procedures and quorums in the National Assembly and the regulation of public access to the National Assembly. In addition, it should be noted that in the case of the national legislature, the election, appointment and functioning of what is, in effect, its executive committee, the President and Cabinet, is fully regulated by sections 83 to 102. Thorough constitutional regulation of provincial executives is similarly to be found in sections 125 to 141. These provisions make it plain that the constitutional power of legislatures to regulate the internal proceedings of committees is a narrow power, not a broad one, and is related not to the executive committees of these legislatures, but only to other committees entrusted with specific tasks or portfolios. The power also does not relate to a power to regulate the main structural components of the legislature, which are fully regulated by the Constitution, but only to those working committees which either chamber of the legislature may decide to establish, and also disestablish, from time to time.

[101] In my view, section 160(6) should be interpreted in a similar fashion. Although it is an important power conferred upon municipalities, its scope is relatively narrow and does not relate to the power to regulate the establishment or functioning of the executive of municipal councils, whatever form that executive may take, or any other committee of the municipality which is a key part of its democratic structure. It relates

only to task and working committees which may be established and disestablished from time to time.

[102] The provisions in Chapter 4 of the Structures Act which are impugned by the provinces as invading the power of municipalities in terms of section 160(6) are the following: the establishment and composition of executive committees and mayors (sections 42 to 53); the election, powers and functions of executive mayors and mayoral committees (sections 54 to 60); the establishment, composition, powers and functions of metropolitan sub-councils (sections 61 to 71); and the establishment and powers and functions of ward committees (sections 72 to 78). All these matters relate to the regulation of the executive of the local government or to committees which form part of the structure of a particular municipality, such as ward committees and metropolitan sub-councils. These are not committees contemplated by section 160(6). These are matters concerning “powers, functions and other features of local government” which are required to be provided for in national or provincial legislation. There can be no objection therefore to their being regulated by national legislation.

[103] The committees which fall within those contemplated in section 160(6) (c) are those regulated by section 71, 79 and 80 of the Structures Act.⁸⁹ The challenge to these provisions is premised on the proposition that the constitutional power of the municipalities to appoint committees is without limits. This premise is wrong. The power of municipalities to appoint committees is subject to section 160(1)(c). They have the power to elect “an executive committee or other committees subject to national legislation”. There is nothing in this provision which suggests that “other committees” are limited to any particular committee. This provision governs the appointment of any committee, including the committees contemplated in section 160(6)(c) of the Constitution. The effect of section 160(1)(c) is that the power of the municipalities to appoint committees contemplated in section 160(1)(c) is subject to national legislation. Therefore there can be no objections to sections 71, 79 and 80.

[104] Apart from this, these provisions largely repeat the provisions of the Constitution which afford municipal councils the power to determine whether to establish committees or not. They do not limit that power in any way. As such, no complaint can be made about them.

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