CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 6/97

CERTIFICATION OF THE CONSTITUTION OF THE WESTERN CAPE, 1997

Heard on: 14-15 May 1997

Decided on: 2 September 1997

JUDGMENT

THE COURT:[1]

[1] The Constitution of the Republic of South Africa, 1996 confers on provincial legislatures the power to make their own provincial constitutions.[2] However,

> "[n]o text of a provincial constitution . . . becomes law until the Constitutional Court has certified —
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> (a) that the text has been passed in accordance with section 142; and
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> (b) that the whole text complies with section 143."[3]

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1 This is the unanimous judgment of all the members of the Court save Didcott J, who was ill and took no part in the proceedings.

2 Section 104(1)(a) of the Constitution provides:

> "The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power —
> (a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143...".

3 Section 144(2) of the Constitution.

The legislature of the province of the Western Cape duly adopted a constitutional text in accordance with section 142[4] of the Constitution and its Speaker, as required by section 144(1), submitted the text to this Court for certification that it complies with section 143.

[2] The President of this Court thereupon directed that the Speaker of the Western Cape legislature, all political parties represented in that body and the government of the Republic of South Africa, be afforded the opportunity to submit written and oral argument in support of or in opposition to such certification. Supporting representations were received on behalf of the Speaker of the Western Cape legislature while the national government and the African National Congress ("the ANC") opposed.[5] In what follows the Western Cape constitutional text will be referred to as "the WCC" and its clauses will

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[4] Which requires a provincial constitution to be passed by at least two thirds of a provincial legislature's members.

[5] A belated and fruitless application was made on behalf of another potential objector to have the hearing of oral argument postponed in order to enable it to consider whether or not it wished to apply to be permitted to make representations. The application was refused for reasons given later in this judgment.

be cited, for example, as "WCC 1". The (national) Constitution will be cited as "the NC" and its provisions, for example, as "NC 1".

[3] Our duty under NC 144(2)(b) is to withhold certification unless "the whole text complies with section 143." We therefore have to test each and every one of the provisions of the WCC, whether challenged or not, against the requirements of NC 143. This we have done but obviously we do not discuss in this judgment provisions that are unchallenged nor potentially contentious. From the outset the government's objection to certification of the WCC was focused on only two of its features. The ANC abandoned some of its initial objections and ultimately challenged relatively few of its provisions. Each of these will be discussed hereunder.

[4] The constitution-making powers of provinces are contained in NC chap 6, which establishes the provinces, defines their territories and generally describes their organs, powers and functions. The chapter has five interrelated provisions relating to provincial constitution making. The first is NC 104(1)(a)[6] which confers the power to adopt a constitution on a provincial legislature; the second is NC 142, which demands a two-thirds majority of its members for the exercise of that power. Then follows NC 143, which prescribes the permissible contents of provincial constitutions and reads as follows:

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6 See n 2 above.

"(1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for —
(a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or
(b) the institution, role, authority and status of a traditional monarch, where applicable.
(2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraph (a) or (b) of subsection (1) —
(a) must comply with the values in section 1 and with Chapter 3 and
(b) may not confer on the province any power or function that falls
(i) outside the area of provincial competence in terms of Schedules 4 and 5; or
(ii) outside the powers and functions conferred on the province by other sections of the Constitution."

That provision is followed by NC 144, requiring certification by this Court as an essential criterion for validity; and lastly, NC 145 providing for the signing, publication and safekeeping of a provincial constitution once it has been certified.

[5] The current exercise focuses on NC 104(1)(a) and NC 143: the constitution-making power and the limits imposed upon it by the NC. The constitution-making powers of the provinces have been discussed in two previous decisions of this Court. The one[7] related to the first proceedings for certification of the NC under section 71(2) of the interim Constitution, Act 200 of 1993, hereafter referred to as "the IC" and its provisions,

[7] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996,* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC). Hereafter referred to as the "*CJ_1* case".

for example, as "IC 1". The other[8] related to a certification under IC 160(4) relating to a constitutional text passed by the provincial legislature of KwaZulu-Natal. One of the central issues in the first certification case was whether "[t]he powers and functions of the provinces defined in the [NC], including the competence of a provincial legislature to adopt a constitution for its province" were "substantially less than or substantially inferior to those provided for in" the IC.[9] An important element of that comparison was the constitution-making power of provinces under the NC.[10] That is, of course, a key issue here.

[6] In the course of that comparison we also had regard to our reasoning in the *KZN* case, where we had to consider certification of a provincial constitution under provisions

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8 *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of KwaZulu-Natal, 1996*; 1996 (4) SA 1098 (CC); 1996 (11) BCLR 1419 (CC). Hereafter referred to as the "*KZN* case".

9 See *Constitutional Principle XVIII.2* in sch 4 to the IC.

10 Above n 7 at paras 342-53.

of the IC that closely correspond with the certification provisions of the NC at issue in the present case.[11] Our conclusion was that the provisions relating to the constitution-making powers of provinces under the two respective national constitutions were essentially the same.[12] Consequently the following observations made in the *KZN* case,[13] although couched in language appropriate to the IC, apply with equal force under the NC:

> "The provisions of s 160 which confer constitution-making powers upon a province are not to be viewed in isolation, but rather to be interpreted within the context of the other provisions of the interim Constitution relating to provincial powers. Section 160(3) is negatively formulated and, read with s 160(4), indicates in peremptory terms what provisions a provincial constitution may *not* contain. They are, subject to the proviso, provisions which are 'inconsistent with a provision of this Constitution, including the Constitutional Principles set out in Schedule 4'. It is clear, therefore, that in determining what provisions relating, for example, to legislative and executive powers may or may not be embodied in a provincial constitution, regard must be had to all provisions in the

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11 Compare IC 160(1), (3) and (4) with NC 104(1)(a), 142, 143 and 144.

12 See above n 7 at para 350.

13 Above n 8 at para 6.

interim Constitution . . . ."

[7] Certification requires a two-step approach: first, an enquiry into whether the NC confers the power on provinces to make constitutional provision for a particular topic and, second, a determination whether there is any inconsistency between the dictates of the two constitutions. If there is an inconsistency, then the further question arises as to whether that inconsistency is permissible or not.

[8] The constitution-making powers of provinces provided for in NC 104(1)(a) are to be viewed in the broader context of the other provisions of the NC relating to provincial powers. Quite clearly, although a constitution-making power is a significant power, it is not a power to constitute a province with powers, functions or attributes in conflict with the overall constitutional framework established by the NC. The provinces remain creatures of the NC and cannot, through their provincial constitution-making power, alter their character or their relationship with the other levels of government.[14] Nevertheless the power is a significant one, enabling a province to regulate its governance in its own fashion, subject to the provisions of NC 143. It includes organising the provincial government, regulating, distributing and circumscribing the functions of its different departments, and prescribing the manner in which the powers it derives from the NC are

[14] Id at para 8.

to be exercised. It also includes powers incidental to such competences and making provision for or regulating other powers of the type normally found in a constitution which are not inconsistent with the NC or the power relationship it establishes.[15]

[9] Once it is determined that a particular matter does fall within the constitution-making power, one then turns to NC 143(1) for the second step of the enquiry, that of checking for inconsistency[16] between the two constitutional instruments. As before, the basic provision is expressed in the negative and in imperative terms: the provincial text "must not be inconsistent" with the NC. Thereafter, NC 143(1)(a) permits a province "to provide for provincial legislative or executive structures and procedures that differ from" those provided for in NC chap 6.[17]

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15 There are many definitions of the word 'constitution'. For present purposes it suffices to paraphrase, as we have done here, the pertinent portion of the definition in Black's Law Dictionary 6 ed (West Publishing Co., Minnesota 1990).

16 In the *KZN* case at para 24 we defined inconsistency as existing when provisions being compared " . . . cannot stand at the same time . . . . They are not inconsistent when it is possible to obey each without disobeying either."

17 NC 143(1)(b) permits a province to provide for a traditional monarch. That provision was not under consideration in this case.

[10] This Court has already had occasion to consider the phrase "legislative or executive structures and procedures". IC 160(3)(a) also provided that in adopting its own constitution, a province could provide for different "legislative and executive structures and procedures". In the *KZN* case[18] at paragraph 4, we held that

> "The reference to 'legislative structures and procedures' clearly relates to the structures and procedures which may be necessary or appropriate for the proper functioning of the provincial organs of government."

In paragraph 5, we held further that

> "We would emphasise, however, that, whatever meaning is ascribed to 'structures and procedures', they do not relate to the fundamental nature and substance of the democratic State created by the interim Constitution nor to the substance of the legislative or executive powers of the national Parliament or Government or those of the provinces."

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18 Above n 8.

[11] There are some differences between IC 160(3) and NC 143, the most important of which is that NC 143(2) contains provisions which were not contained in IC 160(3) at all. NC 143(2) clearly qualifies the permissive provisions of NC 143(1)(a) and (b). Although a provincial constitution may accordingly provide for legislative and executive *structures* and *procedures* which are different from those prescribed by the NC, such provisions must nevertheless comply with the values in NC 1 and NC chap 3 and *may not* confer *powers* or *functions* on the province in question beyond those conferred on them by the NC. The scope of permitted difference is therefore clearly and strictly limited to such structures and procedures. It is impermissible for a provincial constitution, under the guise of making provision for such legislative or executive structures or procedures, to grant the province powers or functions going beyond those conferred by the NC. In *CJ1*[19] we considered whether the provisions contained in NC 143(2)(a) constituted a substantial difference from corresponding provisions in the IC. We concluded that they did not:

> "In the result, what is contemplated by NT 142 and 143 is not a provincial constitution suitable to an independent or confederal State but one dealing with the governance of a province whose powers are derived from the NT. On that analysis there is no real departure from the power of constitution-making which a provincial government enjoys in terms of IC 160. That power, properly analysed, is a power subject to the same

19 Above n 7 at para 350.

limitations and the same potential which we have identified in NT 142 and 143."[20]

[20] In that judgment the NC was referred to as the new text or the NT.

[12] In our view, in order to understand what is contemplated by "structures and procedures" in NC 143(1)(a), it is necessary to commence with a consideration of NC chap 6. That chapter is entitled "Provinces". The first section of the chapter provides for the nine provinces, their names and boundaries.[21] Beyond that, the chapter is divided into four parts concerning provincial legislatures,[22] provincial executives,[23] provincial constitutions[24] and provisions regulating the conflict between national legislation, on the

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21 NC 103.

22 NC 104-124.

23 NC 125-141.

24 NC 142-145.

one hand, and provincial legislation and provincial constitutions, on the other hand.[25]

[25] NC 146-150.

[13] The provisions regulating the provincial legislatures invest them with the legislative authority of the provinces[26] and prescribe the composition and election of provincial legislatures,[27] the membership of such legislatures,[28] the taking of the oath or affirmation by the members of a provincial legislature,[29] the duration and dissolution of provincial legislatures,[30] the sitting and recess periods,[31] the appointment of Speakers and Deputy Speakers,[32] the manner in which decisions shall be taken by the legislature[33] and the giving of evidence before provincial legislatures.[34] They also empower provincial legislatures to regulate their own internal procedures and committee systems[35] and prescribe the procedures for the passage of Bills,[36] and for the publication and

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26 NC 104(1).

27 NC 105.

28 NC 106.

29 NC 107.

30 NC 108 and 109.

31 NC 110.

32 NC 111.

33 NC 112.

34 NC 115.

35 NC 116.

36 NC 119-121.

safekeeping of Acts of provincial legislatures.[37]

[14] The provisions regulating provincial executives provide for the vesting of the executive authority of the provinces in their premiers,[38] the assignment of functions to municipal councils,[39] the powers and functions of premiers,[40] the election of premiers by

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37 NC 123 and 124.

38 NC 125.

39 NC 126.

40 NC 127.

the provincial legislature,[41] the term of office of premiers,[42] the designation and responsibilities of acting premiers,[43] the appointment and composition of executive

41 NC 128.

42 NC 130.

43 NC 131.

councils,[44] the responsibilities of members of executive councils,[45] provincial supervision of local government,[46] the procedure for executive decisions[47] and votes of no confidence.[48]

[15] It is clear from these provisions in chapter 6 that it is not necessary for any province to enact a constitution. Chapter 6 provides a complete blueprint for the

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44 NC 132.

45 NC 133-138.

46 NC 139.

47 NC 140.

48 NC 141.

regulation of government within provinces which provides adequately for the establishment and functioning of provincial legislatures and executives. Provinces which have not adopted provincial constitutions are governed by the provisions of chapter 6. Nevertheless, NC 142-145 (read with NC 104(1)(a)) expressly provide that provinces do have the power to make their own constitutions and that, although the general rule is that the provisions of such constitutions may not be inconsistent with the NC, they may provide for legislative or executive structures and procedures that are different from those provided for in chapter 6.

[16] As pointed out in paragraph 11 above, the phrase "legislative or executive structures and procedures" in NC 143(1)(a) is clearly not concerned with the powers of provincial legislatures or executives. Those powers are exhaustively provided for in the NC. The phrase is concerned only with the form, composition and organisation of a province's institutions ("structures") and the manner in which they exercise their powers ("procedures"). This is reaffirmed by NC 143(2)(b).

[17] The Oxford English Dictionary (2 ed) includes as one of its definitions of "structure", "the mutual relation of the constituent parts or elements of a whole as determining its peculiar nature or character". In our view, it is this meaning of structure that is conveyed by NC 143(1)(a). Structure is concerned with form or composition. A

legislative or executive structure denotes the elements or component parts which make up the legislature or executive. And a provincial constitution is expressly permitted to provide for a legislature or executive whose elements or component parts differ from those provided for in chapter 6 of the NC. The procedures, by contrast, relate to the way in which the province's legislature, its executive and their respective component parts function, whether alone or in relation to one another. Once again although a provincial constitution is permitted to provide for legislative and executive procedures different to those contained in NC chap 6, any difference is subject to the constraints imposed by NC 143(2).

[18] This approach to the phrase "structures and procedures" is given added force by the analysis contained in a seminal essay by Professor D V Cowen where he states:

> "[t]he word 'Parliament' designates both a static and a dynamic concept. The static concept has reference to *structure*, that is, to the elements which constitute Parliament - these being, in the case of the Union Parliament, the King, the Senate, and the House of Assembly. As a static concept, Parliament is simply the elements which comprise it. The dynamic concept, on the other hand, has reference to function. As a dynamic concept, Parliament means the aforementioned elements functioning as a law-making body."[49] (Emphasis in the original; footnotes omitted)

[49] D V Cowen *Parliamentary Sovereignty and the entrenched sections of the South Africa Act* (Juta, Cape Town 1951) at 5-6.

Professor B Beinart took the same view, regarding the process of composing the constituent elements of the Union Parliament as "part of the definition or structure of Parliament".[50] It further seems clear that the above approach was followed, albeit implicitly, in *Harris and Others v Minister of the Interior and Another*.[51]

[19] The effect of NC 143 read with NC 142 is that where a province wishes to provide for different structures or procedures, it must do so *in its constitution*. Different structures and procedures are therefore subject both to special voting procedures (in terms of NC 142, a two-thirds majority in the provincial legislature) and to certification (in terms of NC 144). If they could be provided for in ordinary provincial legislation, they would be subject to neither. It is not surprising that the NC has established such safeguards in these circumstances. Provisions which differ from those of the NC need to be scrutinised to ensure that they do not undermine the national constitutional framework. This is in effect

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50 B Beinart "Sovereignty and the law" 1952 *THRHR* 101 at 120. See also at 113.

51 1952 (2) SA 428 (A), in particular at 463B-E, 464H and 470E-F. It is also interesting to note the nomenclature which G N Barrie "Die gebondenheid van die parlement aan die reg rakende sy struktuur en funksionering" 1981 *TSAR* 46 at 55 uses when he refers to the manner and form analysis in the *Harris* judgment as the classic example of parliament being bound to those legal rules concerning its "struktuur en funksionering"

the very reasoning adopted by this Court in the *KZN* case when it withheld certification of certain provisions in a provincial constitution, which might only come into existence in the future after further decisions involving inter alia the provincial legislature had been taken. We remarked that

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(structure and functioning).

> " . . . in truth, the decision on such provisions had been deferred for later determination by the provincial Legislature, and the constitution in the form in which it was submitted for certification was inchoate, and lacking in finality. The request that the text be certified before a final decision has been taken on these material provisions is premature, and on this ground alone the Constitution cannot be certified."[52]

As pointed out in paragraph 3 above it is our duty to withhold certification unless the whole text of a provincial constitution complies with NC 143. Where the content of a particular provision in a provincial constitution depends on future provincial legislation, such provision is similarly inchoate and cannot be certified. It would also undermine the objectives of the certification procedure in respect of finality and certainty, which were stressed in the *KZN* case.[53]

[20] In the next part of the judgment we will deal with an objection raised by the ANC concerning the repetition of clauses of the NC in the WCC. This objection was directed at several provisions in the WCC which can most concisely be dealt with together. Thereafter we shall deal with objections to provisions of the WCC in numerical order, commencing with the preamble.

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52 Above n 8 at para 46.

53 Id at paras 11 and 36.

Repetition of Provisions in the NC

[21] The ANC objected to the repetition in the WCC of provisions of the NC which relate to matters falling outside the competence of the provincial legislature. As these provisions repeated in the provincial constitution are identical to those in the national constitution, there obviously can be no textual inconsistency between them. But the question still arises whether the provincial legislature has the power even to repeat such provisions in its own constitution. In this regard it is necessary to recall what was said in the *KZN* case:[54]

> "[T]here are two principal ways in which provisions in a provincial bill of rights could be inconsistent with the interim Constitution. Firstly, where the provision relates to a matter falling outside the power of the province, the inconsistency in this instance being in respect of s 126 of the interim Constitution. Secondly, where the provision, although relating to a matter within the province's power, is inconsistent with a provision in chap 3 of the interim Constitution. It needs to be emphasised that in the first case an inconsistency can occur even if the provincial bill of rights were to repeat *verbatim* a corresponding provision in chap 3 of the interim Constitution . . .".

[54] Above n 8 at para 26.

[22] What appeared in the KZN constitutional text was the repetition of matters which had nothing to do with provincial powers or competence. Those matters were contained principally in the bill of rights of the KZN constitutional text. Examples are the provisions which provided for the right to a fair trial and for states of emergency. In those instances this Court held that the "consistency clauses"[55] did not justify that repetition. Such repetition was not germane to the provincial constitution-making process.

[23] By contrast, in the WCC all of the provisions of the NC that are repeated relate to matters which directly affect governance within the province, that is, the provincial legislature and the members of the provincial executive or legislature. Thus, as examples, one finds the repetition of NC 106, which sets out the qualifications for membership of provincial legislatures, in WCC 15(1), (2) and (3), which set out the qualifications for membership of the Western Cape provincial parliament; of NC 108 in WCC 17 (the duration of the provincial legislature and related matters); and of NC 109 in WCC 18 (dissolution of the provincial legislature before the expiry of its term). It would indeed have been difficult for the WCC to be coherent and comprehensible without the repetition of those NC provisions which form the matrix for the related provisions of the WCC. We can find no fault with such provisions.

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[55] As to the meaning of that term, see the *KZN* case n 8 at para 36.

[24] In particular the ANC objected to WCC 32(1) on the ground that it purports to confer a competence on members of the Western Cape legislature to apply to the Constitutional Court for a declaration that a provincial Act is unconstitutional, thereby affecting the jurisdiction of this Court which is beyond the competence of a provincial legislature.[56] We do not agree.

[25] Certainly a provincial legislature does not have the power to expand or contract the scope of jurisdiction of the Constitutional Court.[57] In particular it has no power to regulate access to this Court. But WCC 32(1) does not purport to confer such power on the Western Cape legislature by virtue of the WCC itself. Rather, the challenged clause merely mirrors NC 122(1), the source of the power to regulate access by provincial legislators to the Constitutional Court. It is not an attempt at usurpation of power such as disqualified the KZN constitutional text.

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[56] WCC 32 provides:

> "(1) Members of the Provincial Parliament may apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional.
> (2) An application —
> (a) must be supported by at least 20 per cent of the members of the Provincial Parliament; and
> (b) must be made within 30 days of the date on which the Premier assented to and signed the Act."

[26] A similar objection, raised against WCC 11, which repeats NC 144(1) and regulates the certification by this Court of amendments to the WCC must fail for the same reason.

[27] It should be noted that where provisions of the NC are repeated in the WCC, any future amendment of the NC provision in respect of a matter falling outside the competence of the provincial parliament under NC 104(1) or NC 143 would to that extent render the repeated provision in the WCC unconstitutional and of no effect. This conclusion follows from the provisions of the NC and, indeed, is recorded in WCC 3(2) which states:

> "The legislative and executive powers and functions of the Western Cape recorded in this Constitution emanate exclusively from the national Constitution."

The Preamble

[28] The preamble of the WCC commences with the phrase "in humble submission to Almighty God". In argument the question was raised whether this was inconsistent with NC 15, which provides that

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[57] This Court's jurisdiction is in general circumscribed by NC chap 8.

"(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that —

(a) those observances follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising —

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

The invocation of a deity in these prefatory words to the preamble of the WCC has no particular constitutional significance and echoes the peroration to the preamble to the NC.[58] It is a time-honoured means of adding solemnity used in many cultures and in a variety of contexts. Thus, in the United States with its explicit Establishment Clause separating church and state, the use of the national motto ("In God we trust") and the reference to God in the Pledge of Allegiance to the flag have been characterised as "ceremonial deism".[59] Such words have no operative constitutional effect nor are they

[58] The peroration reads, "May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."

[59] Brennan J (dissenting) in *Lynch, Mayor of Pawtucket, et al. v Donnelly et al.* 465 US 668, 716 (1984), quoting Dean Rostow.

fundamentally hostile to the spirit and objects of the NC. They could also not be used to interpret the provisions of NC 15 restrictively. These words could therefore have no effect on the rights of believers or non-believers. In the circumstances there is no inconsistency between the preamble of the WCC and the NC.

WCC 3(2), 4 and 9(2): Hierarchy of Laws

[29] In their written argument the ANC and the government objected to WCC 3(2), 4 and 9(2) on the grounds that they are inconsistent with the hierarchy of laws established by NC 2, 43, 44, 104, 146 and 147. Just before the hearing of this matter, the ANC withdrew its objection to the clauses while the government conceded that the clauses were capable of an interpretation consistent with the NC and that this interpretation should be given to them. There is no merit in these objections and the concession and withdrawal were rightly made, as we explain below.

[30] The clauses provide as follows:

> "3(2) The legislative and executive powers and functions of the Western Cape recorded in this Constitution emanate exclusively from the national Constitution.
>
> . . . .
>
> 4 This Constitution applies to the Western Cape. Subject to the national Constitution, it is the highest law in the Western Cape, and the obligations imposed by it must be performed diligently and without delay.
>
> . . . .

> 9(2) The Provincial Parliament is bound only by the national Constitution and this Constitution, and must act in accordance with, and within the limits imposed by, these Constitutions."

The objection was that these clauses imply that the provincial constitution will be second only to the NC and will prevail over all national legislation. This, went the argument, is in breach of the NC which stipulates that in certain circumstances the provisions of national legislation will prevail over the provisions of provincial constitutions. In our view, this interpretation of the clauses is not correct.

[31] WCC 3(2) provides that the legislative and executive powers of the province "emanate exclusively" from the NC. This provision is clearly accurate. Provincial legislatures and executives are creatures of the NC. No power may be conferred upon them unless in accordance with that Constitution. Although the primary source of legislative and executive powers is the NC, the NC contemplates that national legislation may assign powers to a province (NT 104(1)(b)(iii)). However should national legislation assign such powers, the origin of the power still lies in the NC. Nothing in WCC 3(2) contradicts this.

[32] WCC 4 states that the WCC will be the highest law in the Western Cape "[s]ubject to the national Constitution". Once again the objection was that the clause was capable of

an interpretation which suggests a hierarchy of laws different to that provided for in the NC. We cannot accept this proposition. In *S v Marwane* 1982 (3) SA 717 (A), the Appellate Division had to consider the use of the phrase "subject to the provisions of this Constitution" in the constitution of Bophuthatswana. Miller JA[60] held that

> "The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one" (At 747H-748A).

60 Speaking on behalf of the majority, Rumpff CJ, Rabie, Joubert and Cillié JJA dissenting.

That approach to the phrase was unanimously adopted by this Court (per Trengove AJ) in *Zantsi v Council of State, Ciskei & Others.*[61]

[33] As WCC 4 stipulates that the WCC is the highest law in the Western Cape, "[s]ubject to the national Constitution", it must be interpreted to mean that it is the highest law in the Western Cape subject to the provisions of the NC. Those provisions include the hierarchy of laws established by the NC. That hierarchy is complex and is to be found in a series of provisions in the NC, particularly NC 146-150. NC 147 specifically provides that in certain circumstances national legislation will prevail over provisions of provincial constitutions. By stating that the provisions of the provincial constitution are subject to the NC, the WCC adopts that hierarchy. The clause cannot therefore be read to establish a hierarchy of laws different to that provided for in the NC. Taking this approach to WCC 4, it becomes plain that it is not in conflict with the hierarchy of laws adopted by the Constitution. It is not necessary for the purposes of certification to give a precise interpretation to the phrase "the highest law in the Western Cape". That phrase would, of course, have to be read together with NC 104(3) which provides that

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61 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 27. See also *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 8.

> "A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution."

[34] The objection to WCC 9(2) was that it contradicted the hierarchy of legislation provided for in the NC. Once again, for the reasons given in the preceding paragraphs it is our view that the objection cannot succeed. The ANC, in particular, argued that the cumulative effect of the provisions in WCC 3(2), 4 and 9(2) was to mislead a member of the public as to the source and extent of legislative and executive power in the Western Cape. In our view this argument is misconceived. Whether the provisions of the WCC are "misleading" in the sense contended for, is not a question relevant to certification. The Court must decide whether upon a proper construction they comply with the provisions of NC 144(2). We are not called upon to decide whether the provisions could have been more felicitously drafted. In any event, in our view, any person reading the first three clauses of the WCC would become aware of the fact that the WCC is subordinate to the NC. These clauses read as follows:

> "1. The Western Cape is a Province of the Republic of South Africa as established by the Constitution of the Republic of South Africa.
>
> 2. The boundaries of the Western Cape are determined by the national Constitution.
>
> 3.1 This Constitution is adopted for the Western Cape in terms of the national

> Constitution, the supreme law of the Republic of South Africa."

Any reader of the WCC is therefore immediately informed that it is subordinate to the NC, and all its provisions need to be read in the context of the NC. There is therefore no merit in the contention that WCC 3(2), 4 and 9(2) are "misleading".

WCC 6 : Provincial Symbols and Honours

[35] WCC 6(1) provides that

> "A provincial Act may provide for —
> (a) provincial symbols;
> (b) the conferral of provincial honours."

The ANC objects to this provision as being inconsistent with NC 84(2)(k) in that the conferral of honours is a function reserved for the President. NC 84 sets out those powers of the President which historically are the residue of the royal prerogative.[62] In NC 127 the powers and functions of premiers are set out. They contain some, but not all, of the powers conferred on the President in NC 84. The conferral of honours is one of those powers not granted to a premier by NC 127. It was also pointed out that the conferral of honours and the provision of provincial symbols are not included in the powers contained

62 See *The President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at para 8.

in schs 4 or 5.

[36] We have already referred to the power granted to the provinces by NC 104(1) to pass a provincial constitution and have said that it authorises the inclusion in such a constitution of provisions appropriate to a provincial constitution and not inconsistent with the provisions of the NC. Conceptually the conferral of provincial symbols and honours does not impinge upon any competence of the other two levels of government and is therefore wholly unobjectionable in principle. Nor is there anything in the NC expressly prohibiting a province from conferring its own honours.[63] It is also not inconsistent with the President's power to confer honours on behalf of the national government.[64] There is therefore no reason for refusing to certify that the provisions of WCC 6(1) comply with the relevant provisions of the NC.[65]

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63 All references in the NC are to national symbols and honours.

64 Municipal authorities in South Africa have for many years conferred civic honours on South Africans and foreigners. They have done so under powers granted to them by the respective consolidated provincial ordinances dealing with local government. In the Cape, for example, section 186(9) of Municipal Ordinance 20 of 1974 makes such provision.

65 We would point out, however, that a provincial Act which makes provision for provincial symbols would require, for its validity, to comply with the relevant provisions of national legislation, such as the Heraldry Act 18 of 1962, which expressly applies to national, provincial and local levels of government. See s 7 of the Act and the

References to "Provincial Parliament"

definition of "official" in s 1.

[37] In the WCC the provincial legislature of the Western Cape is called the "Provincial Parliament". The ANC objects to the use of the term and submits that, by implication, it is inconsistent with the provisions of the NC. We were referred to the use throughout the NC of the words "provincial legislature" to describe the body in which the legislative authority of a province is vested. Furthermore the word "Parliament" is used in the NC exclusively with regard to the national legislature, that is, the National Assembly and the National Council of Provinces. Reference was also made to the judgment of this Court in *Zantsi v Council of State, Ciskei and Others*[66] where the following was said:

> "The word "Parliament" was initially defined in . . . [the] Interpretation Acts as meaning "the Parliament of the Union of South Africa" . . . Thus since the establishment of the Union of South Africa in 1910, the expression "Act of Parliament" has consistently been used in our statute law with reference to legislation passed by the South African Parliament - by the Parliament of the Union of South Africa during the period 1910 - 1961, and from then onwards, by the Parliament of the Republic of South Africa. The expression has never been used in our statute law with reference to any laws passed or made by the Parliaments or Legislatures of any of the former TBVC States."

66 Above n 61 at para 36.

The *Zantsi* case is distinguishable. There, in contradistinction to the present case, we were not concerned with the different terms to be used for describing legislation of the national legislature and that of provincial legislatures respectively. The point at issue in the passage cited was whether the reference to an "Act of Parliament" in IC 101(3)(c) referred only to Acts of the new parliament created by the IC,[67] or whether it also included legislation passed by the former TBVC states and the pre-constitutional South African parliament. Indeed, as is apparent from the last sentence of the quotation the words "Parliaments" and "Legislatures" were used interchangeably in regard to the legislative authority of the former TBVC states. Nothing that was said in that case can therefore have a bearing on the question with which we are now concerned.

[38] It is also submitted on behalf of the ANC that the use of the name "Provincial Parliament" is both inappropriate and an attempt to confer on the province a status, not

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67 IC 101(3)(c) provided as follows:

"Subject to this Constitution, a provincial or local division of the Supreme Court shall, within its area of jurisdiction, have jurisdiction in respect of the following additional matters, namely—

. . . .

(c) any inquiry into the constitutionality of any law applicable within its area of jurisdiction, other than an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution".

only greater than that conferred by the NC, but in conflict with the unitary state established by the NC. In the same context it was submitted that the name would cause confusion in general and in particular for the people of the Western Cape.

[39] Again, there is no express inconsistency. The NC does not specify the name by which provincial legislatures are to be known. In our opinion the name "Provincial Parliament" distinguishes the provincial legislature from the national parliament and even if the intention is thereby to confer additional status upon the provincial legislature, we cannot find that there is the kind of inconsistency that would warrant our withholding certification of the WCC. The difference is one of form and not substance.[68] We agree with the submission of counsel for the Speaker that it does not fall within our jurisdiction under NC 144 to withhold certification because a provision in a provincial constitution is inappropriate. The sole criterion for this Court is compliance with the relevant provisions of the NC.

WCC 10: Amendment of the Provincial Constitution

[40] The ANC also raised objections to WCC 10. This clause provides for special procedures for the amendment of the provincial constitution which mirror those provided for the amendment of the NC by NC 74. The NC does not provide for special procedures

[68] An objection was also raised to the use of the terms "Provincial Ministers" and "Provincial Cabinet" in

for the amendment of provincial constitutions but only establishes a special majority for such amendment. In our view, the addition of special procedures to the requirement of special majorities falls within the province's constitution-making power and does not give rise to an inconsistency with the NC.

WCC 12: Signing, Safekeeping, Publication and Commencement of a Provincial Constitution

[41] The ANC initially also objected to WCC 12, although they abandoned this objection shortly before the hearing of the matter. WCC 12 provides for the signing, safekeeping, publication and commencement of the provincial constitution. It repeats the provisions of NC 145, save that it requires additional publication of the provincial constitution in the official gazette of the province. In our view, it falls impliedly within the province's constitution-making power under NC 104(1)(a) to do this and it does not amount to an inconsistency with the NC.

WCC 14, 15(4) and Schedule 3, Items 4(3) and 9(3): Electoral Systems

[42] The ANC and the national government object to these clauses, which require the

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WCC chap 3, but was not pressed; the difference is once again one of form and not of substance.

provincial legislature to enact legislation prescribing a particular electoral system for the province, on the grounds that they are inconsistent with the NC. The clauses provide as follows:

> "14 **Election of Provincial Parliament**
>
> The Provincial Parliament consists of persons elected as members in terms of an electoral system that —
>
> (a) is prescribed by provincial legislation;
>
> (b) is based on the Province's segment of the national common voters roll;
>
> (c) provides for a minimum voting age of 18 years;
>
> (d) is based predominantly on the representation of geographic multi-member constituencies; and
>
> (e) results, in general, in proportional representation.
>
> 15. **Membership**
>
> . . . .
>
> (4) Vacancies in the Provincial Parliament must be filled in terms of provincial legislation.
>
> **SCHEDULE 3: TRANSITIONAL ARRANGEMENTS**
>
> 4. **Elections of the Provincial Parliament**
>
> . . . .
>
> (3) Subject to subitem (1) and to subitem 9(3):
>
> (a) the national legislation envisaged in section 105(1)(a) of the national Constitution applies to any further elections of the Provincial Parliament, until the provincial legislation envisaged in section 14 of this Constitution is passed; and
>
> (b) the national legislation envisaged in section 106(4) of the national Constitution applies to the filling of vacancies in the Provincial

Parliament, and the supplementation, review and use of party lists for the filling of vacancies, until the provincial legislation envisaged in section 15(4) of this Constitution is passed.

9. **Enactment of legislation required by this Constitution**

. . . .

(3) Provincial legislation envisaged in sections 14 and 15(4) of this Constitution must be enacted within three years of the date of the first election of the Provincial Parliament under this Constitution."

WCC sch 3 item 4(1) provides that the first election of the provincial parliament under the WCC and the filling of any vacancies that occur before the second election will take place in terms of IC sch 2 as amended by annexure A to sch 6 to the NC. Consequently the provincial legislation required by WCC 14(1)(a) and sch 3 item 9(3) will govern only the second and subsequent elections of the provincial legislature and the filling of vacancies that occur after the second election.

[43] The relevant provisions of the NC are the following:

"105. **Composition and election of provincial legislatures**

(1) A provincial legislature consists of women and men elected as members in terms of an electoral system that -

(a) is prescribed by national legislation;

(b) is based on that province's segment of the national common voters roll;

(c) provides for a minimum voting age of 18 years; and

(d) results, in general, in proportional representation.

106. **Membership**

. . . .

(4) Vacancies in a provincial legislature must be filled in terms of national legislation.

Schedule 6, item 11: **Elections of provincial legislatures**

(1) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies —

(a) to the first election of a provincial legislature under the new Constitution;

(b) to the loss of membership of a legislature in circumstances other than those provided for in section 106(3) of the new Constitution; and

(c) to the filling of vacancies in a legislature, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the legislature under the new Constitution.

(2) Section 106(4) of the new Constitution is suspended in respect of a provincial legislature until the second election of the legislature under the new Constitution."

The provisions of the WCC differ from the provisions contained in the NC in two respects. First, WCC 14(d) stipulates that the electoral system be "based predominantly on the representation of geographic multi-member constituencies". This is in conflict with the list system provided for in NC sch 6, item 11 read with IC sch 2 items 10-14.[69] Secondly, WCC 14(a) provides that provincial legislation must prescribe an electoral

[69] No conflict may actually arise, as WCC sch 3 item 4(1)(a) contemplates that WCC 14(d) will come into operation only when the second election for a provincial parliament takes place. The equivalent provisions in the NC (NC sch 6, item 11 read with IC sch 2, items 10-14) govern only the first election after the NC comes into operation. Unless there is a vote of no confidence in either the Western Cape premier or the President, it is probable that the provisions in the WCC would (if certified) only come into force when the equivalent provisions in the NC lapsed.

system for the province in contrast to NC 105(1)(a) which provides that national legislation must prescribe the electoral system.[70]

[44] Counsel for the Speaker acknowledged that these differences between the respective provisions of the NC and the WCC constituted inconsistencies within the meaning of NC 143(1), but argued that they fell within the scope of permissible deviation allowed by NC 143(1)(a). In particular, it was argued, the provision for a different form of proportional representation (a number of geographic multi-member constituencies as opposed to a single list system) and the provision that the electoral system is to be prescribed by the provincial and not the national legislature, were "legislative structures" as contemplated by NC 143(1)(a).

[70] NC 147 has no application here as it relates only to conflicts between national legislation and provincial constitutions. The conflict here is between provincial legislation and national legislation.

[45] The first question then is whether a system for the election of the members of a provincial legislature is a "provincial legislative structure" within the meaning of NC 143(1)(a). An electoral system is simply a way to convert large numbers of votes won by parties or candidates into much smaller numbers of seats in an elected body.[71] The choice of electoral system has a material bearing on the degree of correspondence between votes cast and seats won.[72] The choice made in the NC is straightforward: NC sch 6, read with IC sch 2, stipulates a list system of proportional representation for both national and provincial elections and seat allocation mechanisms designed to promote optimal

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71 See, for example, A Reynolds and B Reilly (eds.) *The International IDEA Handbook of Electoral System Design* (Handbook Series 1/97, Stockholm 1997) at para 13. As the Handbook points out in paras 9 and 33, there are infinite combinations and permutations. These include the "first past the post" system; majority systems; and a wide variety of proportional representation systems. A first past the post system was formerly used in South African elections and is common in the Anglophone world. France has a majority system and proportional representation systems are used, for instance, in Scandinavia, Western Europe, Israel and New Zealand.

72 For a systematic overview of the topic see, for example, R Taagepera and MS Shugart *Seats and Votes: The Effects and Determinants of Electoral Systems* (Yale UP, New Haven 1989).

proportionality.[73] WCC 14(d) seeks to establish a different form of proportional representation for its legislature based on a division of the province into geographic multi-member constituencies.

[46] Therefore, whereas the NC requires the province to be regarded as a single multi-member constituency, that is, an outright list system of proportional representation with a specific seat allocation method, the WCC envisages a system which is inconsistent with that prescribed by the NC.

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[73] At the national level the provinces in effect constitute nine multi-member constituencies, the number of representatives for each having been determined in accordance with estimated population figures. One half of the 400 MPs are elected on provincial lists and the other half on national lists so as to restore overall proportionality. For provincial elections each province forms a single multi-member constituency. The number of members in each provincial legislature was also determined in general by reference to population estimates. There is no threshold for representation and the allocation method is the Droop quota with largest remainders. For an explanation of these terms, see the glossary to the Handbook mentioned in n 71 above.

[47] Counsel for the Speaker argued that an electoral system was part of or integrally related to the structure of a legislative body because it determined the way in which votes cast were translated into seats in the legislative body. Therefore, so it was contended, the permissive power to "provide for . . . provincial legislative structures . . . that differ from those provided for in this Chapter",[74] extended to the provision of a different electoral system for a province. There are several reasons why the argument cannot be sustained.

[48] It is true that an electoral system determines the selection or identification of representatives to function in the one or more elected elements constituting a legislature. It is also true that different electoral systems have a direct bearing on such selection or identification of legislators elected to the various elements constituting a legislature. But this has no effect at all on the constituent elements of the legislative structure. Their nature and number remain exactly the same. There are other factors, such as the level of a threshold for party participation in the allocation of seats, which also affect the number of representatives of the various political parties who are elected to the constituent elements of a legislature. But no such factor can have any effect on the nature or number of such constituent elements. When NC 143(1)(a) permits a provincial constitution to provide for

74 NC chap 6.

a provincial legislative structure different from that provided for in NC chap 6, it permits no more than a difference regarding the nature and number of the elements constituting the legislative structure. An electoral system not only does not constitute one of these elements but also has no effect on the nature or the number of such elements. It is accordingly not encompassed within the permissive provisions of NC 143(1)(a).

[49] The basic premise of the contention advanced on behalf of the Speaker is flawed. The fact that the calculation of the numbers of representatives of parties in a legislative structure is determined by the electoral system adopted, simply cannot mean that the electoral system is or becomes part of that legislative structure. The test to determine whether a particular provision falls within the scope of NC 143(1)(a) is not whether the regulation of that matter can have some bearing on the representation in a legislative structure, but whether it bears on the structure itself. In this regard we reiterate what we said in paragraphs 16 to 18 above. Applying this test, it is clear that an electoral system is not an aspect or part of a legislative structure. It is equally clear that an electoral system is not an aspect or part of a legislative procedure or an executive structure or procedure. We therefore conclude that WCC 14(a) and (d), WCC 15(4), WCC sch 3, items 4(3) and 9(3) are inconsistent with the provisions of the NC and are not saved by NC 143(1)(a).

[50] A further objection related to the provision in WCC 14 that provincial legislation

may establish an electoral system. This, it was argued, was in breach of NC 143(1) in that the provision for structures or procedures different to that provided for in NC chap 6 may only be done within the provincial constitution itself. As an electoral system is not a legislative or executive structure or procedure, it is not strictly necessary to deal with this objection. However, for the reasons set out in paragraph 19 above, the objection is well-founded: what the WCC leaves to future provincial legislation is at this stage inchoate and therefore not certifiable.

WCC 13: Number of Members of a Provincial Legislature

[51] The ANC and the national government also object to this clause, which provides that the provincial parliament shall consist of 42 members. The basis of the objection was that it was inconsistent with NC 105(2) which provides that

> "A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation."

The objectors also argued that because the NC provides that national legislation must prescribe the formula in terms of which the number of seats of provincial legislatures will be calculated, it was not competent for a provincial legislature to regulate this matter in its constitution. Neither argument is valid. The number of members of a legislature is clearly a part or aspect of a legislative structure or procedure, in respect of which NC

143(1)(a) permits a provincial constitution to provide something different.

WCC 16; 19(3); 20(2); 38(2); 39; 41(3); 45 and Schedule 1: Judge President

[52] Under NC 110(1), the first sitting of a provincial legislature after an election must take place at a time and on a date determined by a judge designated by the President of the Constitutional Court. WCC 19(3) provides that the first sitting of the provincial parliament is to take place at a time and on a date determined by the Judge President of the High Court of the Western Cape or a judge designated by him or her.

[53] Under NC 111(2), a judge designated by the President of the Constitutional Court must preside over the election of a Speaker of a provincial legislature. WCC 20(2) provides that the Judge President of the High Court of the Western Cape, or a judge designated by the Judge President, must preside over the election of a Speaker. Under NC 128(2), a judge designated by the President of the Constitutional Court must preside over the election of a provincial premier. WCC 38(2) provides that the Judge President of the High Court in the Western Cape or a judge designated by him or her is to preside at such election of the premier of the Western Cape.

[54] Under NC 129 a premier must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with NC sch 2. A

similar provision in respect of acting premiers is contained in NC 131(3). Under NC 135, members of an executive council of a province are obliged to swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with NC sch 2. A similar provision in respect of members of a provincial legislature is contained in NC 107. In NC sch 2, provision is made for a premier, acting premier, members of provincial executive councils and members of provincial legislatures to swear or affirm in the terms set out therein before the President of the Constitutional Court or a judge designated by the President of the Constitutional Court.

[55] According to WCC 39 the premier must assume office by swearing or affirming faithfulness to the Republic and the Western Cape and obedience to the NC and the WCC in accordance with WCC sch 1. WCC 41(3) makes similar provision in respect of an acting premier. So, too, WCC 45 in respect of provincial ministers and WCC 16 in respect of members of the provincial parliament. In WCC sch 1 provision is made for a premier, acting premier, provincial ministers and members of the provincial parliament to swear or affirm before the Judge President of the High Court of the Western Cape or a judge designated by him or her.

[56] These provisions of the NC are clearly inconsistent with the corresponding provisions of the WCC. Counsel for the Speaker argued that the inconsistency concerns

legislative or executive procedure and is thus sanctioned by NC 143(1). There is, however, an antecedent question, and that is whether a provincial legislature, in exercising its constitution-making power, has jurisdiction to remove from the President of the Constitutional Court a duty imposed on him or her by the NC and to impose that duty on a Judge President. Neither the President of the Constitutional Court nor Judges President are functionaries of any province. Members of the judiciary are independent and subject only to the Constitution and the law. A province does not have the power to impose duties on a Judge President, or to relieve the President of the Constitutional Court of duties imposed on him or her by the NC. It follows that, on this ground, these provisions of the WCC cannot be certified as being in compliance with NC 143. It is unnecessary, therefore, to consider whether the administration of an oath is a "legislative" or "executive" procedure within the meaning of NC 143(1).

[57] Before leaving the subject of oaths and affirmations, reference should be made to an objection initially made by the ANC to the oath and affirmation contained in the WCC having reference not only to the Republic of South Africa and the NC but also to the Western Cape and the WCC. That objection was withdrawn prior to the hearing, and correctly so. The requirement of swearing or affirming faithfulness to the Western Cape and the WCC is in no way inconsistent with any provision of the NC or with the values in section 1 or chapter 3 of the NC.

WCC 24 : Leader of the Opposition

[58] NC 116(2) provides that the rules and orders of a provincial legislature must provide amongst other matters for

> "(d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition."

WCC 24 provides that rules and orders of the provincial parliament must provide for the recognition of the leader of the opposition in the provincial parliament, but it does not repeat the requirement contained in NC 116(2) that the leader of the opposition shall be the leader of the largest opposition party. In our view, the position of leader of the opposition is a legislative structure and therefore it is a matter, in terms of NC 143(1)(a), upon which the provincial constitution may differ from the NC. Although the extent of the difference between the NC and the WCC is not spelt out in the WCC itself, the concerns expressed in paragraph 19 of this judgment are not applicable to WCC 24. The provincial parliament's rules could not, without being unlawful or unconstitutional, regulate the recognition of the leader of the opposition in a manner which would result in its ceasing to be a legislative structure, or in its non-compliance with the provisions of NC 143(2). In the circumstances, the WCC has effectively "provided for" a legislative structure in WCC 24, and the fact that the structure may turn out to be inconsistent with

NC 116(2) is not relevant. Such inconsistency is permitted by NC 143. In our view, therefore, there is no merit in this objection.

WCC 42 : Composition of the Provincial Cabinet

[59] In its written and oral argument, the ANC objected to WCC 42 (read with annexure A), which permits the appointment of a total of 14 members to the provincial cabinet, arguing that it is inconsistent with item 12(2) of sch 6 to the NC,[75] which when read with item 1 of annexure C thereto,[76] expressly limits the number to not more than 10 members. In summary, WCC 42 provides that the provincial cabinet shall consist of the premier and no fewer than five and no more than ten provincial ministers appointed by the premier from among the members of the provincial parliament. WCC 83, however, provides that WCC sch 3 applies to the transition of the Western Cape to a new constitutional order.[77] During such period of transition, and possibly afterwards, such schedule would permit the appointment by the premier of up to four additional members of the provincial cabinet (aggregating up to 14), including two members appointed from outside of the provincial parliament.[78]

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75 Item 12(2) of sch 6 to the NC provides:

> "Until the Premier elected after the first election of a province's legislature under the new Constitution assumes office, *or the province enacts its constitution*, whichever occurs first, sections 132 and 136 of the new Constitution must be regarded to read as set out in Annexure C to this Schedule." (Our emphasis)

76 Item 1 of annexure C to sch 6 of the NC provides, inter alia, that NC 132 is deemed to be read as follows:

"The Executive Council of a province consists of the Premier and not more than 10 members appointed by the Premier in accordance with this section."

77 Section 8 of sch 3 to the WCC provides:

"(1) Subject to sub-item (2),

(a) anyone who is the Premier or a member of the Executive Council when this Constitution takes effect, continues in and holds office in terms of this Constitution as the Premier or a Provincial Minister, as the case may be; and
(b) the Provincial Parliament may, at its meeting to elect a Premier after its first and second election in terms of this Constitution, adopt a resolution by a supporting vote of at least 60 per cent of its members, that for the duration of the term of that Provincial Parliament sections 42 and 43 of this Constitution must be regarded to read as set out in Annexure A to this Schedule, with or without section 42(1)(b) and (7) as set out in Annexure A to this Schedule: Provided that the Speaker may cast a deliberative vote on the resolution.

(2) *Until 30 April 1999, sections 42 and 43 of this Constitution must be regarded to read as set out in Annexure A to this Schedule*." (Our emphasis)

78 Clause 1 of annexure A to sch 3 provides that WCC 42(1) is deemed to read as follows:

[60] The net effect of these provisions read in their entirety is that until 30 April 1999, when the Government of Provincial Unity comes to an end and fresh elections for the provincial parliament are held, the provincial cabinet will consist of two groups of persons. The first group is made up of ten provincial ministers drawn from members of the provincial parliament and appointed by the premier in terms of the principles applicable to a government of provincial unity as stipulated for all provinces in the NC. The second is made up of a maximum of four persons appointed by the premier to specific portfolios determined by him or her; of which, two need not be members of the provincial

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"The Provincial Cabinet consists of the Premier and:

(a) 10 Provincial Ministers who are members of the Provincial Parliament and appointed in terms of subsections (2) to (6); and
(b) *a maximum of four Provincial Ministers appointed in terms of subsection (7), of whom no more than two may not be members of the Provincial Parliament, provided the Premier deems the appointment of such Provincial Ministers expedient.*" (Our emphasis)

parliament.

[61] In our view, the objection by the ANC against these provisions is misconceived. Item 12(2) of sch 6 to the NC,[79] provides that until the premier assumes office after the first election in the province or *until the province enacts its own constitution,* NC 132 and 136 shall be deemed to read as set out in annexure C. The provisions of NC sch 6 therefore were expressly not intended to supersede the provisions of a provincial constitution. This is not surprising as the matters regulated by NC 132 and 136 and item 1 of annexure C to sch 6 clearly concern executive structures as contemplated by NC 143(1)(a). That section expressly authorizes provincial executive structures that differ from those contained in NC chap 6. An enlarged provincial cabinet falls squarely within the concept of executive structures, and is thereby sanctioned by NC 143(1)(a).

[62] The ANC also contended that even if the provisions were concerned with executive structures, they were nevertheless in breach of NC 143(2)(a) in that the appointment of two members to the provincial cabinet who may not be members of the

79 Above n 75.

provincial parliament runs counter to the values set forth in NC 1(d).[80] We cannot agree that the presence of two unelected members in a 14-member provincial cabinet is inconsistent with the principles of democratic governance entrenched in NC 1(d).

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80 Section 1(d) of the NC provides for the following values:

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

[63] In the *CJ1* case,[81] this Court considered whether requiring members of the executive also to be members of the legislature undercut the democratic order by violating the constitutional principle of a separation of powers.[82] We answered in the negative, stating:

> "There 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."[83]

We also noted that the constitutional principle requires that

> "there be a separation of powers between the Legislature, Executive and Judiciary. It does not prescribe what form that separation should take."[84]

In other words, despite the assertion of the ANC to the contrary, the doctrine is

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81 Above n 7.

82 Id at paras 106-113.

83 Id at para 108.

84 Id at para 113.

sufficiently broad to permit not only interdependence between the executive and legislature but also strict independence as in the democracies of the United States of America, France and the Netherlands.[85]

WCC 46(3): Cabinet Members Undertaking Paid Work

85 Id at para 108.

[64] WCC 46(2)(a), in dealing with conduct of members of the provincial cabinet, restates the injunction in NC chap 6 against such members undertaking any other paid work.[86] However, WCC 46(3) goes on to provide that a provincial Act must define paid work for the purpose of the clause. Although no specific objection was lodged against this latter provision, the question must be resolved whether or not it constitutes another bar to certification.

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86 NC 136 reads as follows:

> "(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.
> (2) Members of the Executive Council of a province may not -
> (a) undertake any other paid work;
> (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
> (c) use their position or any information entrusted to them, to enrich themselves or

[65] NC 136 relates to the conduct of members of provincial executive councils. It expressly provides for national legislation to provide a code of ethics. However, it then goes on to provide, inter alia, for a complete prohibition on members of executive councils undertaking any other paid work. The ethical conduct of a provincial MEC is patently not a provincial "executive structure". Can it be said to be a provincial "executive procedure"? Providing for "executive procedures" means to provide for procedures regulating the functioning of the executive as executive; the phrase is not naturally extended to prohibitions regarding private activities of members of the executive. It follows that any prohibition regarding paid work does not fall under NC 143(1)(a). WCC 46(2)(a) can therefore be certified, only if it is not inconsistent with the provisions of the NC.

[66] In our opinion only one meaning can be ascribed to the words "paid work". If there should be a dispute concerning that meaning then it would be for the courts to resolve it. The NC does not intend that the provinces can determine what constitutes "paid work". One cannot have a situation where each province (whether in its

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improperly benefit any other person."

constitution or by provincial legislation) defines different meanings for "paid work". That would be inconsistent with the provisions of NC 136(2). It follows that the provisions of WCC 46(2)(a) are not certifiable.

WCC 61(2) : Treasury

[67] WCC 61(2) provides that the provincial treasury may under certain specified circumstances stop the transfer of funds to a provincial organ of state. The objection by the ANC, which was subsequently withdrawn and not pursued in oral argument, was on the basis that it was inconsistent with the NC in that (a) it confers draconian powers on the provincial treasury which might be abused, in breach of the values set out in NC 1 and of the fundamental right of just administration as set out in NC 33; (b) it omits to provide the safeguards which are to be found in NC 216(3), (4) and (5); and (c) it purports to confer a power which is beyond the competence of the provincial legislature in terms of NC 104(1).

[68] We agree that the objection is not justified. The provision must be read as a whole and in context. WCC 61(1) provides for the establishment of a provincial treasury and for measures to ensure transparency, accountability and public control in accordance with national legislation. This is a corollary of the power flowing from NC 226(1) which establishes a Provincial Revenue Fund for each province, into which all money received

by the provincial government, except that which is excluded by an Act of parliament, must be paid. The establishment of a provincial treasury, as described in WCC 61(2), therefore falls within the scope of the legislative or executive authority of the province. Within the provincial context, such fund would be administered by the province for purposes within and in connection with the provincial competences.

[69] The complaint that the power conferred by WCC 61(2) is draconian is likewise not justified. It is a counterpart of and identical to that prescribed for the national treasury in NC 216(2). Given the fact that the operation of the measures would, in terms of WCC 61(1), be exercised in accordance with national legislation and that the exercise of the power would be objectively justiciable, we do not agree that the provision is in violation of the values set out in NC 1 or the right to just administration. It is therefore not inconsistent with NC 216.

WCC 68(1) : Policing

[70] The basis of the ANC's written objection was that WCC 68(1) was inconsistent with the NC inasmuch as it constituted a usurpation of power which should be exercised by the NC and national legislation. Although the objection was withdrawn, it is nevertheless necessary for the Court to deal with it.

[71] In terms of WCC 68(1), the provincial cabinet is responsible for policing functions vested in it by the provincial constitution or provincial legislation assigned to it in terms of national legislation, and allocated to it in the national policing policy. WCC 67(1) provides that the provincial parliament may pass legislation necessary to carry out certain functions which are listed in WCC 66(1) and which are merely a repetition of NC 206(3)(a) to (e). In terms of NC sch 4, a province has legislative competence with regard to policing "to the extent that the provisions of chapter 11 of the Constitution confer upon the provincial legislatures legislative competence".

[72] It is clear therefore that the provision sought to be impugned deals with the exercise of a power which the province already has in terms of the NC. In our view, there is no inconsistency with the NC and the objection was therefore correctly withdrawn.

WCC 70 : Provincial Cultural Council

[73] WCC 70 provides that

> "Provincial legislation must provide for the establishment and reasonable funding, within the Province's available resources, of a cultural council or councils for a community or communities in the Western Cape, sharing a common cultural and language heritage."

It was contended by the ANC that the provision was inconsistent with NC 185 and that provincial legislation emanating from it would fall foul of NC 146. According to the

ANC, NC 185 contemplates the establishment of a single national commission whose powers will be regulated by national legislation. This, it was claimed, precluded the establishment of cultural councils at provincial level through provincial legislation.

[74] The relevant NC provisions are as follows:

> "**Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities**
>
> **Functions of Commission**
>
> 185. (1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are -
>
> (a) . . . .
>
> (b) . . . .
>
> (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa."

[75] That a province is competent to pass legislation on cultural matters is clear. There is a concurrent national and provincial legislative competence in terms of NC sch 4 and an exclusive provincial legislative competence in terms of NC sch 5. The establishment, through provincial legislation of a provincial council, is therefore not inconsistent with the provision sanctioning the establishment of a national council.

[76] There is likewise no merit in the objection based on NC 146, a provision which

deals with conflicts between national and provincial legislation. NC 146 clearly contemplates the concurrent existence of both national and provincial legislation on a matter falling within an NC sch 4 functional area and provides a procedure to resolve the conflict between the two pieces of legislation. On the other hand, the enquiry in certification proceedings relates to inconsistency between provisions of the national and provincial constitutions.

WCC Chapter 10 : Directive Principles of Provincial Policy

[77] WCC chap 10, headed "Directive Principles of Provincial Policy", was objected to by the ANC on the ground that uncertainty and confusion would flow from the fact that the directive principles are contained in a peremptory clause that declares that the Western Cape government must adopt and implement policies aimed at achieving fifteen specified goals, while the next clause provides that such principles are not legally enforceable but simply guide the Western Cape government in making and applying laws. We do not agree with this objection. WCC chap 10 contains only two clauses, WCC 81 and 82, and it is obvious that they are meant to be read together. When so read, WCC chap 10 is neither contradictory nor designed to create uncertainty or confusion. WCC 82 does nothing more than clearly describe the legal status of the guiding principles of provincial policy found in WCC 81. They are stated to be mere guiding principles relating to and not the source of enforceable legal obligations which have to be within the

competence of the provincial parliament as set out in NC schs 4 and 5 . Similar non-justiciable directive principles of state policy are found in the constitutions of India,[87] Ireland[88] and Namibia.[89]

[78] It is worth considering that in the *KZN* case we stated that "[t]here can in principle be no objection to a province embodying a bill of rights in its constitution", provided that it did not purport to intrude on the field covered by the Bill of Rights contained in the NC.[90] On similar and even stronger grounds, there can in principle be no objection to non-justiciable directive principles of provincial policy being contained in a provincial

87 See Part IV, Articles 36 to 50 of the Constitution of India.

88 See Article 45 of the Constitution of Ireland.

89 See chapter 11, Articles 95 to 101 of the Constitution of the Republic of Namibia.

90 Above n 8 at para 17.

constitution. If a bill of rights, a direct constraint on the legislative and executive organs of state, is permissible if it is consistent with the NC, then surely the limited constraint provided by non-enforceable directive principles fall within the competence of the drafters of the WCC.

[79] It is necessary however to consider whether or not specific items listed in those directive principles are compatible with the NC. In particular, the ANC objected to WCC 81(g) and 81(k) which stipulate that the Western Cape government should seek to achieve "the promotion of a market-orientated economy" and a "system of taxation which is fair, transparent and accommodates the capacity of people to pay".

[80] A number of functional areas listed in NC sch 4 relate to the regulation of aspects of the provincial economy, for example, consumer protection, industrial promotion, tourism, trade and agriculture. The only question is whether a province is entitled to have a policy which is directed at the achievement of a particular type of economy and to decide how its taxing powers, which emanate from the NC, should be exercised. What is clear is that these provisions must not be taken in isolation but must be read in conjunction with other relevant provisions of the WCC, including the other directive principles. WCC 59, to which no objection has been taken, deals substantively with the province's taxing powers. WCC 59(3), which is a mirror image of NC 228(2), states

> "The power of the Provincial Parliament to impose taxes, levies, duties and surcharges, as regulated by an Act of Parliament, may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour."

There is clear recognition of and deference to regulation by an Act of the national parliament as well as to national economic policies.

[81] We are of the view that the questions raised in the objection do not relate to inconsistency with the NC but rather to potential conflicts between national and provincial legislation, a matter which is regulated by NC 146. The objection can therefore not be sustained.

Application for a postponement

[82] It remains to deal with the unsuccessful attempt at intervention by a prospective objector that we mentioned at the outset.[91] In terms of the Constitutional Court Rules only political parties represented in the legislature of the province whose constitutional text is being submitted for certification expressly have a right of audience in such proceedings,[92] but directions can permit representations by others.[93] In the *KZN* case the

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91 Above n 5.

92 See rule 16(3) and (4), read with rule 12(5) of the Constitutional Court Rules, 1995.

Speaker concerned and the national government were invited to make representations and, although no-one else was entitled to be heard, written submissions on behalf of the King's Council of KZN were also considered. Here, again, the Speaker and the national government were invited to make an input and, had submissions of substance emanated from elsewhere, we would no doubt have given them due weight.

[83] In the present case, however, something materially different happened. Three court days before the date of the hearing - and without consulting the parties who were to be heard as of right or by special invitation - Ms Bastienne Klein, the Western Cape regional director of the Black Sash Trust, purportedly acting on behalf of the Trust, filed papers in support of an application for a postponement of the proceedings. The basis was that there had been insufficient time to study the WCC, it allegedly having been unavailable until shortly before, and that time was needed to decide whether or not to lodge any objections to certification of the WCC. From the tenor of the terse founding affidavit it is clear that Ms Klein was unaware of the Constitutional Court Rules governing participation and thought her organisation had audience as of right. The allegation by Ms Klein, that the application had been brought at the eleventh hour because copies of the WCC had not been timeously available for perusal by the general public,

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[93] However, because of the importance of constitution-making and the uniqueness of the certification process, when we dealt with the certification of the NC we also invited contributions from the Constitutional Assembly, the national government and the public at large. Annexure 3 to the *First Certification* judgment lists 84 private parties from whom representations were received and considered.

proved to be incorrect. Moreover, there was no indication that, given time, any new contention would be forthcoming. Even when urged in the course of argument to venture some tentative possibilities, counsel for the applicant remained reticent.

[84] By contrast, there was a great deal to be said for pressing on with the certification exercise. The date(s) for the hearing had long since been reserved, the Court was ready to proceed, extensive teams of legal and other representatives of the parties had gathered from far afield and were ready to debate their respective contentions in court. The cost and inconvenience to those parties, and the undesirability of holding over a decision on the validity of a provincial constitutional text longer than necessary were weighty factors against postponing the hearing. Counsel for the Speaker vigorously opposed the application and further submitted that the deponent to the founding affidavit should be ordered to pay costs personally because of her lack of authority. The other two parties, although opposing the application for a postponement, did not press for a costs order. In the result we had little difficulty in dismissing the application there and then.

[85] With regard to costs little need be said. Although the Speaker was put to some expense and bother to refute the allegations made by Ms Klein, and although some thirty minutes were taken up at the outset of the hearing to dispose of the application for a postponement, it really amounts to a minor hiccough. The costs wasted and the time

taken up were minimal; and although the application was procedurally defective and substantially unfounded, it was brought in good faith on a matter of manifest and lasting importance. In the circumstances we do not consider that any costs order would be appropriate.

Conclusion

[86] Although we have concluded that the WCC cannot be certified as it stands, it should be emphasised that we withhold certification on limited grounds of inconsistency only. They relate to the following clauses:

- WCC 14(a) and (d), WCC 15(4), and WCC sch 3, items 4(3) and 9(3) - electoral system;[94]
- WCC 16, WCC 19(3),WCC 20(2),WCC 38(2),WCC 39, WCC 41(3) and WCC 45, read with WCC sch 1 - administration of oaths of office;[95] and
- WCC 46(3) - cabinet ministers undertaking "paid work".[96]

The Order

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94 See paras 42-51 above.

95 See paras 53-8 above.

96 See paras 65-7 above.

THE COURT

[87] We are unable to and therefore do not certify that the whole of the constitutional text of the Constitution of the Western Cape, 1997 passed by the legislature of that province on 21 February 1997 complies with section 143 of the Constitution.

Chaskalson P

Langa DP

Ackermann J

Goldstone J

Kriegler J

Madala J

Mokgoro J

O'Regan J

Sachs J

For the Black Sash Trust:	B Leech and P Mtshanlana instructed by the Legal Resources Centre (Cape Town)
For the Speaker of the Western Cape Legislature:	J J Gauntlett SC and A M Breitenbach instructed by the State Attorney
For the Government of the Republic of South Africa:	G J Marcus SC, D M Davis, J Heunis, and B Tshabalala instructed by Cheadle Thompson & Haysom
For the ANC:	N Arendse instructed by E Moosa, Waglay & Petersen