CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/97

AFRICAN NATIONAL CONGRESS	First Appellant
JACOB GEDLEYIHLEKISA ZUMA	Second Appellant
versus	
MINISTER OF LOCAL GOVERNMENT AND HOUSING, KWAZULU-NATAL	First Respondent
MINISTER OF TRADITIONAL AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL	Second Respondent
CHAIRMAN OF HOUSE OF TRADITIONAL LEADERS	Third Respondent

Heard on: 7 November 1997

Decided on: 24 March 1998

JUDGMENT

O'REGAN J:

[1] This appeal against a judgment of Combrinck J sitting in the Natal High Court[1] raises the question of the proper interpretation and application of section 182 of the

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[1] That judgment was reported as *African National Congress and Another v Minister of Local Government and Housing and Others* 1997 (3) BCLR 295 (N).

Constitution of the Republic of South Africa, Act 200 of 1993 (the interim Constitution). That section provides as follows:

> "The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in Chapter 10, shall *ex officio* be entitled to be a member of that local government provided that he or she has been identified in a manner and according to guidelines prescribed by the President by proclamation in the Gazette after consultation with the Council of Traditional Leaders, if then in existence, or if not, with the Houses of Traditional Leaders which have then been established, and shall be eligible to be elected to any office of such local government."[2]

The appellants are aggrieved by Proclamation 54 of 1996 (the proclamation) issued by the first respondent, the Minister of Local Government and Housing for the province of KwaZulu-Natal. It establishes seven regional councils for the province and provides that traditional leaders, who in terms of section 182 of the interim Constitution are entitled to be ex officio members of regional councils, shall be members of such councils.

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[2] This provision in the interim Constitution originally read as follows:

> "The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in Chapter 10, shall *ex officio* be entitled to be a member of that local government, and shall be eligible to be elected to any office of such local government."

The provision was amended to read as reflected in the text of this judgment by section 8 of the Constitution of the Republic of South Africa Second Amendment Act, 44 of 1995 which came into force on 20 September 1995.

[2] Paragraph 10(2) of the proclamation, which is the focus of the appellants' complaint, provides as follows:

> "The members of each regional council shall until the First elections are held in terms of a law of a competent authority as contemplated by sections 174 and 245 of the Constitution comprise —
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> . . . .
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> (c) traditional leaders who *ex officio* are entitled to membership of the regional council in terms of section 182 of the Constitution and have been identified in accordance with the provisions of Presidential Proclamation No. R 109, 1995 dated 15 December 1995."

The appellants argue that traditional leaders are not entitled to be members of regional councils for two reasons. First, they argue that the regional councils established by the proclamation are not "local government referred to in Chapter 10" as contemplated by section 182 of the interim Constitution; and secondly, that regional councils are not *elected* local government as contemplated by section 182.

[3] In the appellants' view, therefore, the traditional leaders are not entitled ex officio to be members of regional councils in terms of section 182 of the interim Constitution. They accordingly seek, in addition to an order for costs, an order in the following terms:

(i) That Proclamation No. 54 of 1996, promulgated by the First Respondent in the Provincial Gazette of KwaZulu-Natal No. 5116 of 1 April 1996 is declared to be invalid and of no force and effect in law;

(ii) That a declaratory order be issued that:

(a) The regional councils established in terms of Proclamation No. 54 of 1996, promulgated by the First Respondent in the Provincial Gazette of KwaZulu-Natal No. 5116 of 1 April 1996, are not an elected local government for the purposes of section 182 of the Constitution of the Republic of South Africa Act 200 of 1993; and

(b) A traditional leader of any community observing a system of indigenous law and residing on land within the area of jurisdiction of any such regional council is not ex officio entitled to be a member of that regional council.

[4] It is necessary to set the provisions of section 182 in their historical context. The transition to constitutional democracy in South Africa required major changes not only to national government, but also to other spheres of government, including local government. The interim Constitution provided that all legislative and executive structures, other than local government bodies, existing when the interim Constitution came into force on 27 April 1994 were to be dissolved.[3] They were replaced by new structures established in terms of the interim Constitution itself. By contrast, the interim Constitution provided that local government structures were to persist beyond 27 April 1994 and were to be restructured in terms of the Local Government Transition Act, 209 of 1993 (the Transition Act). This Act was drafted and adopted at about the same time as

[3] Sections 234 - 235 of the interim Constitution.

the interim Constitution[4] and its sole purpose was to provide for the necessary transformation of local government.

[5] Historically, elected local government in South Africa has generally been confined to urban areas and divided along racial lines. Outside urban areas, the functions of local government have been performed by a range of different institutions. In those rural areas where traditional authorities existed, chiefs and headmen performed some of the functions of local government in terms of the Black Administration Act, 38 of 1927.

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[4] The interim Constitution was assented to by the State President on 25 January 1994 and was published in Government Gazette 15466 of 28 January 1994. The Transition Act was assented to by the State President on 20 January 1994 and was published in the Government Gazette on 2 February 1994. The interim Constitution did not come into force until 27 April 1994, but the Transition Act came into force on 2 February 1994.

[6] The transition from racially determined local government to democratic local government was therefore an extremely complex matter. The Transition Act provides for three phases for the transition.[5] The first phase, the pre-interim phase as it was called, ran from the commencement of the Transition Act on 2 February 1994 (ie before the interim Constitution came into force) until the date of the first democratic local government elections, which were held for most areas in November 1995 and for all areas by June 1996. During this phase, the Transition Act provided for the establishment of negotiating forums to negotiate the appointment of temporary councils which were to govern until democratic elections could be held. The second and current phase, called the interim phase, commenced with the first democratic elections which resulted in the establishment of transitional local government. These duly elected transitional local government bodies now exercise the powers of local government provided for them in the Transition Act. The Transition Act expressly recognises that during the interim phase, elected local government "may include the area of jurisdiction of a traditional authority".[6]

[7] The first two phases are transitional in the sense that they make provision for the transition from racially-based local government to non-racial local government. The Act contemplates a third phase which will take place at some time in the future. That phase

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5 See Parts IV, V and VI of the Transition Act. See also the judgment of Kriegler J in *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 178.

6 Section 8(1)(a) of the Transition Act.

will not be regulated by the Transition Act itself however but will be initiated by new legislation to be enacted by a competent authority which will regulate local government in the future.

[8] The interim Constitution recognised the special role of the Transition Act in regulating the transition of local government by providing in section 245(1) (in its original formulation) 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."[7]

As Kriegler J commented in *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paragraph 182:

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[7] It should be noted that until its repeal as a result of the entering into force of the Constitution of the Republic of South Africa, 1996 on 4 February 1997, section 245(1) was amended twice. It was first amended by section 12 of the Constitution of the Republic of South Africa Second Amendment Act, 44 of 1995 to read as follows:

> "Until 31 March 1996, local government shall not be restructured otherwise than in accordance with the Local Government Transition Act, 1993 (Act No 209 of 1993)."

This amendment came into force on 20 September 1995.
It was then amended a second time on 29 March 1996 by section 3 of the Constitution of the Republic of South Africa Amendment Act, 7 of 1996 so that it read as follows:

> "Local government shall not be restructured otherwise than in terms of the Local Government Transition Act, 1993 (Act No. 209 of 1993), in respect of any area in which members of a district council, a metropolitan substructure, a transitional council, a transitional representative council or a transitional rural council as contemplated in the Local Government Transition Act, 1993, have not been elected in terms of that Act."

> "[T]he restructuring of local government was to be governed exclusively by the Transition Act until elections had been held under its provisions. It is obviously significant that the negotiating parties thought it necessary to elevate the restructuring of local government to a constitutionally protected topic. That does not mean that the Transition Act, as it then read, was cast in stone. The Constitution does not say the Act cannot be amended . . . . But what it does mean is that only the Transition Act, amended or not, would govern the restructuring."

The effect, therefore, of section 245(1) was to make it clear that initially the national legislature alone was competent to manage the process of the restructuring of local government. The legislature could amend the Transition Act, but provincial governments which under the interim Constitution had legislative competence in respect of local government[8] would not gain that competence until the initial period of restructuring was complete.

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8 See schedule 6 to the interim Constitution.

[9] The Transition Act was repeatedly amended.[9] When it was first enacted, it contained no specific provisions relating to local government in rural areas, although as I have noted it did contemplate that during the interim stage the jurisdiction of a local government council might include the area of jurisdiction of a traditional authority.[10] But one of the pieces of amending legislation, the Local Government Transition Act Second Amendment Act, 89 of 1995 (the Amendment Act) supplemented the Transition Act by the addition of a new chapter, Part VA, which dealt specifically with the issue of rural local government.[11] The Amendment Act required that local government structures

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9 See Act 61 of 1995, Act 89 of 1995, Act 12 of 1996 and Act 97 of 1996.

10 Section 8 of the Transition Act provided that:

> "(1) A transitional council for which elections shall be held as provided for in section 9, shall be known as —
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> (a) a transitional local council for a non-metropolitan area of local government, which may include the area of jurisdiction of a traditional authority contemplated in section 181 of the Constitution of the Republic of South Africa, 1993. . . ."

11 That Act was promulgated on 20 October 1995 but it provided that Part VA was deemed to have come into force on 30 June 1995.

would exist throughout South Africa, "wall-to-wall" local government as it was called by Respondents' counsel in argument.[12]

[10] The entire area of a province had to fall within either a transitional metropolitan council or a district council. In the case of transitional metropolitan councils, their entire area of jurisdiction is divided into areas in which transitional metropolitan substructures exercise the powers and functions of primary level local government. In the case of district councils, their entire area of jurisdiction may be, but is not necessarily, divided into the areas of jurisdiction of forms of primary local government, such as transitional local councils, transitional representative councils and transitional rural councils. Therefore, metropolitan councils are purely second-tier or umbrella forms of local government, but district councils are not necessarily so.

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12 According to the long title to the Amendment Act, it was "to extend the application of the [Transition] Act throughout the Republic". Section 9 of the Amendment Act introduced section 9D(1) of the Transition Act which provides that, amongst others, the following principle shall apply in respect of rural local government —

"(a) provision shall be made for the division of the whole area of each province into areas of jurisdiction of transitional metropolitan councils, if any, and areas of district councils. . . ."

[11] The Transition Act specifically contemplates that first-tier local government need not be established throughout rural areas. It merely requires that district councils be established to cover all areas not governed by metropolitan councils. The Act, therefore, contemplates that certain "remaining areas" outside of metropolitan and urban areas need have no primary tier of local government, but can fall within the jurisdiction of a district council. As it happens, in most provinces primary tier local governments have been established for the provinces, but in KwaZulu-Natal, this is not the case.[13] This province has chosen, as it was entitled to do in terms of the Transition Act, to establish district councils (which in terms of the proclamation were somewhat confusingly called regional councils) throughout the province, but not to establish primary tier local government throughout the province.

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[13] See *Green Paper on Local Government*, October 1997, at page 9. According to the Green Paper, the North-West province has also adopted the approach taken by KwaZulu-Natal.

[12] According to section 9D(1)(b) of the Transition Act, also introduced by the Amendment Act, a district council shall consist of members elected by transitional local councils, transitional representative councils or transitional rural councils within the area of jurisdiction of the district council; and where there is a remaining area within the jurisdiction of the district council (ie. an area in which there is no primary tier of local government), members elected directly from such area or nominated from such area. The number of members from remaining areas are to be determined proportionally in the light of the number of residents in the remaining area compared to the number of residents in the entire area of the district council.[14]

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[14] Section 9D(1)(b) of the Transition Act provides that:

> "a district council shall consist of —
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> (i) members elected as prescribed by regulation under section 12 on a proportional basis according to the number of members of each of the transitional local councils, transitional representative councils or transitional rural councils, the

areas of jurisdiction or areas of which are situated within the area of such district council; and

(ii) in the case where there is a remaining area, members elected or elected and nominated from such area in accordance with a ratio based on the inhabitant numbers of the area of such district council in relation to such numbers of the remaining area;".

[13] A further important amendment introduced into the Transition Act by the Amendment Act provides that if a member of an Executive Council (MEC) of a province (in this case, the Minister of Local Government and Housing for KwaZulu-Natal) considers it desirable, he or she may permit the nomination of certain members of a district council from interest groups identified in the Transition Act.[15] Four interest groups are recognised in terms of section 9A of the Act – farmers, landowners, or levy payers; farm labourers; women; and traditional leaders. Section 9D(3) stipulates that no single interest group shall nominate more than 10 per cent of the members to be elected and nominated in respect of a relevant remaining area; and that the total number of nominated members shall not exceed 20 per cent of the total number of members to be elected and nominated for the remaining area.

[14] Two important changes were therefore introduced by the Amendment Act. First, local government was to be extended to the entire territory of South Africa, something not previously contemplated by the Transition Act. Secondly, it provided in some circumstances for the nomination of members of local government bodies. Previously, the Transition Act had contemplated that local government bodies would comprise only elected members.

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15 Section 9D(2)(b) read with the definition of "interest group" in section 9A.

[15] The seven regional councils established by the proclamation for the province of KwaZulu-Natal were district councils as contemplated by the Transition Act as amended by the Amendment Act. According to the proclamation, these councils comprise, in addition to the traditional leaders who are entitled to ex officio membership in terms of section 182 of the interim Constitution, members drawn from elected transitional local governments within the area of jurisdiction of the regional council, as well as directly elected members from areas where no transitional local councils exist, and also certain nominated members.[16] In terms of paragraph 10(2)(b)(ii) of the proclamation, the first respondent has declared that the membership of district councils shall include nominated members of two interest groups referred to in the Transition Act – levy payers and women.

[16] I now turn to the proper interpretation and application of section 182 of the interim Constitution. Section 182 must be understood in its context in the interim Constitution. It forms part of chapter 11 which is entitled "Traditional Authorities". The first provision of the chapter, section 181, provides for the continuation of the authority of traditional authorities and confirms that they will continue to exercise and perform their powers and functions in accordance with applicable laws and customs, subject to the repeal or amendment of such laws and customs. The remaining three provisions of chapter 11 deal

16 Paragraph 10(2) of the Proclamation.

with the relationship between traditional leaders and the three spheres of government. At national level, section 184 provides that a Council of Traditional Leaders shall be established which shall have powers to make recommendations to government in relation to matters concerning traditional authorities, indigenous law and custom. At provincial level, section 183 provides that in those provinces where there are traditional leaders, the provincial legislatures shall establish a House of Traditional Leaders which shall play a similar role at provincial level to that played by the Council of Traditional Leaders at national level.

[17] Section 182 governs the relationship between the third tier of government, local government and traditional leaders. Transition to democratic local government at the third tier was to take place in terms of the Transition Act which recognised that in the interim phase of transition, areas over which traditional leaders had had authority could be included within the areas of jurisdiction of elected local authorities.[17] This gave rise to a potential tension between democratic local government and traditional leaders. It is this tension that the interim Constitution seeks, in part, to resolve through the mechanism of Section 182.

[18] As this Court observed in its first certification judgment, *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10)

[17] Section 8(1)(a) of the Transition Act.

BCLR 1253 (CC) at para 10:

> "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."

A wide range of interests and concerns came to be expressed in the process of compromise that led to the adoption of both the interim Constitution and the 1996 Constitution. Section 182 reflects the substantial transition that the establishment of democratic local government in rural areas would signify and in particular its implications for communities that had previously been based on traditional forms of governance. As Combrinck J aptly observed in his judgment in the court a quo:

> "It is obvious from the provisions of the Constitution that one of the problems which the legislature was faced with was the existence of traditional leaders who by custom and indigenous law exercised authority over communities. They were not and never have been democratically elected. Quite clearly their authority could not by the stroke of a pen, be removed. Accordingly provision had to be made for them. Hence Chapter 11 of the [interim Constitution]." (At 302B-C.)

[19] Section 182 is therefore an important constitutional entitlement for traditional leaders whose customary authority and role were being affected by the transition to democracy. Construed purposively, therefore, section 182 means that traditional leaders are entitled to ex officio representation on local government in their areas. That

entitlement arises once elections have been held for local government and once the procedural requirements contained in section 182 have been met. This ensures that traditional leaders are entitled to representation on a council without having to stand for election. It also ensures that for the period of transition the traditional leaders who had previously been exercising the powers and performing the functions of local government will be represented on the newly established institutions which would now be responsible for those functions.

[20] Let me now turn to the appellants' arguments. The first argument was that section 182 only entitled traditional leaders to be members of local government where that local government was "local government referred to in Chapter 10". The appellants argued that the regional councils established in terms of the proclamation were not local government "referred to in Chapter 10". Chapter 10 of the interim Constitution provides for "Local Government". It establishes, in broad terms, the status of local government and the structures, powers and functions of local government.

[21] The appellants rely on section 245(1) of the interim Constitution, set out above,[18] which provides that local government shall not be restructured otherwise than in accordance with the Transition Act until after the first elections for local government have been held. Accordingly they argue that the local government that came into existence

[18] Cited above at paragraph 8, see also n 7.

after the first elections is local government contemplated by the Transition Act and not local government contemplated by chapter 10. Local government contemplated by chapter 10, it was argued, cannot come into existence until further restructuring after the first elections have been held.

[22] In my view, this argument is misconceived. We held in *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC), that the effect of section 245(1) was that the restructuring of local government could be effected in terms of the Transition Act only. The import of that decision was to hold that only the national Parliament would be competent to direct the transformation of local government until the time period identified in section 245(1) had elapsed. Provincial governments would not be constitutionally competent to enact legislation other than that specifically authorised by the Transition Act until the transitional period identified in the interim Constitution had elapsed. We did not hold that the process of transition in local government meant that for other purposes the provisions of chapter 10 of the Constitution had no effect. Section 245(1) is in my view not capable of bearing such a meaning. I therefore cannot accept appellants' argument that local government established in terms of the Transition Act after elections have been held is not local government contemplated by chapter 10.

[23] I have a further difficulty with this aspect of the appellants' argument. If it were to

be adopted, it seems to me that it would produce the absurd result that traditional leaders would not be entitled to sit ex officio on local government bodies elected in terms of the Transition Act, but only on local government bodies established after further restructuring of local government took place in terms of subsequent legislation. As the very purpose of permitting traditional leaders to be members of the local government bodies in the areas where they lived, was to ease the transition from one form of local government to another, this interpretation would be inconsistent with if not destructive of the very purpose of the transition.

[24] As part of their first argument, the appellants also submitted that chapter 10 did not contemplate second-tier or umbrella forms of local government such as the regional councils under consideration here. I cannot accept this argument either. Section 174(2) of that chapter provides that:

> "A law referred to in subsection (1) may make provision for categories of metropolitan, urban and rural local governments with differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories."

This is a broad provision permitting a wide range of differentiated forms of local government with different structures, powers and functions. In my view, therefore, appellants' first argument must fail. The forms of local government established in the province of KwaZulu-Natal after the first elections were held there in June 1996, and in

particular, the regional councils established by the proclamation were forms of local government referred to in chapter 10 for the purposes of section 182.

[25] The appellants's second argument was that the regional councils established by the proclamation were not forms of "elected local government" as contemplated by section 182. The argument was that because certain members of the regional council were nominated by interest groups, regional councils were not elected local government. The appellants therefore asserted that "elected" local government in section 182 should be read as "wholly elected".

[26] The appellants acknowledged that their approach to the interpretation of section 182, when read together with the provisions of section 9D of the Transition Act, led to an anomaly. Section 9D permits an MEC when he or she considers it desirable, to allow certain interest groups to nominate members of district councils. The effect of appellants' reading of section 182 is that the right of traditional leaders to be members of a local government body is dependent upon whether an MEC has exercised the power given to him or her by section 9D or not. As Combrinck J remarked in his judgment in the court a quo, the constitutionally entrenched right of traditional leaders to be members of local government ex officio, would be placed on "a precarious and arbitrary footing" if the appellants' interpretation were to be adopted (at 303A). The precariousness of the constitutional entitlement would arise not only in the case of district councils but also in the case of transitional representative councils, in respect of which nominated members

are also permitted by the Transition Act. In both cases, on appellants' argument, traditional leaders can be prevented from exercising their constitutional entitlement to ex officio membership of a local government body simply because an MEC considers it desirable to permit one of the identified interest groups to nominate even a single member to the local government body.

[27] Appellants' counsel argued that a different anomaly would arise if district councils were to be considered "elected local government" for the purposes of section 182. Traditional leaders would, he argued, be entitled to be members of a district council ex officio as a result of the operation of section 182 of the interim Constitution. Other traditional leaders may, if the relevant MEC considers it desirable, sit as nominated members of the same council. This would result in a situation of "double representation", argued the appellants, and would be anomalous. The proposition is a hypothetical one, for it has not arisen in KwaZulu-Natal, where the first respondent apparently did not consider it desirable for traditional leaders to be represented by nominated members. This is no doubt because, in his view, traditional leaders already had a constitutional entitlement to membership of the regional councils.

[28] A situation of double representation, so to speak, could only arise if an MEC in terms of the powers conferred upon him or her by the Transition Act deemed it desirable for such double representation to occur. It is not necessary for the purposes of this judgment to consider whether and in what circumstances such a decision would be subject

to review, as the question does not arise on the facts of this case. Any double representation would, of course, be numerically limited. First, the number of nominated members is limited by the capping provisions referred to in paragraph 13 above and secondly, the number of traditional leaders who will be entitled ex officio to membership of such councils is limited by the number of such leaders who reside within the area of the council and who are identified formally in terms of the procedures provided for in section 182. It is not clear therefore that the anomaly referred to by the appellants will ever arise, nor is it clear how serious it may be if it does. In the circumstances, I have not been persuaded that it would be more serious an anomaly than that which would arise if the interpretation proposed by the appellants were adopted.

[29] The question of the meaning to be attached to "elected local government" in section 182 needs to be answered by reference to the historical context in which that provision was drafted which I have described above. Its primary purpose was to give traditional leaders an entitlement to be members of local government bodies that had jurisdiction over the area in which they reside to ensure continuity and avoid dislocation during the period of transition. By using the phrase "elected local government", the interim Constitution made it clear that their entitlement did not arise until after the first elections in terms of the Transition Act had been held. At the time that section 182 was enacted, no democratic elections for local government had yet been held, nor had a final date been set for such elections. Indeed, the first elections for local government were only held more than eighteen months after the interim Constitution and the Transition Act

were adopted by parliament.[19] At the time of the drafting of section 182, local government was in what the Transition Act refers to as the pre-interim phase.

[30] It seems to me that the phrase "elected local government" was adopted to make it plain that traditional leaders did not have a constitutional entitlement to membership of local government until after the first elections had been held. In other words, traditional leaders were only to be given an ex officio entitlement to membership of local government bodies in the interim phase contemplated by the Transition Act and not in the pre-interim phase when no elections had yet been held. As I have described, the Transition Act was amended after the interim Constitution came into force to permit nominated members of some forms of local government. The number of members who could be nominated was however, as I have described, strictly limited by the provisions of the Transition Act. Given the restrictions on the number of nominees, and the fact that the majority of members of the local government bodies would still be determined by elections, it does not seem to me that the fact that there are some nominees on those local government councils, results in their not qualifying as "elected" local government as required by section 182 of the interim Constitution.

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19 The first elections for local government were held in most areas of the country in November 1995 but elections were delayed in KwaZulu-Natal, for example, until June 1996.

[31] I cannot accept therefore that the narrow meaning contended for by the appellants should be given to "elected local government" in section 182. In my view, such an interpretation would undermine the clear constitutional purpose sought to be achieved by section 182. It is for these reasons that I cannot accept the second argument proposed by appellants' counsel and the appeal on the merits must accordingly fail.

[32] During argument, questions were put to counsel concerning the meaning of certain provisions in the sixth schedule to the Constitution of the Republic of South Africa 1996. Item 26 of that schedule provides as follows:

> "(1) Notwithstanding the provisions of sections 151, 155, 156 and 157 of the new Constitution —
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> (a) the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force until 30 April 1999 or until repealed, whichever is sooner; and
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> (b) a traditional leader of a community observing a system of indigenous law and residing on land within the area of a transitional local council, transitional rural council or transitional representative council, referred to in the Local Government Transition Act, 1993, and who has been identified as set out in section 182 of the previous Constitution, is *ex officio* entitled to be a member of that council until 30 April 1999 or until an Act of Parliament provides otherwise.
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> (2) Section 245(4) of the previous Constitution continues in force until the application of that section lapses. Section 16(5) and (6) of the Local Government Transition Act, 1993, may not be repealed before 30 April 1999."

Section 245(4) of the interim Constitution provides as follows:

> "Until a period of not less than three years has elapsed from the date on which the members of a district council, a metropolitan substructure, a transitional council, a transitional representative council or a transitional rural council as contemplated in the Local Government Transition Act, 1993, have been elected in terms of that Act, such council or substructure, as the case may be, shall not be disestablished and no change shall be made to the powers, area of jurisdiction, wards or number of seats thereof except in accordance with an Act of Parliament further regulating the local government transition process or by way of proclamation in the *Provincial Gazette* by the Premier of a province acting in consultation with the Minister for Provincial Affairs and Constitutional Development."[20]

These are difficult provisions whose precise implications are not readily apparent. Questions were put to counsel as to the effect of these provisions and counsel for both appellants and respondents were subsequently afforded an opportunity to submit further written argument upon these matters. However, it seems to me that the interpretation and application of these provisions is a matter which does not arise in the current appeal.

[33] This litigation commenced some eight months before the 1996 Constitution came into force. There is no doubt that there is a real and live dispute between the litigants which is the subject matter of the current appeal. That dispute relates to the question of the proper composition of district councils, and in particular, the question of whether

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20 This provision was added to the interim Constitution by section 3(b) of Act 7 of 1996.

traditional leaders were entitled to ex officio membership of such councils from the date of the establishment of those councils following upon the elections. It may be that the actions or decisions of such councils would be subject to challenge if it were to be held that they had been incorrectly constituted for any period. It may be that a further dispute will arise between the parties as to the entitlement of traditional leaders to remain members of district councils subsequent to the promulgation of the 1996 Constitution, but that is not a matter which we should anticipate in these proceedings.

[34] The only question that remains for consideration is costs. The court a quo ordered the appellants to pay the costs of their failed application, including the costs attendant upon the employment of senior counsel. The appellants appealed against that order of the court a quo as well as the order dismissing their application. In *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC), the appellant appealed against a decision of the High Court. The appellant was unsuccessful on the merits, but this Court nevertheless set aside the order of the High Court requiring the appellant to pay costs. Kriegler J, speaking on behalf of a unanimous court and relying on the decisions of the Court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) and *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC), held:

> "Although the appellant failed to establish the constitutional claim he advanced, it was a genuine complaint on a point of substance and should therefore not have been visited with the sanction of a costs order. However slow a court of appeal should be to interfere

> with a costs order in a court of first instance, this is clearly a case where intervention is necessary. Although the appeal must fail on the merits, the appellant is entitled to a reversal of that part of the order in the High Court condemning him to pay the costs and should not have to bear the costs in this Court." (At para 44.)[21]

In this case, too, it seems to me that appellants should not have been visited with an adverse costs order in the court below, even though the appeal must fail on the merits. The issues raised by the appellants were genuine constitutional questions which raised matters of broad concern within the province of KwaZulu-Natal. The issues were complex and it was not argued by the Respondents, nor could it have been, that the litigation was spurious or frivolous. In the circumstances, it is my view that this is not a matter in which the appellants should have been required to pay costs.

[35] The following order is made:

(a) the appeal succeeds in respect of costs only.

(b) Combrinck J's order is set aside and for it the following substituted:

"In the result the application is dismissed. No order is made as to costs."

(c) no order is made as to the costs of appeal.

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[21] See also *City Council of Pretoria v Walker*, CCT 8/97, 17 February 1998, as yet unreported, at paragraph 98.

Chaskalson P, Langa DP, Ackermann J, Didcott J, Goldstone J, Kriegler J, Madala J, Mokgoro J and Sachs J concur in the judgment of O'Regan J.

O'REGAN J

For the appellants: GJ Marcus SC and P Blomkamp instructed by Von Klemperer Davis & Harrison Inc.

For the respondents: AJ Dickson SC instructed by Austen Smith.