CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/02

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Appellant
THE MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT	Third Appellant
versus	
UNITED DEMOCRATIC MOVEMENT	Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	First Intervening Party
AFRICAN NATIONAL CONGRESS	Second Intervening Party
INKATHA FREEDOM PARTY	Third Intervening Party
PAN AFRICANIST CONGRESS OF AZANIA	Fourth Intervening Party
PREMIER OF THE PROVINCE OF KWAZULU-NATAL	Fifth Intervening Party
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Sixth Intervening Party
INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA	First Amicus Curiae
RESEARCH UNIT FOR LEGAL AND CONSTITUTIONAL INTERPRETATION	Second Amicus Curiae

Heard on : 6 - 8 August 2002

Decided on : 4 October 2002

JUDGMENT

THE COURT:

Introduction

[1] In respect of the National Assembly and the provincial legislatures, South Africa has an electoral system based on proportional representation. At the local government level, municipalities have electoral systems which provide for proportional representation combined with ward representation but also resulting in overall proportionality. One of the issues which has been hotly debated in post-apartheid South Africa is the desirability of allowing members of a legislature or municipal council to defect from the political parties which nominated them but nonetheless to retain their seats.

[2] The interim Constitution[1] provided in section 43(b) that members of the National Assembly vacated their seats upon ceasing to be members of the party which nominated them. Such a provision is called an anti-defection provision. There were similar provisions relating to members of the Senate (section 51(1)(b)) and members of provincial legislatures (section 133(1)(b)). Elections to the National Assembly and to provincial legislatures were governed by the provisions of Schedule 2 to the interim Constitution.

[1] Constitution of the Republic of South Africa, Act 200 of 1993.

[3] In the body of the 1996 Constitution there is no anti-defection provision. There is one, however, in Schedule 6 to the Constitution which governs the transition from the interim Constitution to the new constitutional order established by the Constitution.[2] Item 6(3) of Schedule 6 reads as follows:

> "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 the National Assembly under the new Constitution;
>
> (b) to the loss of membership of the Assembly in circumstances other than those provided for in section 47 (3) of the new Constitution;[3] and
>
> (c) to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the

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2 Section 241 of the Constitution provides that:

> "Schedule 6 applies to the transition to the new constitutional order established by this Constitution, and any matter incidental to that transition."

3 Section 47(3) provides that:

> "A person loses membership of the National Assembly if that person –
>
> (a) ceases to be eligible; or
>
> (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership."

Section 47(4) of the Constitution provides that:

> "Vacancies in the National Assembly must be filled in terms of national legislation."

However, item 6(4) of Schedule 6 provides that:

> "Section 47 (4) of the new Constitution is suspended until the second election of the National Assembly under the new Constitution."

Assembly under the new Constitution."

In effect, notwithstanding the repeal of the interim Constitution, the provisions of Schedule 2 were kept alive until the second election under the Constitution. Item 11 of Schedule 6 contains a similar provision with regard to provincial legislatures.

[4] Annexure A to Schedule 6 amends the provisions of Schedule 2. The two amendments which are relevant in these proceedings and which apply to both the National Assembly and provincial legislatures are to be found in items 12 and 13 of Schedule 2. Item 12 replaces item 23 with the following:

"Vacancies

23(1) In the event of a vacancy in a legislature to which this Schedule applies, the party which nominated the vacating member shall fill the vacancy by nominating a person –

(a) whose name appears on the list of candidates from which the vacating member was originally nominated; and

(b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy shall be submitted to the Speaker in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of item 23A (1), the seats in question shall be allocated to the remaining parties *mutatis mutandis* as if such seats were forfeited seats in terms of item 7 or 14, as the case may be."

Item 13 inserts the following after item 23:

"Additional ground for loss of membership of legislatures

23A(1) A person loses membership of a legislature to which this Schedule applies if that

person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76 (1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for –

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party."

[5] On 19 June 2002, the first appellant signed into law four Acts of Parliament. The effect of two of the Acts is to suspend during certain specified periods the anti-defection provisions contained in item 23A(1) of Schedule 2,[4] i.e. those relating to the National Assembly and provincial legislatures. The first of these "window periods" of suspension was to commence on the coming into force of the legislation. Provision is also made for consequential changes to a provincial legislature's delegates to the National Council of Provinces. The purpose of the other two Acts is to allow defection, during the same periods, from political parties in the local government sphere of government.[5]

[6] Each of the Acts was published in a Government Gazette dated 20 June 2002. On the record there is a dispute as to whether the publication in fact occurred on 20 or 21 June 2002. As

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4 These are the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 and the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

5 These are the Constitution of the Republic of South Africa Amendment Act 18 of 2002 and the Local Government: Municipal Structures Amendment Act 20 of 2002.

will be explained below, nothing now turns on that dispute.

The Proceedings in the High Court

[7] The respondent is a political party represented in the National Assembly and in some provincial legislatures and municipal councils. It has taken the view that the four Acts of Parliament referred to in footnotes 4 and 5 (referred to in this judgment as "the impugned legislation") are unconstitutional and invalid.

[8] The respondent brought an urgent application in the Cape High Court at 19h00 on 20 June 2002. In addition to the present three appellants, the respondent also cited the Speaker of the National Assembly and the Chairperson of the National Council of Provinces. In terms of section 81 of the Constitution,[6] the impugned legislation was to come into effect upon publication in the Government Gazette. The respondent sought and was granted an order (by Nel J) in the following terms:

> "1. Pending a decision by a Full Court to be convened by the Judge President as a matter of urgency, the commencement of the Constitution of the RSA Amendment Act and the Second Amendment Act, the Local Government Municipal Structures Amendment Act 2002 and the Loss or Retention of Membership of National and Provincial Legislatures Act 2002 is suspended."
>
> 2. Costs to stand over."

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[6] Section 81 of the Constitution reads:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

[9] In the High Court the appellants opposed the relief sought and raised the dispute concerning the time of publication of the impugned legislation. In the light of that dispute, when the matter came before the Full Court (the Full Court) on 24 June 2002, the respondent sought an amendment to its notice of motion, the effect of which was to seek an order relating to the commencement *or operation* of the impugned legislation. The order granted by the Full Court is in the following terms:

> "1. The application for the amendment to the Notice of Motion is granted.
> 2. An order is made suspending the commencement and/or operation of the Constitution of the Republic of South Africa Amendment Act 2002; the Constitution of the Republic of South Africa Second Amendment Act 2002; the Local Government: Municipal Structures Amendment Act 2002; and the Loss or Retention of Membership of National and Provincial Legislatures Act 2002, pending the outcome of a Constitutional Court application which is to be instituted by the Applicant by not later than noon on 27 June 2002 in which the constitutionality of the aforesaid Acts is to be challenged.
> 3. No order as to costs."

[10] Unfortunately neither the High Court nor the Full Court furnished reasons for the respective orders made by them. This Court has thus been deprived of the benefit of the views of those courts on the constitutionality of the legislation in question and the grounds for the grant of the orders.

The Proceedings in this Court

[11] The respondent lodged the application seeking the relief referred to in para 2 of the order of the Full Court, i.e. challenging the constitutionality of the impugned legislation. Four other

political parties represented in the National Assembly and in some provincial legislatures and local authorities intervened, namely the African Christian Democratic Party, the African National Congress, the Inkatha Freedom Party and the Pan Africanist Congress of Azania. They are the first four intervening parties. The Premier of KwaZulu-Natal and the South African Local Government Association also intervened. They are the fifth and sixth intervening parties. The Institute for Democracy in South Africa and the Research Unit for Legal and Constitutional Interpretation, non-governmental organisations with special interest in and knowledge of electoral systems, were admitted as amici curiae.

[12] The matter was initially set down as a matter of urgency on 3 July 2002, during the recess of this Court. In terms of directions issued by the Chief Justice, argument was invited on the following issues:

> "(i) Is it desirable that this Court, sitting as a court of first and final instance, should decide issues of such fundamental importance as those raised in this application, as a matter of urgency without a reasonable opportunity being given to all parties that might have an interest in the matter to prepare their arguments adequately and make considered submissions to the Court, and without the Court itself having a reasonable opportunity to give careful and adequate consideration to all the issues before deciding the matter?
>
> (ii) Can this Court make an order at this stage of the proceedings that will have the effect of stabilising the situation that exists and ensuring that no person or legislature is prejudiced by the uncertainty that exists, or by the orders made by the High Courts, pending the final determination of the issues that have been raised?"

[13] In addition to opposing the relief sought by the respondent, the appellants wished to appeal directly to this Court against the orders that were made by the High Court and Full Court, contending that these courts lacked the jurisdiction to make the orders that they made. Because of the urgency, a certificate in terms of Rule 18 had not been secured. The appellants sought condonation of that omission. After hearing argument, this Court granted the condonation sought as well as leave to appeal against the two orders. The grant of that leave to appeal had the effect of suspending the orders of the High Court. This Court went on to grant interim relief devised in consultation with the parties, designed to stabilise the situation pending a final adjudication by this Court of the constitutionality of the impugned legislation. The full terms of the order appear from a separate judgment which will accompany this judgment.[7]

The appellants' appeal against the orders of the High Court

[14] The issues which fall for determination are, first, whether the High Court had jurisdiction to make the orders in question, and second, if it did have such jurisdiction, whether the orders should have been made in this case.

[7] *United Democratic Movement v The President of the Republic of South Africa and Others [2]*.

[15] In *National Gambling Board v Premier, KwaZulu-Natal, and Others*,[8] this Court discussed in general terms the jurisdiction of the High Court to grant interim relief pending proceedings exclusively within this Court's jurisdiction. In that case, the proceedings were within the jurisdiction of the High Court. However, this Court considered it important to give guidance on the correct court to approach for interim relief in matters where the High Court lacks such jurisdiction in the main proceedings. The following principles were enunciated by Du Plessis AJ:

> (a) "At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the *status quo*. It does not depend on whether it has jurisdiction to decide the main dispute."[9]
>
> (b) "Whether a High Court will have jurisdiction to grant interim relief pending [proceedings] exclusively within this Court's jurisdiction does not depend on the form or effect of the interim relief. It depends on the proper interpretation of the relevant provision and on the substance of the order: does it involve a final determination of the rights of the parties or does it affect such final determination? If it does not, the High Court will, depending on the provision that grants exclusive jurisdiction, have jurisdiction to grant interim relief."[10]
>
> (c) "To decide whether a High Court has such jurisdiction the provision in terms of which this Court has exclusive jurisdiction must be interpreted."[11]
>
> (d) Where the High Court does not have jurisdiction to determine the main dispute and has jurisdiction to grant interim relief, it "will simply determine whether the

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8 *National Gambling Board v Premier, KwaZulu-Natal, and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at paras 48-54.

9 Para 49.

10 Para 50. Footnote omitted.

11 Para 51.

> applicant has a *prima facie* right to the relief which is to be sought in the court having jurisdiction to deal with it."[12]

[16] In the *National Gambling Board* case, this Court expressly declined to express a view on the question whether the High Court has jurisdiction to grant interim relief in relation to those matters in section 167(4) in respect of which exclusive jurisdiction is conferred upon this Court. Du Plessis AJ said:

12 Para 52.

> "In particular, we do not decide whether a High Court would have the power to grant interim relief to prevent an amendment to the Constitution from coming into operation (s 167 (4) (*d*)) or in circumstances where Parliament or the President has failed to fulfil a constitutional obligation (s 167 (4) (*e*)). These provisions confer very special powers upon this Court which may give rise to different constitutional considerations. There is no need to consider those questions now."[13]

[17] In the *National Gambling Board* case this Court did not consider whether it was compatible with the Constitution for interim relief ever to take the form, whether expressly or by implication, of suspending the operation of legislation which has been duly promulgated. That is the effect of the orders of the High Court and the Full Court in this case.

[18] The relevant provisions of the Constitution to which we must have regard include the following:

Section 80: This provides that:

> "(1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.
>
> (2) An application –
>
> (a) must be supported by at least one third of the members of the National Assembly; and
>
> (b) must be made within 30 days of the date on which the President assented to and signed the Act.
>
> (3) The Constitutional Court may order that all or part of an Act that is the subject of

[13] Para 54.

an application in terms of subsection (1) has no force until the Court has decided the application if–

(a) the interests of justice require this; and

(b) the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs."

Section 122: This contains corresponding provisions in relation to provincial Acts.

Section 167(4): This provides that only this Court may –

"(a) . . .

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

. . . ."

[19] Sections 167(5)[14] and 172(2)[15] create a category of constitutional matters which the High

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[14] Section 167(5) reads as follows:

"The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[15] Section 172(2) reads as follows:

"(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply,

Court has jurisdiction to decide, subject to confirmation by this Court.

[20] In *President of the RSA v South African Rugby Football Union*[16] this Court accepted that the provisions of the Constitution which confer exclusive jurisdiction upon this Court to decide certain constitutional matters have as their purpose:

> ". . . to preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other, by ensuring that only the highest Court in constitutional matters intrudes into the domains of the principal legislative and executive organs of State."

[21] It is also relevant to have regard to the fact that the interim Constitution made provision in section 101(7) for any division of the High Court (then called the Supreme Court) to grant an interim interdict in relation to matters exclusively within the jurisdiction of this Court –

> "notwithstanding that such interdict or relief might have the effect of suspending or otherwise interfering with the application of the provisions of an Act of Parliament."

> directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

16 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at para 29.

That provision was added by section 3 of Act 44 of 1995 in order to resolve the differences of opinion on that issue which had arisen between different divisions of the High Court as to their jurisdiction to grant such interim relief. There is no equivalent power granted to the High Court under the Constitution.

[22] Counsel for the appellants submitted that an interim order suspending the commencement or operation of an Act of Parliament constitutes judicial intrusion into the legislative domain of the most far-reaching kind and frustrates the will of the legislature. They also submitted that in consequence of this, the power to grant an interim order suspending the commencement or operation of an Act of Parliament should be limited to those expressly granted to this Court by sections 80(3) and 122(3) of the Constitution and in respect of the High Court by section 172(2)(b) of the Constitution. In support of this submission, they relied on the decision to omit from the Constitution a provision such as that which appeared in section 101(7) of the interim Constitution. They argued, in the alternative, that only this Court has the power to suspend the commencement or operation of an Act of Parliament in respect of matters falling outside the provisions of sections 80(3) and 122(3). As a second alternative, they argued that even if the High Court has the power to grant an interim order suspending an Act of Parliament pending the determination by this Court of its constitutional validity, that cannot apply to an Act that amends the Constitution.

[23] In making those submissions, counsel for the appellants accepted that, as stated in the

National Gambling Board case,[17] the fact of this Court's exclusive jurisdiction was not in itself decisive in determining the jurisdiction of the High Court to grant interim relief and that that question must depend upon the proper interpretation of the relevant provision. They urged us to hold that upon such an interpretation, the High Court has no jurisdiction to grant such interim relief.

[24] In turn, counsel for the respondent submitted that in this case the High Court did not *decide* whether the impugned legislation was unconstitutional and thus did not make any order which trespasses upon the power of this Court under section 167(4)(d) of the Constitution. They submitted that where an Act of Parliament, whether amending the Constitution or not, threatens a fundamental right conferred by the Constitution, the High Court must have jurisdiction to grant interim relief suspending the commencement or operation of such legislation pending a decision on the merits by this Court. It is only the latter power which is reserved for the sole jurisdiction of this Court.

[25] The issues are both important and difficult to resolve. One of the founding values in section 1 of the Constitution is a multi-party system of democratic government to ensure accountability, responsiveness and openness. The legislature has a very special role to play in such a democracy – it is the law-maker consisting of the duly elected representatives of all of the

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17 Above para 16.

people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law. On the other hand, the Constitution as the supreme law is binding on all branches of government and no less on the legislature and the executive. The Constitution requires the courts to ensure that all branches of government act within the law. The three branches of government are indeed partners in upholding the supremacy of the Constitution and the rule of law.

[26] The answers to the questions raised must be found in the terms of the Constitution itself. It contains clear and express provisions which preclude any court from considering the constitutionality of a bill save in the limited circumstances referred to in sections 79 and 121 of the Constitution, respectively. These sections provide as follows:

> "79(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
>
> (2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.
>
> (3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if –
>
> (a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
>
> (b) section 74 (1), (2) or (3) (*b*) or 76 was applicable in the passing of the Bill.
>
> (4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either –
>
> (a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it."

"121(1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.

(2) If, after reconsideration, a Bill fully accommodates the Premier's reservations, the Premier must assent to and sign the Bill; if not, the Premier must either –

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(3) If the Constitutional Court decides that the Bill is constitutional, the Premier must assent to and sign it."

Those sections of the Constitution make provision for the President, in the case of Parliament, and the premier of a province, in the case of a provincial legislature, to refer a bill to the Constitutional Court if the President or premier, as the case may be, has a reservation about its constitutionality. This power of abstract judicial review is exceptional and something quite distinct from the power, having found an enactment inconsistent with the Constitution, to strike it down and to grant appropriate consequential relief relating to its effect. It follows, in our opinion, that on a proper reading of the Constitution, no court may, save as provided in sections 79 and 121, consider the constitutionality of a bill before the National Assembly or a provincial legislature.[18] If no court may decide the constitutionality of a bill, no court could grant interim relief. There

[18] It is consistent with this finding that sections 80 and 122 (above para 18) allow for the requisite number of members of the National Assembly or a provincial legislature to refer *an Act* to this Court for an order

would be no proceeding in respect to which it could apply.

[27] Once again it should be noted that there is a fundamental difference between abstract judicial review and a specific inquiry into an inconsistency between one or more provisions of a statute and some right or value protected by the Constitution. However, in the present case, the bills had been assented to and signed by the first appellant prior to the respondent's approach to the High Court. Whether or not they had been published, in terms of section 81 of the Constitution,[19] they had become Acts of Parliament. The only express provision of the Constitution which caters for this eventuality is contained in section 80 of the Constitution,[20] which provides that the requisite number of members of the National Assembly may refer an Act to this Court for an order declaring that part or all of the Act is unconstitutional. In the case of abstract review in terms of section 80(3), this Court (and it alone) is empowered to suspend the operation of the impugned provisions pending determination of the challenge. Whether the High Court nevertheless has jurisdiction to suspend the operation of an Act of Parliament, whether before or after they have been published, is a question which it is not necessary in this case to decide. In what follows, we shall assume

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declaring that such Act or part of it is unconstitutional.

19 Above n 6.

20 Above para 18.

that there might be exceptional cases in which the High Court might grant such an order.

[28] Legislation, and especially legislation which amends the Constitution, does not usually have an immediate effect on persons or their rights. More often than not, it establishes a framework in terms of which public officials or individuals take action or modify their conduct. Where such legislation is impugned as unconstitutional, and it appears that action pursuant to its terms is imminent and is likely to cause serious and irreparable prejudice, in all but the most exceptional cases, interim relief could be designed to prevent such prejudice pending a decision by a court having jurisdiction to decide on the constitutionality of the legislation. In making such an order, a court would not have to *decide* on the constitutionality of the legislation. If the legislation is such that its constitutionality may be considered by the High Court under section 172(2),[21] the order could be made pending such consideration, and if found unconstitutional, pending an application for confirmation by this Court. The jurisdiction to make such an order would be consistent with the approach enunciated by this Court in the *National Gambling* case.[22] I would emphasise that such an order would not have the effect of suspending the coming into force of the impugned legislation.

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21 Above n 15.

22 Above para 15.

[29] The jurisdiction of the High Court to grant such interim relief is not expressly ousted by the Constitution even in the case of constitutional amendments where this is the only Court entitled to *decide* its constitutionality.[23] Such interim relief would in no way *decide* the constitutionality of the legislation in question and its terms would only apply pending a decision by this Court.

[30] The Constitutional Court is not designed to act in matters of extreme urgency. It consists of eleven members[24] and a quorum of the Court is eight of them.[25] This Court is in recess for some months of each year and during those times its members disperse to their homes which, in some cases, are a considerable distance from the seat of the Court in Johannesburg. Members of the Court are however obliged to be available for recall to the seat of the Court at short notice. However, it is not always possible to convene a quorum of the Court at very short notice during a recess. If the High Court is not able to grant an interim order in an urgent case where there is a

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23 Section 167(4)(d) of the Constitution provides that only the Constitutional Court may "decide on the constitutionality of any amendment to the Constitution".

24 Section 167(1) of the Constitution provides that:
"The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges."

25 Section 167(2) of the Constitution provides that:
"A matter before the Constitutional Court must be heard by at least eight judges."

justifiable fear of irreparable harm, a person who might be prejudiced by an act flowing from the legislation might well be left without an effective remedy. That would be an unfortunate consequence which should not lightly be held to be an inevitable consequence of the provisions of the Constitution.

[31] Having regard to the importance of the legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation. Where the legislation amends the Constitution and has thus achieved the special support required by the Constitution, courts should be all the more astute not to thwart the will of the legislature save in extreme cases.

[32] From the foregoing, we would hold that:

(a) It is not necessary in this case to decide whether a high court has jurisdiction to grant interim relief the effect of which is to suspend the operation of national or provincial legislation;

(b) A high court has jurisdiction to grant interim relief designed to maintain the status quo or to prevent a violation of a constitutional right where legislation that is alleged to be unconstitutional in itself, or through action it is reasonably feared might cause irreparable harm of a serious nature.

(c) Such interim relief should only be granted where it is strictly necessary in the interests of justice. That is the constitutional standard provided in sections

80(3)[26] and 122(3)[27] of the Constitution and should also apply in cases such as those presently under consideration.

(d) In determining the interests of justice, the court must balance the interests of the person seeking interim relief against the interests of others who might be affected by the grant of such relief.

(e) The interim relief should be strictly tailored to interfere as little as possible with the operation of the legislation and all the more so where the legislation relates to an amendment to the Constitution.

[33] An applicant for such relief would have to rely on manifest prejudice or prejudice that is established on the facts placed before the court. In its application to the High Court, the respondent did not suggest that the terms of the impugned legislation in themselves would cause any prejudice to it or any other person. The respondent went no further than to state the following in its founding affidavit:

> "It is clearly in the interest of the municipal system, of democracy and ultimately of the political parties which participate in the democratic process in this country, that the commencement of this legislation be suspended before any large scale crossing of the

26 Above para 18.

27 Id.

> floor takes place, pending the outcome of a constitutional challenge to the constitutionality of the entire scheme as evidenced by the provisions of the Acts."

In their heads of argument in this Court, counsel for the respondent appear to have assumed prejudice. No submissions in that regard were advanced during oral argument. There is no basis, in the present case, for the High Court or the Full Court having assumed prejudice to the respondent by reason only of the promulgation of the impugned legislation. More importantly, no consideration appears to have been given in the High Court to the question whether less invasive relief would have been sufficient to meet any potential prejudice. As is evident from the interim order made by this Court on 4 July 2002, far less invasive relief could have been granted.

[34] In these circumstances, we are of the view that the High Court erred in granting the orders now on appeal and they fall to be set aside.

[35] As appears from the judgment delivered in *United Democratic Movement v The President of the Republic of South Africa and Others [2]*,[28] the appropriate order as to costs in this case is that each party is to pay its own costs.

[36] *The Order*

The following order is made:

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[28] Above n 7. This judgment is being decided contemporaneously with two other judgments arising in this matter.

THE COURT

1. The appeal is upheld and the order of the High Court is set aside.

2. Each party is to pay its own costs.

By the Court: Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J.

For the Appellants:

W. Trengove SC, V. Maleka SC, K.D. Moroka and A. Schippers instructed by the State Attorney, Cape Town.

For the Respondent and the First and Fourth Intervening Parties:

J.C. Heunis SC and M. Osborne instructed by De Klerk and Van Gend Incorporated, Cape Town.

For the Second Intervening Party:

K. Swain SC and R.J. Seggie instructed by Von Klemperers, Pietermaritzburg.

For the Third and Fifth Intervening Parties:

M. Pillemer SC and A. Annandale instructed by Larson Bruorton & Falconer, Durban.

For the First Amicus Curiae:

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