IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 73/03

In the matter between:

XOLISILE ZONDI Applicant

and

MEC FOR TRADITIONAL & LOCAL GOVERNMENT AFFAIRS First Respondent

WILLIE STEENBURG Second Respondent

KOBUS BOTHA Third Respondent

RICHARD COOK Fourth Respondent

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APPLICANT'S WRITTEN ARGUMENT IN RESPONSE TO

FURTHER DIRECTIONS DATED 28 MAY 2004

A. INTRODUCTION

1. This written argument is delivered in response to the further directions given by the Chief Justice dated 28 May 2004.

2. In the original application before the Court *a quo* an order was sought declaring various sections of the Pound Ordinance No. 32 of 1947 (Natal) to be inconsistent with the Constitution and invalid. No order was sought in relation

to the need for confirmation of the order of constitutional invalidity by the Constitutional Court.[1] However, His Lordship Mr Justice Kondile, in making an order of constitutional invalidity, ordered that:

> "the matter is being referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution of the Republic of South Africa Act 108 of 1996."[2]

3. A few days after the order of Kondile J the applicant lodged papers in an application before this Court for confirmation of the order of constitutional invalidity in terms of Constitutional Court Rule 16(4).[3] The Registrar of the Pietermaritzburg High Court presumably also referred the order of constitutional invalidity to this Court in terms of Constitutional Court Rule 16(1).

4. Thereafter, on 24 December 2003, the Chief Justice issued directions for the hearing of the application for confirmation of the order of constitutional invalidity as well as providing for the steps to be taken in any appeal against that order.

5. On 7 January 2004 the first respondent (the MEC) delivered a notice of appeal against the order of constitutional invalidity in terms of Constitutional Court Rule 16(2).[4]

6. In the various papers, including written argument by the applicant and the first respondent, and during the course of the hearing, there was a common

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[1] Notice of Motion, Volume 2: pages 4-6.

[2] Order of 11 December 2003, Volume 2: page 72.

[3] Notice of Motion, Volume 1: pages 1-4.

assumption that the order of constitutional invalidity by Kondile J was required to be confirmed by the Constitutional Court in terms of section 167(5) of the Constitution.

7. That assumption now having been questioned, the parties have by directions by the Chief Justice been asked to address argument on whether the order of invalidity made by the High Court is properly subject to confirmation in terms of section 172(2)(a) of the Constitution.

B. IS CONFIRMATION NECESSARY?

8. Section 167(5) of the Constitution provides that it is the Constitutional Court that makes the final decision whether "an act of Parliament, a provincial Act or any conduct of the President is constitutional".

9. Consonant therewith, section 172(2)(a) of the Constitution provides that 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 that such an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

10. Whether or not the order of Kondile J declaring various sections of the Ordinance to be constitutionally invalid requires to be confirmed by the Constitutional Court depends upon whether the Ordinance is "a provincial Act"

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[4] Notice of Appeal, Volume 2: pages 73-76.

within the meaning of the above sections. That phrase is not defined in the Constitution.

11. On the plain meaning of the words employed, an Ordinance is clearly not included by the use of the word "Act". The word commences with a capital letter signifying a proper noun. In contemporary legal history an Ordinance has never been referred to as an Act, or *vice versa*. The usage of the words Act and Ordinance has always been clear. Section 85 of the Union of South Africa Act of 1910 gave the power to Provincial Councils to enact "ordinances". Thereafter, section 84 of the Republic of South Africa Constitution Act 32 of 1961, which became section 84 of the Provincial Government Act 32 of 1961 when the Republic of South Africa Constitution Act 110 of 1983 commenced, and which was repealed by the Interim Constitution, also gave to Provincial Councils the power to make "ordinances".

12. Section 126 of the Interim Constitution gave to the provincial legislatures the power to make "provincial laws". When such laws were enacted they were called provincial "Acts". It is not known why this was done, but it may be to do with the fact that the TBVC and homeland legislatures had called their enactments "Acts". It may also be a reflection of the new status of provincial legislatures having original legislative competence on an equal footing with the national Parliament. Prior to 1994, although the provincial councils had original legislative competence, as opposed to delegated, their legislation was subject to

any overriding national legislation, the limits set by the national Parliament and to approval by the State President, and it was confined to ‘own affairs’.[5]

13. The Constitution defines “provincial legislation” as including:

> “(a) subordinate legislation made in terms of a provincial Act; and
>
> (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.”[6]

14. The Administration of the whole of the Ordinance was assigned to the Province of KwaZulu-Natal with effect from 17 June 1994 under Proclamation 107 of 1994 published in *Government Gazette* 15813 of that date. It is accordingly “provincial legislation” as falling with paragraph (b) of the above definition.

15. Sections 119 to 124 of the Constitution deal with the procedure to be followed by a provincial legislature to adopt legislation, and section 123 provides that “a Bill assented to and signed by the Premier of a province becomes a provincial Act”. Since the Ordinance was not adopted pursuant to the procedures set out in the Constitution and no alternative manner is provided for legislation to become “a provincial Act”, it is apparently not a provincial Act for the purpose of section 167(5) and 172(2)(a).

16. Further, albeit *obiter*, this Court in *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC) at paragraph [11] said the following:

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[5] See section 84(1) of the Provincial Government Act 32 of 1961 as it was prior to being repealed by the Republic of South Africa Constitution Act 200 of 1993. See also, generally, Baxter *Administrative Law* (1984) at 192 and 490-494.

[6] Section 239 of the Constitution.

> "The terms of 'an Act of Parliament' and 'provincial Act' are not expressly defined anywhere in the Constitution, but there is no doubt as to what these terms mean. An Act of Parliament is an Act passed by the national legislature. A provincial Act is an Act passed by a provincial legislature."

17. It is not anomalous that an order of constitutional invalidity of a provincial Ordinance need not be confirmed by the Constitution. Albeit that such legislation is legislation of an elected legislature, there are other forms of such legislation that are not subject to confirmation. We have in mind municipal by-laws, whether old-order or new-order, and former homeland and TBVC legislation. Further, subordinate legislation that may have considerably more impact on the lives of people in South Africa is not required to be confirmed. It might indeed be regarded as anomalous if orders of constitutional invalidity of old-order provincial Ordinances were required to be confirmed by the Constitutional Court, but orders of constitutional invalidity of new-order municipal by-laws do not require such confirmation notwithstanding that municipalities are now recognised as a separate sphere of government with original legislative competence.[7]

18. In the *SARFU case*[8] this Court explained that the rationale behind the requirement of confirmation of certain orders of constitutional invalidity by the Constitutional Court lay in the separation of powers doctrine: it is this Court that must supervise the exercise of the power of the Judiciary of declaring statutes and the conduct of the highest organs of State inconsistent with the Constitution

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[7] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC), paras [35]-[39].

and thus invalid. For the reasons already given with regard to the inferior status of the old provincial councils, we submit that that rationale does not apply to their legislation.

19. Aside from in sections 167(5) and 172(2), the phrase "provincial Act" is used eight times in the Constitution. Of these, six are clearly by their context references only to new-order Acts,[9] and some of these can be references only to Acts under the 1996 Constitution.[10] The references to "a provincial Act" in sections 126 and 146(6) (being the remaining two references) could possibly be references also to old-order provincial enactments, but they need not be. If the phrase "a provincial Act" is to be construed as referring only to new-order provincial Acts, and the approach is adopted that that phrase has the same meaning wherever it is used in the Constitution, no anomaly or absurdity will result.[11]

20. In the circumstances we submit that the order of constitutional invalidity made by Kondile J is not required to be confirmed by the Constitutional Court and that the application for such condonation is accordingly not properly before the Court.

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8 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC), para [29].

9 Sections 120(2), 122(1), 123, 124 and 226(2) and item 27 of Schedule 6.

10 Sections 120(2), 122(1), 123 and 226(2).

11 Although there is a presumption of statutory interpretation that words or phrases used in a statute should bear the same meaning wherever they are used, one has to be cautious in that approach. Context is all important. See *mv Forum Victory: Den Norske Bank ASA v Hans K Madsen CV*

C. THE MEC's APPEAL

21. Paragraph 1(b) of the Chief Justice's directions asks whether this Court should not regard the appeal by the MEC against the judgment of the High Court as an application for leave to appeal.

22. For the reasons advanced by us in section B of the applicant's supplementary written argument dated 5 March 2004, there are very real difficulties in allowing a party that has elected to abide a court's decision to then appeal that decision. Certainly in conventional litigation that would not normally be countenanced.

23. However, we recognise that the considerations in constitutional litigation are different. This Court has repeatedly emphasised the importance of the Government presenting argument to this Court on the question of the constitutional validity of legislation.[12]

24. Although we see no difficulty in the MEC's appeal being dealt with as an application for leave to appeal (assuming that the MEC asks for it to be treated in that way), the Court has a real interest in ensuring finality in litigation and in ensuring that parties (and in particular the Government) enter cases at the right time and do not merely seek to enter them on appeal.

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and Others (Fund Constituting the Proceeds of the Sale of the mv Forum Victory) 2001 (3) SA 529 (SCA), para [11].

[12] For example, *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC), paras [10]-[12].

25. In the circumstances, if the Court is to grant the MEC leave to appeal, it would be appropriate that regardless of the ultimate outcome of the case the MEC is ordered to pay the applicant's costs.

26. We make no point on the question of the non-compliance by the MEC with the Rules of the Court.

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With Rights of Appearance

DURBAN

9 June 2004

ZONDI-FUR WRIT ARG

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