

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE : CCT 73/03

In the matter between :

XOLISILE ZONDI

APPLICANT

and

MEMBER OF THE EXECUTIVE COUNCIL  
FOR TRADITIONAL & LOCAL GOVERNMENT  
AFFAIRS

FIRST RESPONDENT

WILLIE STEENBURG

SECOND RESPONDENT

KOBUS BOTHA

THIRD RESPONDENT

RICHARD COOK

FOURTH RESPONDENT

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**FIRST RESPONDENT'S WRITTEN ARGUMENT IN RESPONSE TO  
FURTHER DIRECTIONS DATED 28<sup>TH</sup> MAY 2004**

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**1. INTRODUCTION**

1.1 In terms of directions given by the Chief Justice dated 28<sup>th</sup> May 2004 the parties were requested to furnish further written argument on the following questions :-

- “(a) Is the order of invalidity made by the High Court subject to confirmation under Section 172 (2)(a) of the Constitution?
  
- (b) If the order of invalidity made by the High Court is not subject to confirmation by this Court, why :-

- (i) This Court should not regard the appeal by the MEC against the judgment of the High Court as an application for leave to appeal and;
- (ii) The non-compliance with the rules of this Court should not be condoned?"

1.2 In terms of the order of the Court **a quo** the order of constitutional invalidity was referred to the Constitutional Court for confirmation in terms of Section 172 (2)(a) of the Constitution.

1.3 Thereafter the parties acted in all respects as if the order of referral for confirmation had been correctly given, and on that assumption. The directions issued were also consistent with this assumption.

1.4 The main issue is, therefore, whether this assumption was correct.

## **2. IS CONFIRMATION NECESSARY?**

2.1 Under the Interim Constitution the power to test laws and the jurisdiction of the various courts was dealt with in Sections 98 (2)(c) and 101 (3).

2.2 In terms of Section 98 (2)(c) the Constitutional Court had jurisdiction over

“any inquiry in the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution.”

2.3 Section 101 (3)(c) conferred on the Supreme Court the jurisdiction to inquire :-

“into the constitutionality of any law applicable within its jurisdiction, other than an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of the Constitution.”

2.4 For the purposes of these sections it was held that the Supreme Court has no jurisdiction to inquire into the constitutionality of an Act of Parliament passed by the South African Parliament either before or after the commencement of the Constitution, but that it did have jurisdiction to inquire into the constitutionality of law made by the legislatures of the TBVC states applicable within its jurisdiction.

**Zantsi v Council of State, Ciskei & Others 1995 (4) SA 615 (CC)**

**Prior v Battle and Others 1999 (2) SA 850 (TKD)**

2.5 A change to these jurisdictional areas was introduced by the Final Constitution.

- 2.6 In terms of Section 167 (5) and 172 (2)(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 that such an order has no force unless confirmed by the Constitutional Court, which makes the final decision.
- 2.7 The question is whether “a provincial Act” is limited to legislation passed by a provincial legislature under the Constitution or whether, in its context, it means provincial legislation whether passed by a provincial legislature before or after the Constitution or whether assigned to it in terms of the Constitution?
- 2.8 In Section 239 of the Constitution the following definitions are found :-

**“national legislation’ includes –**

- (a) subordinate legislation made in terms of an Act of Parliament; and
- (b) legislation that was in force when the Constitution took effect and that administered by the national government;”

**“provincial legislation’ includes –**

- (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.”

2.9 Schedule 6 of the Constitution provides in Item 2 the following :-

**“Continuation of existing law**

**2.**

- (1) All law that was in force when the new Constitution took effect continued in force, subject to –
  - (a) any amendment or repeal; and
  - (b) consistency with the new Constitution.
- (2) Old order legislation that continues in force in terms of subitem (1)–
  - (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
  - (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.”

2.10 In Item 3 of Schedule 6 various old order references are interpreted to mean an organ under the Constitution and includes the following :-

- “(2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation –
  - (a) to a Parliament, a House of Parliament or a legislative assembly or body of the Republic or a homeland, must be construed as a reference to –

- (i) Parliament under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
  - (ii) the provincial legislature of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive; or
- (b) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers Council or executive council of the Republic or of a homeland, must be construed as a reference to –
- (i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or
  - (ii) the Premier of a province under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive.”

2.11 Old order legislation is defined in Item 1 to mean :-

“legislation enacted before the previous Constitution took effect.”

2.12 Any assignment of legislation under Section 235 (8) of the Interim Constitution is regarded as having been done under Item 14, which provides specifically as follows :-

**“Assignment of legislation to provinces**

**14.** (1) Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive council of the province.

(2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may –

- (a) amend or adapt the legislation to regulate its interpretation or application;
- (b) where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (a), those provisions to which the assignment applies or to the extent that the assignment applies to them; or
- (c) regulate any other matter necessary as a result of the assignment, including the transfer or secondment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial executive or any department of state, administration, security service or other institution.”

2.13 Item 14 (4) then provides :-

“When legislation is assigned under subitem (1) any reference in the legislation to an authority administering it, must be construed as a reference to the authority to which it has been assigned.”

2.14 The Pound Ordinance No. 32 of 1947 was enacted by the provincial Council and amended under the former Constitutions.

**Section 85 of the Union of South Africa Act, 1910**

**Section 84 of the Republic of South Africa Constitution  
Act No. 32 of 1961**

**Section 84 of the Provincial Government Act No. 32 of 1961**

2.15 The Provincial Council was the legislative body of the former province of Natal. The legislation which it passed is included in the Section 239 definition of “provincial legislation”.

2.16 It is submitted that within its context “provincial Act” as used in Sections 167 (5) and 172 (2)(a) of the Constitution includes the old order provincial legislation which was assigned to the provinces in terms of Schedule 6 of the Constitution.



2.17 In the same way an “Act of Parliament” as used in the said sections includes national old order legislation and not only legislation passed by Parliament as contemplated in the Constitution or the Interim Constitution.

2.18 In the premises it is submitted that the order made in the Court **a quo** is subject to confirmation by the Constitutional Court.

### **3. FIRST RESPONDENT’S APPEAL**

3.1 In the event of the Ordinance not being regarded as a “provincial Act” for the purposes of Sections 167 (5) and 172 (2)(a) of the Constitution then the following submissions are made.

3.2 First Respondent asks that the Constitutional Court should regard First Respondent’s appeal as an application for leave to appeal and that First Respondent’s failure to comply with the rules in this regard should be condoned.

3.3 The justification for this application is that :-

3.3.1 The Court **a quo** made an order of referral for confirmation;

3.3.2 all parties assumed that the proceedings were confirmation proceedings and treated them as such;

3.3.3 the issue has belatedly arisen as a novel issue;

3.3.4 it would be just and expedient to treat the proceedings as leave to appeal and an appeal because the matter was fully argued on an equivalent basis.

DATED at PIETERMARITZBURG this            day of JUNE 2004.

A.J. DICKSON SC

A.A. GABRIEL