

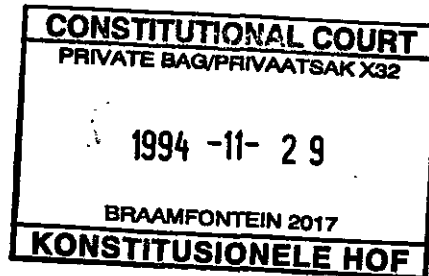
IN THE SUPREME COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

In the matter between:

THE STATE

and

WESSEL ALBERTUS VERMAAS



---

FURTHER REASONS BY MR JUSTICE KIRK-COHEN

In a letter dated 29 September 1994 the Registrar of the Constitutional Court informed me that the Honourable the President of the Constitutional Court invited me to comment on various issues referred to in paragraph 3 of that letter and to furnish further reasons or comment which may be of assistance. In the hope that these reasons and comment will be of assistance, I submit this report.

I make two preliminary comments:

1. I have been informed that this case is to be heard simultaneously with the case of S v Du Plessis (referred to in my judgment at p 10 line 12). I have read the subsequent judgment of HARTZENBERG, J and also his reply to a similar invitation extended to him as has been extended

to me. I will attempt not to repeat his reasoning, references to other decisions and conclusions save for stating that, with respect, I agree that the issue raised in the matter before him and the issue before me may be referred to the Constitutional Court in terms of the provisions of section 102(2) of Act 200 of 1993 (the Constitution).

2. The fact that this report is in English will in no way prejudice the accused, Mr Vermaas. He speaks English fluently; on the first occasion he argued an application in person in January/February 1992 he stated that, as far as court matters and proceedings were concerned, he was more at home with English and by choice argued the application in English.

I refer to the contents of paragraph 3 *seriatim*.

1. At paragraph 3(a)(i): In my view the answer is "no".
2. At paragraph 3(a)(ii): In my judgment I interpreted section 102(2) as enabling a provincial division to refer an issue, other than an issue falling within the provisions of subsection 1, to the Constitutional Court.

The issue I referred to the Constitutional Court is interlocutory but it is of vital and material significance. Having regard to the stage the trial had reached when the application for legal representation at state expense was launched, the length of the record, the multiplicity of the exhibits a decision one way or another will, from a practical point of view, be far-reaching as mentioned in the judgment.

I wish to point out certain aspects of the structure of section 102 which, in my opinion, justify the interpretation I placed upon section 102(2).

The section as a whole consistently draws a distinction between a "matter" and an "issue" (Afrikaans "aangeleentheid" and "geskilpunt").

The word "matter" is used to refer to the total dispute or lis between the parties, be it a trial or application on motion. The word "issue" is used to denote, not the trial or the application as a whole, but a part thereof. I give the following examples (with my underlining):

Section 102(1):

" If, in an any matter before a provincial or local division ... there is an issue which may be decisive for the case, ..."

Section 102(2):

" If, in any matter before a provincial or local division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), ..."

Section 102(3):

" If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter ..."

...

Section 102(5):

" If the Appellate Division is able to dispose of an appeal brought in terms of subsection (4), without dealing with any constitutional issue ...

...

Section 102(8):

" If any division of the Supreme Court disposes of a matter in which a constitutional issue has been raised ..."

See also subsections 12 and 17.

Section 102(1) provides for the reference, not of the issue alone, but the whole matter to the Constitutional Court.

" 102(1) If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court."

Thus, where this subsection is applicable, the matter is referred to the Constitutional Court. If it is necessary for the provincial or local division to hear evidence which may be necessary for the purpose of deciding the issue, it shall do so and then, as in the case where no such evidence is required, the matter is referred to the Constitutional Court. After reference to the Constitutional Court there is nothing, and certainly no part of the matter, before the provincial or local division.

There is thus no reason for the provincial division to suspend anything before it because the whole matter is now before the Constitutional Court. In my opinion the Constitutional Court may, if necessary, refer the matter, or any specific portion thereof, back to the provincial division if this should be necessary after the Constitutional Court has decided the issue in question.

A distinction is made in section 102(2). In this event provision is made for the local or provincial division to refer an issue, and only an issue, to the Constitutional Court:

" If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court."

Here the constitution provides that, if there is in any matter before a provincial division an issue other than a subsection 1 issue, the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it pending the decision of the issue by the Constitutional Court. In this instance, differing from the subsection 1 situation, the matter remains before the local or

provincial division and only the issue is referred to the Constitutional Court.

Section 102(3): This subsection draws the same distinction between an issue and the matter:

" If, in any matter ... there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction."

This subsection, by the use of the words "if it does not refer an issue to the Constitutional Court" provides that the provincial or local division has a discretion whether to refer an issue or not; that discretion can only exist where an issue is not one falling under subsection 1 ie an issue falling under subsection 2 where it is not obligatory to refer the matter to the Constitutional Court. This is borne out by the words "... give a decision on such issues as are within its jurisdiction". The same subsection provides that where there are constitutional issues within the exclusive jurisdiction of the Constitutional Court, the provincial or local division must "make findings of fact which may be relevant" in that regard.

Section 102(8): this subsection also draws the distinction between a matter and an issue. Where the Supreme Court has disposed of a matter in which a constitutional issue was raised, the Supreme Court, if it is of opinion that the issue:

" ... is of such public importance that a ruling should be given thereon, it may, notwithstanding the fact that the matter has been disposed of, refer such issue to the Constitutional Court for a decision."

In my opinion:

1. Subsection 8 again underlines the distinction between a matter and an issue;
2. Only an issue is referred to the Constitutional Court which acts in this instance in an advisory capacity by way of a declarator or giving a ruling (an opinion).
3. Such a constitutional issue placed before the Constitutional Court may involve an interlocutory issue or the interpretation and application of a fundamental right in terms of chapter 3, (both of which are involved in the case before me).

In my opinion subsections 5, 6, 9 and 12 support the distinction between a matter and an issue therein.

Seen in the context of section 102 as a whole, subsection 1 therefore provides that where an issue is referred to the Constitutional Court the whole dispute, be it an action or an application, is referred to that Court.

If subsection 2 is to be read as a proviso to, or qualification of, subsection 1 then:

1. It does not purport to be a proviso or qualification of subsection 1;
2. The constitution contains many provisos and the pattern and linguistic treatment is to refer to them as provisos which is not followed in section 102;
3. A non sequitur results; viz subsection 1 provides that the whole matter is referred to the Constitutional Court which is in conflict with subsection 2 which does not refer the matter to the Constitutional Court but specifically provides that the matter remains before the local or provincial division and the matter shall be suspended pending the decision of the Constitutional Court.

The opening words of subsection 2 are significant; "If, in any matter ..." denote any matter whatsoever and they are not linked to the matter referred to in subsection 1. If they were so linked the opening words would surely have read "If in such matter ..." or at least "If in any such matter ...". The words used therefore indicate that the matter referred to in subsection 2 is not the same matter as referred to in subsection 1. It is of note that in subsections 1, 2 and 3 the opening words are similar, namely "If, in any matter ..."; the linguistic treatment therefore indicates that in those three instances separate types of disputes are dealt with.

This meaning to be attached to the words "any matter" in subsection 2 is to a matter containing an issue "other than an issue referred to the Constitutional Court in terms of subsection 1". The relevant issue is thus the (other) issue. The subsection provides that if the relevant issue is referred to the Constitutional Court then and in that event the proceedings before the provincial division will be suspended.

Because the matter is not referred to the Constitutional Court the subsection deals with a matter where the provincial or local division is given a discretion whether or not to refer an issue to the Constitutional Court. Thus the words "if it refers the relevant issue to the Constitutional Court" refer to an issue (other than a subsection 1 issue) arising in any matter (not being a subsection 1 matter).

In my opinion, therefore, subsection 2 deals with a constitutional issue where the local or provincial division has a discretion whether to refer that issue to the Constitutional Court and that can only be in regard to an issue not within the exclusive jurisdiction of the Constitutional Court. In my opinion the words "if it refers the relevant issue" are used in relation to a non-subsection 1 type issue.

Before dealing with the general intention of the constitution which supports this interpretation I refer to the unreported case of S v A Coetzee and Others (referred to by HARTZENBERG, J). In my opinion MARAIS, J, with respect, erred in his interpretation of section 102(1) and (2) in that he did not consider the difference between the concepts and use of the words matter and issue.

At p 1008 MARAIS, J, in referring to section 102(2) as interpreted by HARTZENBERG, J and myself, states that the interpretation we place thereon is "intended to allow other issues apart from those in section 102(1) to be referred" ... "but leaves in the air the procedure when there is a referral under section 102(1) and there are other issues remaining to be dealt with". As stated above on my interpretation nothing is left in the air when there is a referral under section 102(1) - the whole matter is referred to the Constitutional Court and this is the point that the learned judge, with respect, overlooks.

On p 1008-1009 the learned judge refers to the words "relevant issue" and wishes to qualify and read into the use of those words the phrase "referred to in subsection (1)". This reasoning is unjustifiable as the constitution does use those words; in addition the reasoning overlooks, and is incompatible with, the distinction drawn between the words matter and issue.

The constitution as a whole provides for wide, rather than restricted, access to the Constitutional Court on constitutional issues, in particular fundamental rights. As an example hereof I refer to section 102(8) where provision is made for a ruling only which would include interlocutory issues of importance. I also refer to the following:

- i) Section 100(2) provides that the Constitutional Court may make provision for direct access to the court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction. This does not mean or imply that the Constitutional Court is to be flooded with applications. It is only where it is in the interest of justice so to do that direct access will be granted. This would include an application in terms of the provisions of section 7(4)(b) involving the interpretation of a fundamental right. The provisions of section 35(3) are wide enough to include in the phrase "interpretation of any law" the provisions of the constitution itself. The

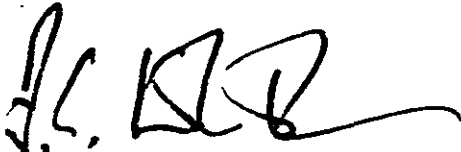
provisions of section 35(3) would postulate an all-embracing and liberal interpretation of section 102(2).

ii) In support of the foregoing it seems illogical that section 102(8) provides for a ruling in a matter that has been disposed of but that subsection 2 should be so interpreted that, where there is a vital and relevant issue having far-reaching effect, as in this case, the subsection should receive a restrictive interpretation where, at least, the liberal interpretation is justifiable in regard to the section seen as a whole.

iii) Section 98(2) provides that the Constitutional Court is the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the constitution; this provision too supports an interpretation that access to the Constitutional Court on a constitutional issue, such is at stake *in casu* should, in the interests of justice be decided now.

3. Ad paragraph 3(a)(iii): I have nothing to add to what is set out in my judgment at page 15 line 28 - page 18 line 6. I am aware that subsequently various decisions have been given in regard to the interpretation of the section; I refer in particular to S v Saib 1994 2 SACR 517 D at 523(b)-524(a) and S v Ndimma and Others 1994 2 SACR 525 D.

4. At paragraph 3(a)(iv): it was conceded before me by counsel for Mr Vermaas that the accused was not entitled to representation by a legal representative of his own choice. In my view the section does not so provide. I wish to point out that in this matter such a right, if it were to exist, would lead to an intolerable situation if counsel or attorney of the accused's choice is unavailable to commence and to conclude without interruption the necessary preparation and delivery of an argument. Such a situation could lead to interminable delays of the trial which commenced in September 1991.



**F C KIRK-COHEN**  
**JUDGE OF THE SUPREME COURT OF SOUTH AFRICA**  
**(TRANSVAAL PROVINCIAL DIVISION)**

24 November 1994

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MR. G T M PRINSLOO  
DEPARTMENT OF JUSTICE · DEPARTEMENT VAN JUSTISIE  
REPUBLIC OF SOUTH AFRICA · REPUBLIEK VAN SUID-AFRIKA

Office of the Registrar of the Supreme  
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Kantoor van die Griffier van die  
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**CONSTITUTIONAL COURT**  
PRIVATE BAG/PRIVAATSAK X32  
  
1994 -12- 0 6  
  
BRAAMFONTEIN 2017  
**KONSTITUSIONELE HOF**

PRIVATE BAG X67  
PRETORIA

28th November 1994

The Registrar of the Constitutional Court  
Private Bag X32  
BRAAMFONTEIN  
2017

**FURTHER REASONS BY THE HONOURABLE MR JUSTICE**  
**KIRK-COHEN IN RESPECT OF THE STATE VS W.A. VERMAAS**

Attach hereto please find the original document. The copies  
have already been dispatched to you.

This error is regretted.

  
**G T M PRINSLOO**  
**CHIEF REGISTRAR**  
Lr

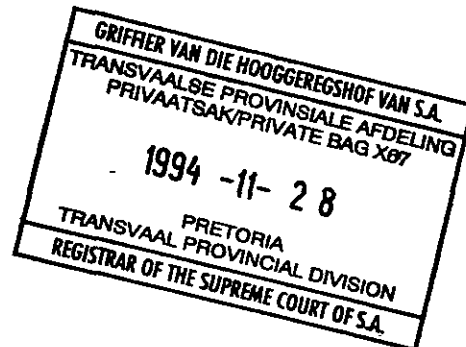
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There is thus no reason for the provincial division to suspend anything before it because the whole matter is now before the Constitutional Court. In my opinion the Constitutional Court may, if necessary, refer the matter, or any specific portion thereof, back to the provincial division if this should be necessary after the Constitutional Court has decided the issue in question.

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Section 102(8): this subsection also draws the distinction between a matter and an issue. Where the Supreme Court has disposed of a matter in which a constitutional issue was raised, the Supreme Court, if it is of opinion that the issue:

" ... is of such public importance that a ruling should be given thereon, it may, notwithstanding the fact that the matter has been disposed of, refer such issue to the Constitutional Court for a decision."

In my opinion:

1. Subsection 8 again underlines the distinction between a matter and an issue;
2. Only an issue is referred to the Constitutional Court which acts in this instance in an advisory capacity by way of a declarator or giving a ruling (an opinion).
3. Such a constitutional issue placed before the Constitutional Court may involve an interlocutory issue or the interpretation and application of a fundamental right in terms of chapter 3, (both of which are involved in the case before me).

In my opinion subsections 5, 6, 9 and 12 support the distinction between a matter and an issue therein.

Seen in the context of section 102 as a whole, subsection 1 therefore provides that where an issue is referred to the Constitutional Court the whole dispute, be it an action or an application, is referred to that Court.

If subsection 2 is to be read as a proviso to, or qualification of, subsection 1 then:

1. It does not purport to be a proviso or qualification of subsection 1;
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The opening words of subsection 2 are significant; "If, in any matter ..." denote any matter whatsoever and they are not linked to the matter referred to in subsection 1. If they were so linked the opening words would surely have read "If in such matter ..." or at least "If in any such matter ...". The words used therefore indicate that the matter referred to in subsection 2 is not the same matter as referred to in subsection 1. It is of note that in subsections 1, 2 and 3 the opening words are similar, namely "If, in any matter ..."; the linguistic treatment therefore indicates that in those three instances separate types of disputes are dealt with.

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Because the matter is not referred to the Constitutional Court the subsection deals with a matter where the provincial or local division is given a discretion whether or not to refer an issue to the Constitutional Court. Thus the words "if it refers the relevant issue to the Constitutional Court" refer to an issue (other than a subsection 1 issue) arising in any matter (not being a subsection 1 matter).

In my opinion, therefore, subsection 2 deals with a constitutional issue where the local or provincial division has a discretion whether to refer that issue to the Constitutional Court and that can only be in regard to an issue not within the exclusive jurisdiction of the Constitutional Court. In my opinion the words "if it refers the relevant issue" are used in relation to a non-subsection 1 type issue.

Before dealing with the general intention of the constitution which supports this interpretation I refer to the unreported case of S v A Coetzee and Others (referred to by HARTZENBERG, J). In my opinion MARAIS, J, with respect, erred in his interpretation of section 102(1) and (2) in that he did not consider the difference between the concepts and use of the words matter and issue.

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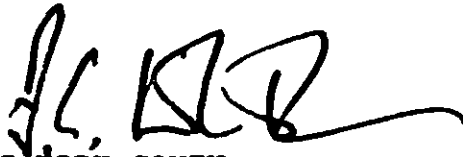
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24 November 1994