IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. CCT 54/00

In the matter between:

SIAS MOISE Plaintiff

and

TRANSITIONAL LOCAL COUNCIL OF GREATER GERMISTON Defendant

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Intervenor

and

THE WOMEN'S LEGAL CENTRE Amicus Curiae

WRITTEN SUBMISSIONS OF WOMEN'S LEGAL CENTRE REGARDING THE APPLICATION FOR VARIATION

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Introduction

1. These supplementary written submissions are made pursuant to the Directions given by the President on 13 July 2001.

2. In what follows each of the issues set out in paragraph 1 of the Directions is dealt with in turn.

Standing

3. The Women's Legal Centre ("WLC") participated in these proceedings pursuant to the Directions of the President made on 28 February 2001. Paragraph 3 of those directions provided:

"*Any other party or interested person wishing to make representations to the Court concerning the question whether the order by the Honourable Mr Acting Justice Hoffmann should or should not be confirmed shall lodge with the Registrar of the Constitutional Court by not later than 20 March 2001, notice of intention to do so, indicating whether the representations will support or oppose confirmation*".

4. The Directions were issued after both parties to the proceedings in the Court *a quo* had indicated that they did not intend participating in the confirmation proceedings in this Court in terms of sections 167(5) and 172 of the

Constitution of the Republic of South Africa, 1996 ("the new Constitution").

5. The WLC participated and supported the confirmation of the order made by the Honourable Mr Acting Justice Hoffman in the court *a quo* because in the WLC's view section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 94 of 1970 ("section 2(1)(a)" and "the Limitation Act", respectively) unnecessarily and in breach of the rights of access to courts and equality in the Bill of Rights in the new Constitution restricted delictual claims against provincial and local authorities.

6. The WLC was the only respondent to the invitation in the Directions of 28 February 2001, aside from the Minister of Justice and Constitutional Development ("the Minister") who at the request of this Court appointed counsel to argue against confirmation of the order of unconstitutionality. In practical terms the WLC argued one side of the case, the other being argued by the Minister.

7. The WLC was not admitted as an *amicus curiae* in terms Rule 9 of the Rules of this Court. It intervened pursuant to a general notice – the Directions of 28 February 2001 – inviting those interested to participate in the proceedings. The comments of this Court in *Hoffmann v South African Airways*[1] regarding the differences between the status and rights of an *amicus curiae* and an intervening party with a direct interest in the outcome of the litigation are therefore distinguishable.

[1] 2001 (1) SA 1 (CC) at par 63.

8. The WLC participated in the confirmation phase of this matter in the public interest and the interests of justice pursuant to a *sui generis* procedure directed by the President. What is more, the proceedings in which the WLC participated are *sui generis*, i.e. confirmation proceedings in terms of sections 167(5) and 172(2) of the new Constitution, which have to be determined by this Court irrespective of the attitude of the parties.

9. The application for the variation of this Court's order of 4 July 2001 has likewise been made by the WLC, a participant in the confirmation proceedings, in the public interest and the interests of justice. In paragraph 5 of her affidavit in support of the application Ms Quénet said that the absence of any provision in the order regulating the retrospective effect of the declaration of invalidity will lead to "*uncertainty as to its effect upon actions instituted but not finally determined at the time that the order was made*". It is submitted that such uncertainty is inimical to the public interest and the interests of justice.

10. It is accordingly submitted that the WLC is a public interest participant, whose standing to bring the application for variation is analogous to that of a public interest litigant in Bill of Rights proceedings in terms of section 38 of the new Constitution. There is no reason to adopt a narrow approach to the issue of standing in constitutional cases.[2] There can be no doubt that in participating in this case generally, and in bringing the variation application in particular, the WLC is genuinely acting in the public interest.[3] The variation application is the only

[2] *Ferreira v Levin NO; Vryenhoek and others v Powell NO* 1996 (1) SA 984 (CC) at par 165 and 229-30. See generally *Dawood, Shalabi, Thomas and Another v Minister of Home Affairs* 2000 (1) SA 997 (CC) at 1028G-1030C.
[3] Compare *Ferreira, supra*, at par 234.

reasonable and effective manner in which the uncertainty as to the retrospective applicability of the declaration, described below, can be resolved.

11. Alternatively, it is submitted for the reasons given below that the President or the Court should in the public interest and the interests of justice amend the terms, conditions, rights or privileges of the WLC determined by the Directions of 28 February 2001 so as to permit its bringing this application (compare Rule 9(3) of the Rules of this Court).

The uncertainty

12. As indicated above, the WLC submits that the absence of any provision in the order regulating the retrospective effect of the declaration of invalidity will lead to "*uncertainty as to its effect upon actions instituted but not finally determined at the time that the order was made*". The uncertainty arises in three ways.

13. First, this Court in its judgment tested the constitutionality of section 2(1)(a) against the provisions of the new Constitution and, in confirming the order of the Court *a quo*, in effect declared section 2(1)(a) unconstitutional and invalid. There is however uncertainty as to whether the declaration of invalidity operates prospectively or retrospectively. This uncertainty arises for the following reasons:

13.1 In cases such as *Mohlomi v Minister of Defence,*[4] where a finding of inconsistency with the Constitution of the Republic of South Africa Act, 200 of 1993 ("the interim

[4] 1997 (1) SA 124 (CC) at par 26(b).

Constitution), was made, and *Lesapo v North West Agricultural Bank and another,*[5] *where a finding of inconsistency with the new Constitution was made, this Court considered it necessary to regulate the retrospective effect of the declarations of unconstitutionality in a manner which expressly identified the classes of persons who could rely on the declarations. This suggests that in the absence of an order of that sort the order would have been prospective only.*

13.2 *Against this it may be argued that in the absence of an order limiting the retrospective effect of an order declaring a statutory provision unconstitutional and invalid, the declaration invalidates the provision in question with effect from the date on which the new Constitution commenced, i.e. 4 February 1997.*[6] *It follows from this that the declaration of invalidity confirmed by this Court operates retrospectively with effect from the date on which the new Constitution commenced. The WLC believes this argument to be the correct one but, as explained in paragraph 21.2 below, given the approach of this Court to the constitutionality of section 12(1)(b) of the Supreme Court Act, 59 of 1959, in Prince v President, Cape Law Society and others*,[7] contends that the relevant date is that on which the interim Constitution commenced (27 April 1997).

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[5] *2000 (1) SA 409 (CC) at par 34.*

[6] *See section 172(1) of the new Constitution. Compare Ferreira v Levin N.O. and others; Vryenhoek and others v Powell N.O. and others* 1996 (1) SA 984 (CC) at par 27-8 per Ackermann J. Although this was a minority judgment, Chaskalson P (writing for the majority of this Court) expressly concurred with Ackermann J on this aspect at par 158. See also *National Coalition for Gay and Lesbian Equality and others v Minister of Justice and others* 1999 (1) SA 6 (CC) at par 96; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) at par 6; *New National Party of South Africa v Government of the Republic of South Africa and others* 1999 (3) SA 191 (CC) at par 22. See generally Budlender *et al Juta's New Land Law* 1-5 to 1-6 (Issue 1); Chaskalson *et al Constitutional Law of South Africa* 6-43 and 6-44 (Revision Service 5).

[7] *2001 (2) SA 388 (CC) at par 32-40.*

14. Secondly, if the declaration of invalidity does operate prospectively only, the question which arises is whether the operative date is the date of the order by Hoffmann AJ in the Court *a quo* (25 October 2000) or the date of this Court's order (4 July 2001).

15. Thirdly, if the declaration of invalidity operates retrospectively and not prospectively only, the following difficulty arises. In the period between 27 April 1994 or 4 February 1997, on the one hand, and 4 July 2001 (the date of this Court's order), on the other, the question of compliance with section 2(1)(a) will doubtless have arisen in many cases – the Limitation Act is a general statute affecting a large number of organs of state – and in some of these it may have been decisive of the matter. It is uncertain what effect, if any, the declaration of invalidity will have on cases which during that period were finally determined because of non-compliance by the plaintiff with section 2(1)(a).

A patent error or omission

16. This Court has the power, provided it is approached within a reasonable time,[8] to supplement its judgment and order to deal with an accessory or consequential matter which this Court overlooked or inadvertently omitted to include.[9]

17. It is submitted that an order in terms of section 172(1)(b)(i) of the new Constitution regulating the retrospective effect of a declaration of invalidity is an accessory or consequential matter.

18. It is submitted that the absence of any provision in this Court's order in the present matter regulating the retrospective effect of the declaration of invalidity is a patent error or omission because this Court could not have intended to give rise to the uncertainty described above. The uncertainty is unnecessary and may cause dislocation in the civil justice process in that:

18.1 disputes may arise and litigation may ensue in other matters as to the retrospective operation of the declaration of invalidity; and/or

18.2 cases which have been finalised prior to 4 July 2001 may be reopened.[10]

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[8] *Which, it is submitted, happened in the present case.*

[9] *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) at par 22, 23 and 29. See also *S v Wells* 1990 (1) SA 816 (A) at 819G-820H, especially 820E-H.

[10] *S v Zuma and others* 1995 (2) SA 642 (CC) at par 43; *S v Bhulwana; S v Gwadiso* 1996 (1) SA

Amendment where there is no patent error or omission

19. It is submitted that this Court does have a general discretionary power in the interests of justice to correct errors in its judgments or orders, which do not amount to ambiguities or patent errors or omissions, although this power should be exercised sparingly. This source of this power is section 173 of the new Constitution.[11]

20. It is further submitted that the discretion should be exercised in this case, which is not where the principle of finality in litigation should yield to the need for clarity as to the retrospective effect of the declaration of invalidity.

Conclusion

21. It is submitted that if this Court does decide to regulate the retrospectivity of the declaration of invalidity:

21.1 this Court should follow the approach adopted in *Mohlomi's* case, where this Court's declaration of invalidity applied to all actions instituted before or since the commencement of the Constitution which were not already barred on that date and which had not been finally determined by the date of this Court's order;[12] and

21.2 the relevant date to be included in the order as to retrospectivity is 27 April 1994, that is, the date on which the Interim Constitution came into operation. That is because

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388 (CC) at par 32. See also *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at par 56 to 58.

[11] *Compare Firestone South Africa (Pty) Ltd, supra*, at 308A-309A and, particularly, *Ntuli, supra*, at par 23 and 30, where this question was raised but not decided.

[12] *Mohlomi, supra*, at par 25.

the Limitation Act pre-dates the Interim Constitution. The only amendments to the Act subsequent to 27 April 1994 (by the Justice Laws Rationalisation Act 18 of 1996 and the General Law Amendment Act 49 of 1996) have no bearing on the constitutional question determined by this Court. The amendments were limited to replacing two of the exceptions in section 3(1) with references to new legislation and to deleting all references to "*the territory of South-West Africa*".[13]

22. It is accordingly submitted that the order of this Court made on 4 July 2001 should be varied by adding, after paragraph 26 of the judgment, a paragraph in the following terms:

"27. This declaration of invalidity will apply to and govern all actions instituted either before or since 27 April 1994 which were not already barred by section 2 on that date and which, at the time of this order, have not been finally determined by judgments delivered at first instance or on appeal or by settlements duly concluded."

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16 August 2001

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[13] *The applicability of the interim Constitution was discussed in footnote 19 of the WLC's original written submissions.*

LIST OF AUTHORITIES

Cases

1. *Brink v Kitshoff NO* 1996 (4) SA 197 (CC)
2. *Dawood, Shalabi, Thomas and Another v Minister of Home Affairs* 2000 (1) SA 997 (CC)
3. *Ferreira v Levin NO; Vryenhoek and others v Powell NO* 1996 (1) SA 984 (CC)
4. *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A)
5. *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)
6. *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC)
7. *Lesapo v North West Agricultural Bank and another* 2000 (1) SA 409 (CC)
8. *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC)
9. *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)
10. *National Coalition for Gay and Lesbian Equality and others v Minister of Justice and others* 1999 (1) SA 6 (CC)
11. *New National Party of South Africa v Government of the Republic of South Africa and others* 1999 (3) SA 191 (CC)
12. *Prince v President, Cape Law Society and others* 2001 (2) SA 388 (CC)
13. *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC)
14. *S v Wells* 1990 (1) SA 816 (A)
15. *S v Zuma and others* 1995 (2) SA 642 (CC)
16. *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173

Books

1. Budlender *et al Juta's New Land Law* 1-5 to 1-6 (Issue 1)
2. Chaskalson *et al Constitutional Law of South Africa* 6-43 and 6-44 (Revision Service 5)