

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT/2319

Ex parte: CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

In re: THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

NOTICE OF OBJECTION IN TERMS OF RULE 15(4) AND DIRECTION OF THE DIRECTIONS ISSUED BY THE PRESIDENT OF THE CONSTITUTIONAL COURT ON 13 MAY 1996

I, Carel Ockert du Preez, Head of the Department of Housing, Local Government and Planning, wish to avail myself of the invitation by the President of the Constitutional Court to make a written submission regarding the certification of the new constitution.

TAKE NOTICE FURTHER that the address to which communications can be directed is:

THE HEAD OF DEPARTMENT
DEPARTMENT OF HOUSING, LOCAL GOVERNMENT AND PLANNING

THE SPECIFIC PROVISIONS CONCERNED

Clauses 146(1) to (5), 148, Chapter 7 (especially clause 155(1))
Schedule 4: Part B and Schedule 5: Part B.

THE CONSTITUTIONAL PRINCIPLES CONCERNED

Principle XVIII.2 and Principle XXIV.

THE GROUNDS OF OBJECTION

In terms of section 126(1), read with Schedule 6 of the Constitution of the Republic of South Africa, 1993 (the "Interim Constitution"), a provincial legislature is competent to make laws for the province with regard to Local Government. This competence is held by a provincial legislature concurrently with Parliament. In terms of section 126(3) of the Interim Constitution a provincial law pertaining to Local Government shall prevail over an Act of Parliament except in so far as is specified in that section.

Paragraph 2 of Principle XVIII requires that -

"The powers and functions of the provinces defined in the [Interim] Constitution... shall not be substantially less than or substantially inferior to those provided for in . . . [the Interim] Constitution."

The new constitutional text provides for legislative powers of provinces, with regard to Local Government, which are substantially less than those provided for in the Interim Constitution:

What is proposed is that a province no longer have full capacity to legislate on Local Government. Instead certain specified areas of Local Government are listed in Part B of Schedule 4 and Part B of Schedule 5 as falling within the legislative competence of provinces. These very specific competences are then supplemented with a few specific legislative powers which arise from the duties imposed upon provinces in Chapter 7 with regard to Local Government (section 154(1) and 155(1)) and the power to provide for privileges and immunities of Municipal Councils members within the framework of national legislation (section 161).

A new provision, apparently intended to cover matters not specifically dealt with in the Constitution, is included in section 164. All matters concerning local government not dealt the Constitution may be prescribed by national legislation or by provincial legislation wit framework of national legislation (section 164).

The cumulative effect of these provisions is not only that the legislative competence of provinces with regard to Local Government are severely reduced but also that the provisions of the Interim Constitution to the effect that all provincial legislation regarding Local Government prevails over national legislation except where section 126(3) of the Interim Constitution applies, have been altered so that only those matters listed in Part B of Schedule 4 are now to be dealt with in this manner (section 146(1)). Although the matters listed in Part B of Schedule 5 are effectively put beyond the legislative competence of Parliament, these matters are of a less important nature than those matters which are effectively put beyond the legislative competence of provincial legislatures. In effect the legislative competence of provinces with regard to Local Government hay substantially reduced - notwithstanding the very artificial separation of Part B of Schedule 4 and Part B of Schedule 5.

In addition, if section 146(2) - (4) is read with section 148, it is apparent that "the presumption of prevalence" (if one may call it that) has been substantially shifted in favour of national legislation contrary to the position which pertains under the Interim Constitution. It is submitted that this weakens the position of provinces.

Moreover, although clause 155(1) of the new constitutional text appears, on the face of it, to conform to Principle XXIV, it is submitted that in fact it does not do so, and that in order to so conform the new constitutional text should contain a provision to the effect, or (at the very least) which proceeds from the basis, that both national and provincial legislation may provide powers, functions and other features of local government. Otherwise it is very difficult to see why Principle XXIV was included.