

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE No. 23/96

In Re:-

**THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN
TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF
SOUTH AFRICA, ACT 200 OF 1993.**

WRITTEN OBJECTION OF THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL

The Province of KwaZulu-Natal hereby objects to the certification of the draft Constitution adopted by the Constitutional Assembly on May 8, 1996 (the Draft), submitting that it contravenes the Constitutional Principles (CP) mentioned hereinafter.

1 . The Draft contravenes CP XVIII(2) as it provides for less and inferior provincial powers and functions than those which this Province enjoys in terms of the Constitution of the Republic of South Africa Act, 200 of 1 993 (the Constitution) in terms of the Draft this Province would no longer be able to participate, through its senators, in the following decision-making processes at national level:

- introduction and passage of legislation on matters other than provincial matters,
- constitutional amendments not affecting provincial powers, functions and boundaries,
- legislation referred to in section 61 of the Constitution,
- referral of national bills to the Constitutional Court,
- reconsideration of bills referred back by the President,
- oversight of the administration,
- election of the President,
- impeachment of the President,
- passing of a vote of no confidence in the executive.

Chapter 3 of the Draft

- characterises this Province not as a government in its own right, but as a sphere of government and an organ of the state,
- restrains the exercise of our provincial powers through the institutionalised intergovernmental relations and mandatory cooperation,
- restrains this Province from resorting to a court to redress dispute with other organs,
- gives exclusive power to Parliaments, acting without the consent of the Council of Provinces, to define and regulate intergovernmental relations, the freedom of which is presently entrenched in the Constitution.

In terms of the Draft, the powers and functions of this Province have been diminished with respect to the following matters:

- official language(s) for this Province,
- this Province's name,
- powers in terms of section 61 of the Constitution,
- referral of provincial bills to the Constitutional Court,
- administrative functions with respect to:
 - clause 100 of the Draft allowing the central government intervention, direction and possible substitution,
 - clause 125(3) making this competence contingent upon administrative capacity,
 - clause 125(4) preventing judicial resolution of administrative capacity issues,
- provincial public protector,
- provincial civil service commission,
- the power of national legislation to override provincial legislation, with respect to:
 - the reversal of the onus of proof set out in section 1 26(3) of the Constitution,
 - the broadening of the overrides set out in section 1 26(3) of the Constitution,
 - additional overrides,
 - additional rules to solve conflicts of legislation requiring prior certification of a provincial law by the Council of provinces and recovering uncertainty in favour of the national legislation,
- provincial constitution, requiring compliance of such constitution not only with the national constitution but also with:
 - clause 143(2),
 - national legislation,
 - retrospectively, with the Draft itself with respect to the existing provincial constitution,
- local government,
- armed services and organizations,
- traditional authorities,
- indigenous and customary law,
- provincial house of traditional leaders,
- procurement as an incidental provincial competence in terms of the Constitution, which the Draft requires to be exercised within national framework legislation,
- financial autonomy, which becomes subject to clauses 215 and 216 of the Draft,
- financial allocations to local government,
- user charges,
- gambling taxes,
- lotteries and sports pools,
- non-university and non-technikon tertiary education,
- provincial public media other than media services directly controlled or provided by the provincial government,
- assignment of the administration of national legislation.

The list of functional areas set out in Schedules 4 and 5 of the Draft, which is longer and more detailed than the corresponding Schedule 6 of the Constitution, diminishes the

autonomy of this Province, listing some of the competencies which are part of the functional areas listed in Schedule 6, or matters reasonably incidental or necessary thereto, to the exclusion of others, so that the details limit rather than expand on the contents of provincial autonomy, for most of the additional language is covered, by construction or implication, by Schedule 6.

2. The Draft contravenes:-

- CP XIX for it does not provide for the exercise of powers by the national government on a delegation or agency basis,
- CP XX for section 125(3) undermines the notion of adequate/ appropriate executive powers,
- CP XX for failing to provide for fiscal viability while requiring compliance with its clause 227(4),
- CP XX, XXI and XXII with respect to the power to determine the Province's name,
- CP XX for failure to allocate to Provinces powers crucial to cultural diversity, including residual powers,
- CP XIX and XXI as it provides for no matters in which this Province has final decision making power

CP XXII:-

- as clause 146(4) encroaches on the powers of this Province creating an irrefutable presumption of necessity,
- as clause 146(6) and 4'i (2) to (5) prevent immediate legal redress,
- as clause 125(2)(b) forces this Province to administer conflicting laws, pending the administrative, rather than judicial resolution of the conflict,
- as clause 147(2) subjects the provincial constitution to national legislation,
- as it recognizes no area of entrenched provincial autonomy as Chapter 3 forces co-operation, and prevents policy differentiation,

CP XXI:-

- as clause 105(1), 106(4), 157 and 190, as they relate to provincial and local government elections, curtail the role of this Province,
- as clause 127(1) requires the calling of a referendum in accordance with national legislation,
- as clause 65(2) provides for the relation between this province and its representatives,
- as clause 1 63 provides that national rather than provincial legislation shall determine the organization of local government's interests and their interaction with this Province,

CP XX:-

- as clauses 197(1) and 196 established a single public administration and related commission, in spite of section 125(1).

As very little time and a restricted scope has been afforded for this submission, this Province requests leave of this Honourable Court to submit a more detailed written argument on the foregoing and other objections, and to present oral argument in support thereof.

DATED AT PIETERMARITZBURG ON THIS 30 DAY OF MAY 1996.

FRANK THEMBA MDLALOSE
PREMIER, KWAZULU-NATAL