

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT/23/9

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, THE DIRECTIONS ISSUED BY THE PRESIDENT OF CONSTITUTIONAL COURT ON 13 MAY 1996

BE PLEASED TO TAKE NOTICE THAT, Gerald Norman Morkel, Minister of the Police Service for the Western Cape, wishes to avail himself of the invitation by the President of the Constitutional Court to submit written objections to the certification of the Constitution adopted by the Constitutional Assembly on the 8th of May 1996.

TAKE NOTICE further that the said Gerald Norman Morkel would welcome the opportunity to submit oral argument to the Constitutional Court after consideration of this written argument.

TAKE NOTICE further that the certification of the Constitution is objected to on the following grounds:

Provincial powers in respect of police

1. It is submitted that the provisions of the Constitution relating to police, more in particular clauses 199(4), 205, 206, 207, 208, Schedule 4 and Schedule 6 Annexure D item 1 and 2 result in the conclusion that the powers and functions of provinces in relation to police are substantially less than or substantially inferior to those provided for in the Interim Constitution, 1993, and therefore that Constitutional Principle XVIII.2 of the Interim Constitution 1993, has been contravened.

2. It is evident from both the Interim Constitution (sec 214(1)) and the new Constitution (clauses 199(1) and 205(1)) that there is a single police service for the Republic of South Africa structured at both national and provincial levels. The Interim Constitution establishes a joint responsibility for police between the national and provincial levels, and provides for explicit executive and legislative powers for both levels. The new Constitution provides that *national legislation must establish the powers and functions of the police service* (sec 205(2)). It is submitted that this provision significantly diminishes the provincial competences provided for in the Interim Constitution.

3.1 Provincial executive authority currently includes the *responsibility for the performance by the Service in or in regard to that province of the functions set out in section 219(1)(sec 217(1))*. This establishes a political responsibility for police at the provincial level and indeed covers a wide range of functions.

A provincial minister of police currently has the obligation to approve or veto appointment of the provincial commissioner of police for that province (sec 217(2) of the Interim Constitution).

3.2 In the new Constitution political responsibility vests at national level in a member of the Cabinet (clause 206(1)), and the provinces are basically left with a monitoring liaison function (clause 206(2)). The involvement of the provincial executive in the appointment of the provincial commissioner has been reduced from in consultation, which includes the obligation to approve or veto, to after consultation (clause 207(3) read with Schedule 6 Annexure D item 1(b)). It is submitted that these provisions amount to a qualitative reduction in the powers of provinces.

4.1 According to the Interim Constitution a provincial legislature has concur legislative authority with Parliament to pass laws on police, subject to the provisions Chapter 14 (Schedule 6). This legislative power is qualified in sec 217(3) where stipulated that provincial laws must not be inconsistent with national legislation and it be in regard to the range of functions contained in sec 219(1).

4.2 No specific provision is made in Chapter 11 of the new Constitution for legislative authority for provinces. In fact, sec 199(4) only provides for national legislation to structure and regulate the security services, which include police. A heavily qualified provision appears in Schedule 4, where police is indicated as a concurrent functional area where both national and provincial levels have legislative competence, but it is limited *to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislature legislative competence*. According to this provision provinces, although they have concurrent legislative authority, can only legislate in so far as is provided for in Chapter 11. It is submitted that this indeed leaves very limited scope, if any, for a provincial legislature pass laws regarding the police service within that province. It is submitted that this results in a substantive reduction in the legislative authority of provinces.

5.1 The functions of provincial commissioners of police are currently constitutionally provided for in sec 219 of the Interim Constitution. A provincial commissioner is accountable to the responsible member of the Executive Council for the performance of the actual policing functions (sec 219(1)), and to the National Commissioner for more personnel related functions and those functions assigned to him or her by the National Commissioner (sec 219(2)).

5.2 The functions of provincial commissioners are not enumerated in the new Constitution. On the contrary, sec 207(4)(a) stipulates that national legislation shall prescribe the responsibilities of provincial commissioners. There is furthermore no specific provision for the provincial executive to give directions to the provincial commissioner in that province. An amendment to sec 219(1) to omit provincial executive control over provinces commissioners is in fact prescribed by Schedule 6 Annexure D item 2. This implies that there is no requirement of accountability of the provincial commissioner to the provincial executive. This conclusion is strengthened by the fact that it is specifically provided in sec 207(4)(b) that a provincial commissioner must perform his or her duties *subject to the power of the National Commissioner*. It is thus submitted that the provincial commissioner is only accountable to the National Commissioner for the performance of his duties. This weakens the control of a provincial executive over police in that province.

6. It is submitted that the qualitative and quantitative reduction of provincial powers functions as indicated above inevitably leads to the conclusion that provincial powers and functions in relation to police are substantially less than and substantially inferior to the current position as provided for in the Interim Constitution.

SIGNED: G. Morkel ON 30 May 1996 AT Cape Town

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

Minister of the Police Service : Western Cape

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