

MINISTER OF POLICE (WESTERN CAPE)

11 JUNE 1996

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT/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 , 1993**

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT BRAAMPARK
FORUM 11 JOHANNESBURG

KINDLY TAKE NOTICE that the written argument on behalf of the Member of the Executive Council for the Police Service, Western Cape, is filed herewith.

Dated at CAPE TOWN this 10th day of June 1996.

D J BRAND

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WRITTEN ARGUMENT OF ON BEHALF OF THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE POLICE SERVICE, WESTERN CAPE

EXPLANATORY NOTE

1. In these written submissions:

1.1 The Constitution of the Republic Of South Africa 1993 (Act No 200 of 1993), will referred to as “the Interim Constitution:

- 1.2 The Constitution of the Republic of South Africa, 1996, will be referred to as “the new Constitution”, and
- 1.3 Sections of the Interim Constitution and the new Constitution will be referred to as “sections” and “clauses” respectively.
2. In this written argument, which is filed at the invitation of the Court objection is made to the certification of the new Constitution on the basis that the provisions relating to provincial powers in respect of police do not comply with Constitutional Principle XVIII.2.

CONSTITUTIONAL PRINCIPLES

3. The importance of the Constitutional Principles are clearly indicated in the Preamble to the Interim Constitution where they are referred to as “a solemn pact”. This priority status is emphasised by the fact that the Constitutional Principles together with the provisions regarding the certification of the new Constitution, are entrenched (section 74(1) of the Interim Constitution), or cast in stone, as Basson South Africa's Interim Constitution (1994) 2 puts it. (See too Basson 100; et al Rights and Constitutionalism: The New South African Legal Order (1994) 158; De Villiers The Constitutional Principles: Content and Significance in De Villiers (ed) Birth of a Constitution 37).
4. The role and status of the Constitutional Principles are described in the following fashion by Chaskalson P in *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) on 8931:

"The Constitutional Principles are a set of 34 provisions contained in Schedule 4 of the Constitution. They represent principles which were agreed upon and adopted by the Negotiating Council of the Multi-Party Negotiating Process to provide definitive guidelines for the drafting of the final Constitution. The current Constitution makes a number of references to the Constitutional Principles. That they have a significant role to play is obvious."
5. The thirty-four Constitutional Principles in Schedule 4 of the Interim Constitution not only act as a framework for the drafting of all subsequent Constitutions, but also the yardstick against which the new constitutional text must be measured before it can be certified by this Court in terms of section 71(2) of the Interim Constitution. All the provisions of the new Constitution will thus have to be tested against the Constitutional Principles. (See *S v Heita and Another* 1992 (1) SA 785 Nm HC at 787D - 788A; *Executive Council, Western Cape Legislature v President of the RSA* 1995(4) SA 877 CC at 894A-C. *Premier KwaZulu-Natal v President of the Republic of South Africa* 1996 (1) SA 769 CC at 7731 - 774A.)
6. When applying the test of measuring the new Constitution against the Constitutional Principles, it is submitted that the set of principles should be read as a whole and applied to

the full text of the new Constitution. However, this does not preclude the application of a particular Constitutional Principles. The remarks made by Kentridge AJ in *S v Zuma* 1995 (2) SA 642 (CC) on 6521 - 653A are quite appropriate:

“While we must always be conscious of the values underlying the Constitution, it is meets nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single ‘objective’ meaning. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish to mean.

We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of general resort to ‘values’ the result is not interpretation but divination.”

7. Since this written argument is focused at the provincial powers in respect of police, it is submitted that the Constitutional Principle that is of particular relevance in this matter is Constitutional Principle XVIII.2, which reads as follows:

“The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.”

8. As regards the application of Constitutional Principle XVIII.2, it is submitted that the Court should weigh individual provisions of the new Constitution against the respective provisions in the Interim Constitution and decide whether the new text requirements. In addition, the Court should take a global view of the whole ambit of the particular jurisdictional area and determine, with reference to the end result, whether there is a substantial reduction in the powers and functions of the provinces.

9. It is submitted that the requirement of Constitutional Principle XVIII.2 is a twofold, viz. (1) that the powers and functions of the provinces shall not be substantially less than, or

- (2) Substantially inferior to those provided for in the Interim Constitution. It thus comprises both a quantitative and qualitative test, the operative words being **“substantially less.”** and **“substantially inferior.”** **Erasmus Provincial government under the 1993 Constitution. What direction will it take?** 1994 SA Publikereg/Public Law 407 states in this regard on 418:.

“Principle XVIII now guarantees the present range of provincial powers and functions as a minimum. They may be increased in the final constitution, not diminished. They ‘shall not be substantially less than or substantially inferior’ to those provided for in the 1993 Constitution.”

10. The meaning of “substantially” in the context of Constitutional Principle XIII.2. is aptly described in The Shorter Oxford English Dictionary Vol II (3rd ed) (1987) , where the fourth definition of “substantial” reads as follows:

“That is, constitutes, or involves an essential part, point or feature; essential material.”

11. It is submitted that the clear wording of Constitutional Principle XVIII.2 requires an objective analysis to be made of the respective provisions of both the Interim Constitution and the new Constitution in order to decide whether the requirements of the said Principle have been met.

PROVINCIAL EXECUTIVE AUTHORITY RE: POLICE

12. Chapter 14 of the Interim Constitution clearly indicates that police is an area of jurisdiction that is shared by the national and provincial levels of government. Section 214 (1) specifically states that the police service “*shall be structured at both national and provincial levels and shall function under the direction of the national government as well as the various provincial governments.*” The detail of this shared responsibility for police is dealt with in Chapter 14, which leaves the impression that a relationship in the nature of a partnership between the national and provincial levels of government must be established.
13. Provincial executive powers in respect of police must be taken care of by a member of the Executive Council (MEC) of a province designated by the Premier of the province. In terms of section 217 (1) of the Interim Constitution the MEC is charged “*with the responsibility for the performance by the Service in or in regard to that province of the functions set out in section 219 (1).*” This clearly establishes a political responsibility for police at the provincial level and indeed covers a wide range of functions. (See **Shubane Provincial Institutions in De Villers (ed) Birth Of a Constitution 239**).
14. The powers of the MEC in a province include the following:
- * the obligation to approve or veto the appointment of the provincial commissioner for police (section 217(2)(a));
 - * the power to institute appropriate proceedings against the provincial commissioner if he has lost the confidence of the Executive Council (section 217 (2) (b); and
 - * responsibility for the performance of the functions set out in section 219 (1), which reads:
 - (a) the investigation and prevention of crime ;
 - (b) the development of community-policing services;
 - (c) the maintenance of public order;
 - (d) the provision in general of all other visible policing services, including-
 - (i) the establishment and maintenance of police stations;
 - (ii) crime reaction units; and
 - (iii) patrolling services;

- (e) protection services in regard to provincial institutions and personnel;
- (f) transfers within the province of members of the Service performing functions in terms of this section; and
- (g) the promotion, up to the rank of lieutenant-colonel, of members of the Service performing functions in terms of this section.”

15. **Basson** *op cit* 266 distinguishes between the provincial and national powers and functions of the police by stating:

"It is clear that the provincial powers and functions of the Service (listed as responsibilities of the Provincial Commissioner concerned) are different from the powers and functions without prejudice to the other powers and functions which are exercised by the national Service, and that these competencies are accordingly not restricted by the national competencies listed in s 218 (supra). It is also clear that these are provincial competencies and as such are to be exercised in a province only."

16. It is submitted that the range and content of provincial police powers and functions are of such dimensions that it can be said that a comprehensive share of the executive powers and functions re police vests at provincial level.

17. Although the clause 205 (1) of the new Constitution indicates that “*the national police service must be structured to function in the national, provincial and, where appropriate, local spheres,*” it is submitted that the shared responsibility for police is structured in a different fashion than in the Interim Constitution to the detriment of provinces.

18. According to clause 206(1) of the new Constitution , political responsibility for police vests at national level in a member of the Cabinet. There is no obligation on a Premier of a province to appoint a member of the Executive Council of that province to be responsible for police. This not only weakens provincial executive powers *re* police, but it also clearly indicate a shift of political or executive responsibility for police away from the provinces to the national sphere. In fact, as far as executive powers are concerned, provinces are basically left with a monitoring and liaison function as stipulated in clause 206(2):

“Each province is entitled -

- (a) *to monitor police conduct;*
- (b) *to have oversight of the effectiveness and efficiency of the police service, including receiving reports on the police service;*
- (c) *to promote good relations between the police and the community;*
- (d) *to assess the effectiveness of visible policing; and*
- (e) *to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.”*

19. A substantial change has occurred in the role of the provincial executive in the appointment of the provincial commissioner. The obligation of the responsible member of the Executive Council to approve or veto the appointment of the provincial commissioner omitted from the new Constitution. Currently the National Commissioner must act in consultation with a MEC to appoint the provincial commissioner, but in terms of the new Constitution the National Commissioner must appoint after consultation with the provincial executive (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.

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PROVINCIAL LEGISLATIVE POWERS RE POLICE

20. A provincial legislature has, in terms of section 126 read with Schedule 6 of the Interim Constitution, concurrent legislative authority with Parliament to pass laws on police, “*subject to the provisions of Chapter 14.*” Limitations are specifically contained in section 217 (3) where it is stipulated that provincial legislative power is qualified in section 217 (3) where it is stipulated provincial laws must not be inconsistent with national legislation and it must be in regard to the range of functions contained in section 219 (1). A further limitation, relating to the standards of performance of functions of the police service and the rights of citizens, is found in section 217 (4).
21. No specific provision is made in Chapter 11 of the new Constitution for legislative authority of provinces in respect of police. In fact, clause 199 (4) in Chapter 11 only provides for national legislation to structure and regulate the security services, which include police .
22. A heavily qualified provision appears in Schedule where police is indicated as a concurrent functional area where both national and provincial spheres have legislative competence, but is limited “*to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislature 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 to pass laws regarding the police service in that province.

23. Contrary to the position in the Interim Constitution (section 217(3)) read with section 219(1)), Chapter 11 of the new Constitution does not contain any list of provincial functions which may form the subject of provincial legislation. . This is a further indication of the very limited and substantially reduced provincial legislative powers.

CONTROL OF THE POLICE SERVICE

24. A division of functions of the police service between the national and provincial spheres is made in section 218 and 219 of the Interim Constitution. The structure and language of

Chapter 14, in particular these two sections, indicate that certain functions are the responsibility of the National Commissioner (section 218) and other functions are the responsibility of the various provincial commissioners. **Shubane** *op cit* 239 states with regard to the position of the provincial commissioners:

“ The provincial commissioner is accorded significant powers as set out in s 219. In executing his her functions he/she is subject to the person in the executive council with the relevant executive powers. This implies significant provincial policing powers.”

25. In terms of the Interim Constitution a provincial commissioner is accountable to the responsible member of the Executive Council of that province for the performance of the actual policing functions (section 219(1) and to the National Commissioner for more personnel related functions as well as those functions assigned to him or her by the National Commissioner (section 219(2)).
26. Unlike the position in the Interim Constitution, the functions of provincial commissioners are not enumerated in the new Constitution. On the contrary, clause 207(4)(a) of the new Constitution stipulates that **national legislation** shall prescribe the responsibilities of provincial commissioners.
27. There is furthermore no specific provision for the provincial executive to give directions to the provincial commissioner in that province. An amendment to section 219(1) of the Interim Constitution to omit provincial executive control over provincial commissioners is in fact prescribed by Schedule 6 Annexure D item 2 of the new Constitution. 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 specific provision is made in clause 207(4)(b) of the new Constitution for a provincial commissioner to perform his or her duties “subject to the power of the National Commissioner for the performance of his or her duties, and acts under direction of the National Commissioner only.
28. It is submitted that the omission of a detailed list of functions of the provincial commissioners as well as the omission of provincial executive control over provincial commissioners amount to a substantial reduction of provincial powers and functions.

CONCLUSION

29. When judging the individual provisions of the new Constitution concerning the province the provincial powers in respect of police, it is submitted that it do not meet the standard of not being “substantially, less than” or “substantially inferior to” the position of provinces stipulated in the Interim Constitution. In fact, it is submitted that it fails on both the quantitative and qualitative elements of the test.

30. If the Court takes a global view, it is submitted that the net result is the same. The qualitative and quantitative reduction of provincial powers and functions as argued above inevitably leads to the conclusion that provincial powers and functions in relation to police are substantially inferior to the current position as provided for the Interim Constitution. The new Constitution thus do not comply with Constitutional Principle XIII.2.

ORDER

25. It is respectfully submitted that the Court shall not certify the new Constitution due to the non-compliance of the text with all the Constitutional Principles, in particular Constitutional Principle XVIII.2. In the event of such a finding, it is requested that the Court shall make an order to refer the new Constitution to the Constitutional Assembly to amend the text in order to comply with Constitutional Principle XVIII.2.

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List of authorities

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3. De Villiers The Constitutional Principles: Content and Significance in De Villiers, B (ed) *Birth of a Constitution* (1994)
4. *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995(4) SA 877 (CC)
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8. Erasmus, G *Provincial Government under the 1993 Constitution. What direction will it take?* 1994 SA Publiekreg/Public Law 407
9. *The Shorter Oxford English Dictionary Vol 11* (3rd ed) (1987)
10. Shubane, K Provincial Institutions in De Villiers (ed) op cit