CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 1/96

KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995.

and

Case CCT 6/96

Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995.

Heard on: 21 May 1996

Delivered on: 05 July 1996

JUDGMENT

CHASKALSON P:

[1] In October 1995 two Bills, the Payment of Salaries, Allowances and Other Privileges to the Ingonyama Amendment Bill (the Ingonyama Amendment) and the

KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill (the Amakhosi Amendment) were before the KwaZulu-Natal provincial legislature. The Bills sought to amend and to re-enact as laws of the KwaZulu-Natal province, legislation which had been enacted by the KwaZulu legislature before the Constitution of the Republic of South Africa, 1993, was in force. Objections were raised by members of the KwaZulu-Natal legislature to the constitutionality of certain provisions of the two Bills and the disputed issues were referred by the Speaker of the legislature to this Court for a ruling in terms of section 98(9) of the Constitution. The issues raised in the two disputes are similar and the two matters were heard together.

[2] Mr Marcus appeared on behalf of members of the African National Congress in support of their objection to the Ingonyama Amendment, and Mr. Davis on behalf of the same members in support of their objection to the Amakhosi amendment. Although their arguments overlapped to some extent, they also differed in certain respects. Their arguments were applicable to both Amendments, though in some instances they were addressed to only one of them. Mr. Richings appeared for the KwaZulu-Natal government in both matters.

The subject matter of the Bills

[3] The Amakhosi Amendment seeks to re-enact and amend the KwaZulu Amakhosi and Iziphakanyiswa Act of 1990 - the Amakhosi Act. That Act deals with various

matters relating to amakhosi and iziphakanyiswa in what was previously the self-governing territory of KwaZulu. The long title of the Act describes it as an Act

> to consolidate and amend the laws relating to **amakhosi** and **iziphakanyiswa** to provide for recognition, appointment and conditions of service, discipline, retirement, dismissal and deposition of **amakhosi** and **iziphakanyiswa** . . . ;

and to deal with other matters.

[4] Section 12 of the Act empowers the Chief Minister of KwaZulu, after consultation with his cabinet, to:

> recognise, appoint or depose any person as an **inkosi** for a certain tribe or an **isiphakanyiswa** for a certain community, as the case may be, in accordance with the provisions of this Act.

The duties, powers, authority and functions of amakhosi and iziphakanyiswa are set out in section 18 of the Act and provision is made in section 19 for their remuneration and allowances, which are to be determined by the Chief Minister after consultation with his Minister of Finance. The Act also deals with the suspension of amakhosi and iziphakanyiswa,[1] inquiries into misconduct alleged to have been committed by them,[2] and sanctions which can be imposed on them if found guilty of misconduct. The ultimate

[1] s.22

[2] s.23

penalty is dismissal from office.[3] The Act was amended in 1993 in respects not material to the present dispute.

[5] The Ingonyama Amendment seeks to re-enact and amend the KwaZulu Act on the Payment of Salaries, Allowances and Other Privileges to the Ingonyama of 1993 - the Ingonyama Act. This Act makes provision for the payment to the Ingonyama of a monthly salary, allowances and other privileges to be determined by the KwaZulu cabinet and is deemed to have come into operation on 1 April 1972. The Act replaced previous legislation dealing with such matters.

The competence to repeal or amend Acts of the KwaZulu Legislative Assembly after the 27th April 1994.

[6] On 27 April 1994 when the Constitution of 1993 came into force, the two Acts formed part of the law in force in that part of the province of KwaZulu-Natal which had previously been the self-governing territory of KwaZulu. In terms of section 229 of the Constitution they continued to be in force in that part of the province:

> subject to any repeal or amendment of such laws by a competent authority.

Until such repeal or amendment they are to be construed in accordance with section

[3] s.24

232(1) of the Constitution which provides:

(1) Unless it is inconsistent with the context or clearly inappropriate, a reference in a law referred to in section 229-

(a) to the Republic or to any territory which after the commencement of this Constitution forms part of the national territory-

(i) as a constitutional institution, shall be construed as a reference to the Republic referred to in section 1; or

(ii) as a territorial area, shall be construed as a reference to that part of the national territory in which the law in question was in force immediately before such commencement, unless such law is applied by a law of a competent authority to the whole or any part of the national territory;

(b) to a Parliament, House of Parliament or legislative assembly or body of any territory which after the commencement of this Constitution forms part of the national territory, shall-

(i) if the administration of such a law is allocated in terms of this Constitution to the national government, be construed as a reference to Parliament referred to in section 36; or

(ii) if the administration of such law is allocated or assigned in terms of this Constitution to a government of a province, be construed as a reference to the provincial legislature of that province;

(c) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council of any territory which after the commencement of this Constitution forms part of the national territory, shall-

(i) if the administration of such law is allocated in terms of this Constitution to the national government, be construed as a reference to the President acting in accordance with this Constitution; or

(ii) if the administration of such law is allocated or

assigned in terms of this Constitution to a government of a province, be construed as a reference to the Premier of such province acting in terms of this Constitution;

(d) .....

[7] The first question that has to be decided is whether the provincial legislature of KwaZulu-Natal has the competence to repeal or amend the two Acts.

[8] Section 126(1) of the Constitution empowers a provincial legislature to make laws for its province

> with regard to all matters which fall within the functional areas specified in Schedule 6,

and section 126(2)provides that this

> shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence. [4]

Do the Acts deal with matters within the functional areas specified in Schedule 6?

[9] The Amakhosi Act deals with the appointment, remuneration, and role of

[4] The legislative competence of provinces in respect of Schedule 6 matters is not an exclusive competence. Subject to section 126 of the Constitution, it is one which the provinces exercise concurrently with Parliament.

traditional authorities, including their functions at local government level, and the enforcement by them of indigenous and customary law. These are all matters within the purview of Schedule 6 of the Constitution.

[10] Section 13 of the Amakhosi Act provides that:

> The **inkosi** of the Usuthu Tribe is the paramount **inkosi** of the Zulus and is also known as the King of the Zulus, the **Ingonyama** or **Isilo**.

As such the Ingonyama is also subject to the Amakhosi Act, though not to the provisions dealing with remuneration and allowances[5] which are regulated by the Ingonyama Act. The Ingonyama Act deals only with the remuneration and allowances of the Ingonyama.

[11] It was not disputed that the Ingonyama is an important figure in Zulu customary law. He is not only a traditional leader, but as King he has a special place within the structure of traditional authority in KwaZulu-Natal. Although the institution of the Ingonyama is very important to and revered by a large proportion of the South African community the special place it has in the province of KwaZulu-Natal is recognised in the Constitution. Section 160 of the Constitution makes provision for the adoption of provincial constitutions. It stipulates that such constitutions shall not be inconsistent with the 1993 Constitution or the constitutional principles set out in Schedule 4 to that

[5] section 19(1)(a) of the Amakhosi Act

Constitution, but provides in subsection (3)(b) that they may

> where applicable, provide for the institution, role, authority and status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal.

[12] The Amakhosi Act and the Ingonyama Act are in force in part of the province. They deal with Schedule 6 matters and the administration of these Acts was assigned by the President in terms of section 235 of the Constitution to a competent authority within the jurisdiction of the government of the province of KwaZulu-Natal.[6] It could hardly be suggested that in such circumstances the KwaZulu-Natal legislature does not have the competence to repeal or amend the Acts, and I have no doubt that such power is vested in the provincial legislature. Whether that power can legitimately be used to enact the disputed provisions of the Bills is a different question, to which I will now turn.

Do the amendments introduce provisions that go beyond the legislative competence of a province?

[13] The Amendments seek to re-enact the two Acts so as to make them laws of the

[6]Proclamation 107 of 1994 promulgated in Government Gazette 15183 of the 17th June 1994.

province and not merely laws in force in part of the province. There can be no objection to this.[7] Apart from technical amendments designed to achieve this purpose, and to substitute appropriate organs and functionaries of the new constitutional order for those referred to in the Acts, the Bills introduce new provisions which in effect would prohibit the Ingonyama and traditional leaders from accepting any remuneration or allowances other than that already provided for by the two Acts. It is to these "new provisions" that objection is taken.

[14] The relevant provision in the Ingonyama Amendment is clause 3 which provides that subsections (3) to (7) reading as follows be introduced after section 2(2) of the existing Act:

> (3) The Ingonyama and any member of the Royal House shall neither personally nor through the agency of any other person accept any remuneration, allowance, in-kind benefit, compensation, reimbursement, or other payment of any nature whatsoever, in their capacities as such, from any source under the Republic, save for that provided for and determined in terms of this Act or other law or custom of the Province.
> (4) Any payment to the Ingonyama, or member of the Royal House, or their agents, referred to in sub-section (3) other than that provided for and determined in terms of this Act or other law or custom of the Province, shall be made to the Government, which shall deposit it into the Provincial Revenue Fund, to be distributed for the benefit of the Ingonyama and members of the Royal House in terms of this Act.
> (5) Any in-kind benefit referred to in sub-section (3) shall, insofar as its nature permits, likewise vest in the Government which shall apply it for the benefit of the Ingonyama.
> (6) The Minister shall have the power to take such steps and to do all things necessary for

[7] Section 232(1)(a)(ii) of the Constitution contemplates that laws applicable in part of a province may be applied by the legislature of a competent authority to the whole of the province.

the recovery of the aforementioned payments and in-kind benefits, including the institution of legal proceedings in the name of the Government.

(7) This section shall apply notwithstanding anything to the contrary contained in other laws over which this Act shall prevail in terms of section 126 of the Constitution.

[15] The disputed provisions of the Amakhosi Amendment are similar. They are contained in clause 5 of the Bill which introduces a new section 19A reading as follows:

19A.(1) No traditional leader shall accept any remuneration, allowance, in-kind benefit, compensation, reimbursement, or other payment of any nature whatsoever, in his capacity as such, from any source under the Republic, save for that provided for and determined in terms of this Act or other law of the Province, or pursuant to the performance of any functions or duties rendered in terms of section 184 of the Constitution.

(2) Any payment to a traditional leader referred to in sub[-]section (1) other than that provided for or determined in terms of this Act or other law of the Province shall be made to the Government, which shall deposit it into the Provincial Revenue Fund, to be disbursed for the benefit of traditional leaders in terms of this Act.

(3) Any in-kind benefit referred to in sub[-]section (1) shall, insofar as its nature permits, likewise vest in the Government which shall apply it for the benefit of traditional leaders.

(4) The Minister shall have the power to take such steps and do all things necessary for the recovery of the aforementioned remuneration or in-kind benefits, including the institution of legal proceedings in the name of the Government.

(5) This section shall apply notwithstanding anything to the contrary contained in other laws over which this Act shall prevail in terms of section 126 of the Constitution."

The purpose of the disputed provisions

[16] It was contended by the objectors that the classification of the disputed provisions for the purpose of determining whether or not they fall within Schedule 6, depends not only on the form in which the provisions have been couched, but also on

their underlying purpose. The provincial legislature sought to enact the Ingonyama Amendment and the Amakhosi Amendment at a time when Parliament was considering a Bill which has since been enacted into law as the Remuneration of Traditional Leaders Act 29 of 1995. This Act makes provision for payment of remuneration and allowances to be made to traditional leaders out of the national revenue fund. The remuneration is to be determined by the President[8]

> after consultation with the Council of Traditional Leaders established by section 184(1) of the Constitution and the Commission on Remuneration of Representatives contemplated in section 207 of the Constitution.[9]

It was contended that the true purpose of the Amendments was to frustrate the implementation of the Remuneration of Traditional Leaders Act, and that the substance of the provisions to which objection was taken is not to make provision for the payment of salaries and benefits to the Ingonyama and traditional leaders by the provincial government, but to prevent them from accepting remuneration and allowances which might become payable to them in terms of the national legislation. The object of doing so, it was submitted, was to create a relationship of subservience between them and the provincial government, and this is an object that falls outside the scope of Schedule 6.

[8] In terms of section 82(3) of the Constitution this means the President acting in consultation with the cabinet.

[9] Section 2(1) of the Remuneration of Traditional Leaders Act 29 of 1995.

[17] In dealing with a contention that the disputed provisions encroached upon the Chapter 3 rights of the Ingonyama, amakhosi, and iziphakanyiswa, Mr. Richings argued that if this was so it was justifiable because the king and the amakhosi could not "serve two masters" and their primary allegiance was to the provincial legislature by whom they were appointed. Although it was not conceded by Mr. Richings that the object of the proposed provincial legislation was to frustrate the implementation of the Remuneration of Traditional Leaders Act, it was not suggested by him that the legislation had any purpose other than to prevent the Ingonyama, amakhosi and iziphakanyiswa from accepting payment directly from the national government.

[18] The national and the proposed provincial legislation are not so much concerned with the fixing of salaries and allowances, but with who has the "right" to pay the Ingonyama, amakhosi and iziphakanyiswa. It is unfortunate that the political conflict concerning KwaZulu-Natal has degenerated to a state in which this should have become an issue. It matters not whether the purpose of either the national or the proposed provincial legislation is to secure influence over the Ingonyama, amakhosi and iziphakanyiswa, or to protect them from being subjected to the influence of the other government. The Ingonyama, amakhosi, and iziphakanyiswa occupy positions in the community in which they can best serve the interests of their people if they are not dependent or perceived to be dependent on political parties or on the national or provincial governments. This ideal is not furthered by making the Ingonyama, amakhosi and iziphakanyiswa the subject of conflicting national and provincial legislation. The

question before us, however, is not whether the national legislation or the proposed provincial legislation is desirable, but whether the proposed provincial legislation is inconsistent with the Constitution.

[19] Mr. Richings contended that if the Amendments deal with a matter relating to a functional area within Schedule 6 it is within the legislative competence of the province, and the purpose of the proposed legislation is not relevant to a decision on its constitutionality. If the purpose of legislation is clearly within Schedule 6 it is irrelevant whether the court approves or disapproves of its purpose. But purpose is not irrelevant to the Schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in Schedule 6. In such a case a court would hold that the province has exceeded its legislative competence.[10] It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the KwaZulu-Natal provincial legislature.

The substance of the Ingonyama and Amakhosi Amendments: payment of salaries, allowances and other privileges.

[10]See for example, *Attorney General for Alberta v Attorney General for Canada* 1939 AC 117(PC); *Ladore v Bennet* 1939 AC 468 (PC) at 482-3.

[20] Mr. Marcus contended that the substance of the Ingonyama Amendment is the payment of salaries allowances and other privileges and that this is not a subject covered by the functional areas of traditional authorities or indigenous law and customary law which are listed in Schedule 6. He pointed to the fact that the Constitution deals specifically with the payment of salaries to provincial functionaries in sections 135(4)[11] and 149(10)[12] and that section 207 makes provision for the establishment by an Act of Parliament of a Commission on the Remuneration of Representatives whose mandate is to make recommendations to Parliament, provincial legislatures and local governments concerning the payment of members of all elected bodies, including members of Provincial Houses of Traditional Leaders and members of the Council of Traditional Leaders. The fact that the Constitution deals specifically with the payment of salaries to these functionaries in sections 135(4) and 149(10) does not warrant the inference that the provinces do not have powers incidental to their powers under Schedule 6, to pay salaries to other functionaries.

[21] I can not agree that legislation dealing with the payment of salaries and allowances to the Ingonyama, amakhosi and iziphakanyiswa is not within the competence of the KwaZulu-Natal legislature. They are all functionaries whose appointment and

[11] payment of the salaries of members of provincial legislatures which are to be determined by a provincial law. The effect of this provision is to give provincial legislatures, in addition to powers they have under Schedule 6, a specific constitutional power, to make such payments.

[12] payment of remuneration and allowances to the Premier and Members of the Executive Councils of provinces which are to be determined by the President. The effect of this provision is to deny to provincial legislatures the power to make such determinations.

powers are regulated by legislation. Such legislation is contemplated by section 181 of the Constitution which provides:

> (1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this constitution shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
> (2) Indigenous law shall be subject to regulation by law.

The appointment and powers of the Ingonyama, amakhosi and iziphakanyiswa were regulated by law - the Amakhosi Act - before the Constitution came into force. That law vested in them powers of governing tribal communities and it was a law concerned with traditional authorities and indigenous and customary law. As such it was a law within the competence of a provincial legislature. Section 181 in fact refers to laws made by a "competent authority" and not to an Act of Parliament which is what one would have expected if the intention had been to exclude such a competence from the provincial legislatures.

[22] If a law dealing with the appointment and powers of traditional leaders is within the competence of the provinces, a law providing for the payment of salaries and allowances to such leaders must also be within such competence. Such payments are incidental to the appointment, for the salary and allowances attach to the office. In this respect the traditional leaders are no different to other functionaries appointed by a

provincial executive to administer the province, and it could hardly be suggested that a province has no power to make laws dealing with the payment of salaries and allowances to such functionaries.

[23] Section 207 does not detract in any way from this conclusion. It deals with members of elected legislative bodies of the national government and of the provincial and local governments, including members of the Provincial Houses of Traditional Leaders and the Council of Traditional Leaders. It is not applicable to the payment of salaries and allowances to traditional leaders who are appointed under the provincial legislation and are not elected. Although the Commission is to be established by an Act of Parliament its duty is to make recommendations to Parliament, provincial legislatures and local governments concerning such salaries and allowances. There are no provisions of the Constitution dealing specifically with the payment of salaries and allowances to members of local authority legislatures, yet recommendations as to the amounts of such salaries and allowances are to be made to such bodies. This is a clear indication, if any is needed, that the fixing of salaries and allowances of statutory functionaries is not an exclusive national competence.

The substance of the Ingonyama and Amakhosi Amendments: imposition of taxes.

[24] Mr. Davis contended that if regard is had to the substance of the proposed section 19A of the Amakhosi Act it should be classified as dealing with taxation, and as such, should be held to be beyond the competence of the provincial legislature.

[25] Section 19A of the Amakhosi Amendment requires any remuneration or allowance received by amakhosi and iziphakanyiswa, other than that paid to them under the Amakhosi Act to be deposited into the Provincial Revenue Fund. This, so the contention went, is a tax, because an obligation is imposed on amakhosi and iziphakanyiswa to make a compulsory contribution to the Provincial Revenue Fund for the public benefit.

[26] In *Permanent Estate and Finance Co.Ltd. v Johannesburg City Council*[13] Ramsbottom J., in holding that a compulsory endowment fee imposed on township developers in terms of provincial legislation as a condition of the establishment of a township was not a tax, said:

> I do not propose to attempt to give a definition of the word tax. Though difficult to define, I think that a tax can be recognised with reasonable ease. To require any person who carries on business or who owns a dog or a motor car to pay a prescribed fee is, I think, to impose a tax. The money paid is taken into general revenue and is used for general purposes; the person who pays receives no specific service in return for his payment. Endowment money paid by a township owner is quite a different thing; it is an agreed payment for services which are to be performed for the improvement of the township and from which the township owner will derive a financial benefit. To require the township owner himself as a condition for the grant of permission to establish a township to make the township habitable by an urban community would not be to impose a tax upon him, and where that work is to be performed by a local authority, to require him to pay for, or to contribute towards the cost of, the work is likewise not to impose a tax.

[13] 1952 (4) SA 249(W), 258H-259B

[27] It is also not necessary in the present matter to attempt to define the word "tax". The amakhosi and the iziphakanyiswa are appointed under legislation which makes provision for their remuneration and allowances. To provide in the legislation that it is a condition of their holding office that they may not accept remuneration or allowances from any other organ of state for performing their functions as amakhosi and iziphakanyiswa, is to make that term part of the conditions of their holding office; and the term does not become a tax by the addition of a provision that any remuneration or allowance received in breach of that condition shall be paid into the provincial revenue fund to be applied to the benefit of all amakhosi and iziphakanyiswa.

[28] The fallacy in Mr. Davis' argument is that it looks at the provision concerning payment into the revenue fund in isolation, and ignores the fact that the provision applies only to the proceeds of money received in breach of the terms of the statute according to which the amakhosi and iziphakanyiswa hold office.

[29] An obligation to account for monies or other benefits received in breach of the conditions on which they hold office is not a tax; it is a normal consequence of such a breach. The amakhosi and iziphakanyiswa are paid out of the provincial revenue fund. If it is lawful for the provincial legislature to impose as a term of their holding office, a prohibition against accepting other payments and benefits, it must also be lawful for it to require such officers to account to the provincial revenue fund for any monies or other

benefits received in breach of that term. But if it is not lawful to impose such an obligation the ancillary obligation to account would also be unlawful. It follows that if the subject matter of the legislation is within the competence of the provincial legislature, the constitutionality of the Amendments depends on the legality of the prohibition, and not on the legality of the consequential obligation to account should the prohibition be breached.

Extra-territorial application.

[30] The prohibitions apply to payments whether made in the province of KwaZulu-Natal or not. It was contended that it is beyond the competence of the provincial legislature to prohibit the acceptance of payments made outside of the province, and that the Amendments are accordingly invalid.

[31] Sections 125(2) and (3) of the Constitution provide that:

> (2) The legislative authority of a province shall, subject to this Constitution, vest in the provincial legislature, which shall have the power to make laws for the province in accordance with this Constitution.
>
> (3) Laws made by a provincial legislature shall, subject to any exceptions as may be provided for by an Act of Parliament, be applicable only within the territory of the province.

[32] If the Ingonyama, amakhosi and iziphakanyiswa hold office in terms of legislation of the province of KwaZulu-Natal, as will be the case if the Amendments become law, they will be required to discharge their functions subject to the provisions of such legislation. It can reasonably be assumed that they will observe the legislation if it is valid, and that it is unlikely to be necessary for steps to be taken to secure compliance with any of the provisions. Should that prove to be necessary, however, the legislation could be enforced in KwaZulu-Natal.

[33] The substance of the legislation is the appointment of traditional leaders within the province and the prescription of terms according to which they hold office. These are matters within the competence of the provincial legislature. Personal obligations are attached to the holding of such offices and one of these personal obligations is that as Ingonyama, amakhosi and iziphakanyiswa, they may not accept remuneration or other benefits from any organ of the state other than the appointing authority. The fact that this personal obligation has the incidental effect of prohibiting the acceptance of money or benefits from organs of the state outside of the province, is not in my view of any relevance. The question is not one of extra-territoriality; it is, whether the condition is one which the appointing and regulating authority is entitled to impose. If it is, it attaches to the office, and binds the persons who hold that office even if it affects their conduct outside of the province.

The legality of the prohibition

[34] The validity of the prohibition and the obligation to account was challenged on two broad grounds. First, that the substance of the prohibition is simply an attempt to prevent Parliament and other provincial legislatures from exercising legislative competences vested in them by the Constitution; secondly, that the prohibition infringes Chapter 3 rights of the amakhosi and iziphakanyiswa, including the Ingonyama.

Encroaching upon the powers of other legislatures

[35] Parliament has enacted legislation empowering the President to determine the remuneration and allowances payable to traditional leaders and authorizing such payments to be made out of the national revenue fund. It was contended that the Amakhosi and the Ingonyama Amendments are inconsistent with this legislation and that section 19A(5) of the Amakhosi Amendment and section 2(7) of the Ingonyama Amendment which provide that

> This section shall apply notwithstanding anything to the contrary contained in other laws over which this Act shall prevail in terms of section 126 of the Constitution.

are inconsistent with section 126 of the Constitution.

[36] A provincial legislature cannot confer upon its own legislation a right of precedence over an Act of Parliament in circumstances in which the Constitution directs that the Act of Parliament will prevail. Although section 19A(5) of the Amakhosi Amendment and section 2(7) of the Ingonyama Amendment are capable of being construed as attempting to do this, they can also be construed narrowly to mean no more than that the proposed Amendments are intended to prevail over an Act of Parliament in all circumstances in which the provincial legislation would be given priority by section 126. A narrow construction along these lines would indicate an intention to occupy the field of payment to traditional leaders as fully as the provincial legislature is entitled to do. If the Amendments become law, a narrow construction, which does not bring the subsections into conflict with the Constitution, would have to be adopted in preference to a broader construction which would give rise to a conflict. The subsection is capable of the narrow construction that I have mentioned and this disposes of the argument that the subsections are in conflict with section 126.

[37] All provincial laws are liable to be overridden by an Act of Parliament within the categories referred to in section 126(3). The question whether the Amendments, if enacted, will be inconsistent with the Remuneration and Allowances of Traditional Leaders Act 29 of 1995, and if so whether in terms of section 126(3) they will prevail over, or be subordinate to, determinations made in terms of such legislation is not

relevant to the constitutionality of the Amendments,[14] and does not therefore arise in these proceedings. That question must be left open for determination if and when it arises.

Encroaching upon the powers of the provincial legislature

[38] The prohibition against accepting remuneration or other payments from "any source under the Republic" is not entirely clear. It was suggested in argument by Mr Richings that the phrase refers to payments from the government of the Republic. This is a possible construction of the words. But they could also be construed as referring to payments from other provincial governments as well as payments from the national government. The Republic of South Africa is one sovereign state and the provinces are part of the Republic.[15] The phrase "under the Republic" is used in section 132 of the Constitution to refer to remuneration paid by a province and it would be consistent with this use of the words to construe the Amendments as prohibiting the receipt of payments from either the national or provincial government. I will assume in favour of the objectors that the wider meaning is the one which will be adopted by a Court construing the section.

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[14] *The Dispute Concerning the National Education Policy Bill No. 83 of 1995* (CCT46/95; judgment, as yet unreported, delivered on 3 April 1996) para.

[15] section 1 of the Constitution.

[39] It does not follow, however, from the fact that the Ingonyama, amakhosi and iziphakanyiswa are prohibited by the Amendments from accepting payments from other provincial governments, that the Amendments encroach upon the legislative competence of such provinces. Although they may have subjects outside of the province, the Ingonyama, amakhosi and iziphakanyiswa are traditional leaders appointed under legislation of KwaZulu-Natal. The conditions according to which they hold office are subject to regulation by provincial legislation. If the Amendments become law, the relevant legislation will not prohibit other provinces from making their own laws in regard to traditional authorities; what it will do is to prohibit traditional leaders holding office under the KwaZulu-Natal legislation and paid by the KwaZulu-Natal government from accepting payments from other organs of state, and to prescribe certain consequences if they do so. That legislation if otherwise valid would be applicable within KwaZulu-Natal and, subject to the provisions of section 126 of the Constitution, it would be enforceable within the province. Construed in this manner the legislation does not encroach upon the authority of other provincial legislatures. They are free to enact their own legislation and to offer payments to the Ingonyama, amakhosi, and iziphakanyiswa in terms thereof. But if such payments are offered to them, recipients who are subject to the legislation in terms of which they hold office, may expose themselves to sanctions prescribed by that legislation.

Section 13 of the Constitution

[40] Mr. Marcus contended that the provision requiring the receipt of any prohibited payments or benefits to be accounted for by the Ingonyama through payment to the provincial revenue fund constitutes a seizure of his private possessions in breach of section 13 of the Constitution. There is no substance in this contention. If the underlying prohibition is valid, the consequences attaching to a breach of the provision cannot be characterised as a seizure of property; and if the underlying prohibition is invalid the ancillary obligation to account would fall away.

Sections 28(2) and (3) of the Constitution

[41] The same applies to the arguments advanced by both counsel for the objectors, that the provision for payment into the revenue fund amounts to a deprivation of rights in property without compensation in breach of sections 28(2) and (3) of the Constitution. If the underlying prohibition is valid, the obligation to account is not an unlawful taking of property; it is a consequence of the breach. If the underlying prohibition is invalid, the ancillary obligation to account would fall away.

Section 28(1) of the Constitution

[42] Both counsel for the objectors contended that the prohibition against accepting remuneration or allowances that may be offered by other organs of the state infringes the rights of the Ingonyama, amakhosi, and iziphakanyiswa under section 28(1) of the

Constitution "to acquire and hold rights in property".

[43] Both Amendments confine the prohibition to the acceptance of other payments or benefits by the Ingonyama, amakhosi and iziphakanyiswa, "in their capacities as such".[16] The prohibition is directed to the receipt of additional remuneration or benefits for the performance of functions for which they are being paid by the KwaZulu-Natal government. This seems to me to be a reasonable and not uncommon condition of an appointment to an office, and not to constitute an interference with property rights.

[44] I am not unmindful of the fact that the Amendments do not specifically prohibit the receipt of payments or benefits from persons or bodies other than organs of state. I am not persuaded, however, that this has any bearing on the constitutionality of the provision. There may be reasons for permitting such payments or benefits to be accepted if they are made in accordance with customary law. But even if this is not so, a condition of service cannot be characterised as unconstitutional, because it is less restrictive than it might legitimately have been.

Section 26 of the Constitution

[16]The proposed section 2(3) of the Ingonyama Act and the proposed section 19A(1) of the Amakhosi Act.

[45] The prohibitions were also challenged on the grounds that they infringe the section 26 rights of the Ingonyama, amakhosi, and iziphakanyiswa to "freely to engage in economic activity and to pursue a livelihood anywhere in the national territory". The simple answer to this argument is that the Amendments do not impose any such restriction. The Ingonyama, amakhosi and iziphakanyiswa are free to give up their positions as traditional leaders and to engage in any other economic activity that they choose. They are also free to engage in other economic activity that is not inconsistent with their status as traditional leaders. What they cannot do is to breach their conditions of appointment which are fixed by statute and which attach to their office.

Members of the Royal House

[46] The prohibition in the Ingonyama Amendment applies not only to the Ingonyama, but also to members of the Royal House. A member of the Royal House is defined as any "immediate dependent of the Ingonyama". It is not clear to me who is to be regarded as an immediate dependent of the Ingonyama for the purposes of this provision, but in the view that I take of the matter, it is not necessary to decide this question.

[47] The members of the Royal House are not referred to in the Ingonyama Act and are mentioned for the first time in the Amendment. They hold no specific office in terms of the legislation and the reasons for the conclusion that the proposed legislation in its application to the Ingonyama, amakhosi and iziphakanyiswa is competent do not

necessarily apply to them. To prohibit them from accepting offices of profit under the Republic, or from engaging in activities that prevent them from accepting remuneration or benefits from organs of the state, would be to curtail their rights to engage in economic activity. In my view, however, this is not the meaning that should be given to the Amendment. The prohibition applies only to payments or benefits received by such persons "in their capacity as" members of the Royal House. It would presumably include payment or benefits received for assignments carried out on behalf of the Ingonyama, or for accompanying him on an official visit. There may be other functions performed by the Ingonyama's immediate dependents in their capacity as members of the Royal House, but the prohibition is limited by the qualification, and is likely to have a fairly narrow application.

[48] The remuneration and allowances paid by the KwaZulu-Natal government to the Ingonyama would have regard to his obligations to his immediate dependents and to services that they might be required to perform on his behalf as members of the Royal House. What the Amendment in effect requires is that the Ingonyama must make provision for such expenditure out of his official remuneration and allowances, and that his immediate dependents should not have to look to other organs of state for such support. Seen in this light, the prohibition is incidental to the overriding purpose of the legislation, which is to establish one source of payment for the Ingonyama's support and expenditure. It does not infringe the Chapter 3 rights of his immediate dependents to say that they must look to the Ingonyama and not to other organs of the state for their support

and for compensation in respect of duties that they perform on his behalf.

Costs

[49] It has not been established that the Amendments will be inconsistent with the Constitution on any of the grounds advanced by the objectors. This Court has decided that litigants seeking to ventilate important issues of constitutional principle in proceedings such as those which have been brought in the present matter ought not to be deterred from doing so by the risk of having to pay their adversary's costs.[17] The issues raised in the present proceedings fall into that category, and it was not suggested that there were any special factors in the present case that require the Court to depart from this rule.

Order

[50] The following order is made: The Payment of Salaries, Allowances and Other Privileges to the Ingonyama Amendment Bill of 1955 and the KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill, 1995 submitted to this Court by the Speaker of the KwaZulu-Natal legislature in terms of sections 98(2)(d) and 98(9) of the Constitution are not unconstitutional on any of the grounds advanced by the petitioners.

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[17] *In re the School Education Bill of 1995 (Gauteng),* 1996 (4) BCLR 537, para.36.

A. Chaskalson
President Constitutional Court

Mahomed DP, Ackermann J, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J, and Sachs J concur in the judgment of Chaskalson P.

For the KwaZulu-Natal provincial legislature: FG Richings SC

Instructed by:	Friedman & Falconer
For the Petitioners:	DM Davis GJ Marcus
Instructed by:	Von Klemperer Davis & Harrison Inc.