CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 33/97

MEMBER OF THE EXECUTIVE COUNCIL
FOR DEVELOPMENT PLANNING AND
LOCAL GOVERNMENT IN THE PROVINCIAL
GOVERNMENT OF GAUTENG — Appellant

versus

THE DEMOCRATIC PARTY — First Respondent

IVOR BLUMENTHAL — Second Respondent

ELIZABETH CLOGG — Third Respondent

Heard on : 17 March 1998

Decided on : 29 May 1998

JUDGMENT

CHASKALSON P:

[1] My judgment deals only with the application for leave to appeal.[1] On the merits of the appeal, I concur in the judgment of Yacoob J and in the order made by him.

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[1] Yacoob J was not a member of this Court when leave to appeal was granted, and has therefore taken no part in this aspect of the case.

[2] At a meeting of the Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council ("the Council") on 31 May 1997, a dispute arose as to the voting majority required for the approval of its budget for the forthcoming financial year. While certain members of the Council argued that a simple voting majority was all that was required,[2] others insisted that a two-thirds majority was necessary.[3]

[3] The Council and the appellant in the present matter brought an urgent application in the Witwatersrand High Court for an order declaring a simple voting majority to be sufficient. At the heart of the dispute between the parties were and are different interpretations as to the status of and relationship between certain contradictory provisions in the 1996 Constitution[4] and the Local Government Transition Act[5] ("the LGTA"). The matter came before Snyders J who held that item 26(2) of schedule 6 of the 1996 Constitution in effect insulated sections 16(5) and (6) of the LGTA against constitutional scrutiny until 30 April 1999.[6] For the

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2 They relied on sections 160(2)(b) and 160(3)(b) of the 1996 Constitution.

3 They relied on sections 10G(3)(a) and 16(5) of the Local Government Transition Act 209 of 1993.

4 Constitution of the Republic of South Africa, 1996.

5 Act 209 of 1993 as amended.

6 *Eastern Metropolitan Substructure of The Greater Johannesburg Transitional Metropolitan Council and Another v Democratic Party and Others* 1997 (8) BCLR 1039 (W).

purposes of the present judgment it is not necessary for me to consider the reasons for this decision in any detail. It is sufficient to say that as a result of the finding made by her, Snyders J dismissed the application with costs.

[4] The appellant and the Council decided to challenge this decision. They wished to appeal directly to the Constitutional Court or, in the event of such leave being refused, to the Supreme Court of Appeal ("the SCA") or a full bench of the High Court. The problem which they faced was that the existing legislation and rules of court did not deal specifically with the procedure to be followed in such circumstances.

[5] This was due to the fact that the interim Constitution,[7] in terms of which the Constitutional Court was established, provided that appeals from decisions of provincial or local divisions of the Supreme Court on constitutional matters lay solely to the Constitutional Court,[8] which was the court of final instance in respect of such matters.[9] The Appellate Division ("the AD"), the highest court in respect of all other matters, did not therefore have jurisdiction in

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7 Constitution of the Republic of South Africa Act 200 of 1993.

8 Id sections 102(12) and (14).

9 Id section 98(2).

respect of matters within the jurisdiction of the Constitutional Court.[10] This was however changed by the 1996 Constitution which repealed the interim Constitution.

[6] Section 166 of the 1996 Constitution, which deals with the judicial system, provides that:

> "The courts are -
> (a) the Constitutional Court;
> (b) the Supreme Court of Appeal;
> (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
> (d) the Magistrates' Courts; and
> (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

[7] Schedule 6 of the 1996 Constitution, which deals with the transition from the legal order under the interim Constitution to the new order established by the 1996 Constitution, provides in so far as is relevant in item 16 that:

> "(2)(a) The Constitutional Court established by the previous Constitution becomes the Constitutional Court under the new Constitution.
>
> . . . .
>
> (3)(a) The Appellate Division of the Supreme Court of South Africa becomes the Supreme Court of Appeal under the new Constitution.
>
> . . . .

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10 Id section 101(5).

> (4)(a) A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in subitem (6).
>
> . . . ."

[8] In dealing with the jurisdiction of the SCA, the 1996 Constitution provided that it "may decide appeals in any matter"[11] and thereby brought constitutional matters within its jurisdiction. It also provided that the Constitutional Court "is the highest court in all constitutional matters"[12] and that the SCA "is the highest court of appeal except in constitutional matters . . . ."[13]

[9] As far as procedure is concerned the 1996 Constitution provides in section 171 that "[a]ll courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation." And in section 167(6) that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -
>
> (a) to bring a matter directly to the Constitutional Court; or
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> (b) to appeal directly to the Constitutional Court from any other court."

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11 Above n 4 section 168(3).

12 Id section 167(3)(a).

13 Id section 168(3).

[10] When Snyders J delivered her judgment in the present case[14] the national legislation and rules contemplated by section 167(6) had not yet been passed,[15] nor had the Uniform Rules of Court been amended to make provision for the manner in which appeals from decisions of the High Court on constitutional issues should be dealt with.

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14 Case number 15655/97; as yet unreported judgment of the Witwatersrand High Court delivered on 29 September 1997.

15 The legislation has since been enacted as the Constitutional Court Complementary Act Amendment Act 79 of 1997 but has not yet come into force.

[11] Rule 18 of the existing Constitutional Court Rules makes provision for appeals to the Constitutional Court from decisions of the High Court[16] on constitutional matters. The procedure prescribed by these rules requires a party wishing to appeal against such a decision to apply formally to the Constitutional Court for leave to appeal. In terms of rule 18(e) the applicant has to attach to the application a certificate from the judge or judges who gave the decision, stating whether or not such judge or judges are of the opinion that:

> "(i) the constitutional issue is one of substance on which a ruling by the Court is desirable; and
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> (ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the division concerned for further evidence; and
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> (iii) there is a reasonable prospect that the Court will reverse or materially alter the decision given by the division concerned if permission to bring the appeal is given. . . ."

[12] The Supreme Court Act[17] and Uniform Rule 49[18] also make provision for appeals from decisions of the High Court. Section 20 of the Act, which deals with appeals in civil

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16 The rules deal with appeals from decisions of provincial or local divisions of the Supreme Court but, in terms of item 16(5)(c) of schedule 6 of the 1996 Constitution, this must now be read as referring to appeals from the High Court.

17 Act 59 of 1959.

18 It is not necessary for the purposes of this judgment to set out the terms of this rule.

proceedings, provides that:

> "An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given on appeal shall be heard by the appellate division or a full court, as the case may be."

It goes on to provide that appeals in such matters can be brought only with leave of the court against whose judgment or order the appeal was made or, if such leave is refused, with leave of the AD itself.[19] The court granting leave determines whether the appeal is to be made to a full court of a provincial division or to the AD.[20] The AD is to be engaged only if the considerations involved in the appeal are of such a nature as to warrant its attention.[21] Appeals can be made to the AD against the decision of the appeal

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19 Above n 17 section 20(4)(b).

20 Id section 20(2)(a).

21 Id.

by the full court, but only with special leave of the AD.[22]

[22] Id section 20(4)(a).

[13] If civil proceedings are construed in section 20 as including "constitutional matters", the section, in so far as it provides that appeals from provincial or local divisions *shall* be heard by the AD or a full court, is prima facie inconsistent with section 167(6) of the 1996 Constitution, which requires provision to be made for appeals to be brought directly to the Constitutional Court from a decision of any other court where "in the interests of justice and with leave of the Constitutional Court". To read it consistently with the 1996 Constitution, section 20 may have to be construed as applying to civil proceedings other than constitutional matters, or possibly as being invalid to the extent that it requires appeals from the High Court in constitutional matters to be made to the SCA. In either event consideration will have to be given to the question whether appeals from the High Court to the SCA in constitutional matters are to be governed by section 20 or 21 of the Supreme Court Act.[23]

[14] It is not necessary in the present case to decide how appeals to the SCA in constitutional matters should be dealt with. That is pre-eminently a question for the SCA to decide. It is

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[23] Section 21(1) of the Supreme Court Act provides:

> "In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division."

As to the application of this section, see *Heyman v Yorkshire Insurance Co. Ltd.* 1964 (1) SA 487 (A) and *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A).

sufficient to say that the Supreme Court Act should not be construed in a way which detracts from the provisions of section 167(6) of the 1996 Constitution.

[15] In *S v Pennington and Another*[24] this Court held that, pending the enactment of the legislation or the passing of the rules contemplated by section 167(6) of the 1996 Constitution, the procedures for bringing matters before this Court must be regulated either by its existing rules[25] or, where such rules are not applicable, by procedures prescribed by the Court itself, which as far as possible should be in accordance with procedures ordinarily followed by this Court in similar cases.[26] Rule 18 of the Constitutional Court Rules deals with appeals from decisions of the High Court to this Court. The practice followed by this Court in dealing with such applications is for the President to refer the application to all the members of the Court who decide in conference whether or not to grant leave to appeal. The decision of the Court is then communicated to the parties. This procedure is consistent with section 167(6) of the 1996 Constitution and, pending the promulgation of the rules contemplated by the section, rule 18 and the existing practice of the Court remain applicable to such matters.

[16] There is no rule of the High Court dealing with the manner in which applications for leave to appeal should be dealt with where the applicant wishes to appeal directly to the Constitutional Court or, in the event of such leave not being granted, to appeal to the SCA. The procedure followed by the Council and the appellant in the present case was to apply to the High

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24 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC).

25 Id para 14.

26 Id para 23.

Court for a certificate to be issued in terms of Constitutional Court Rule 18(e) in order to enable them to apply to this Court for leave to appeal, and also, and in the same application, in case such leave should be refused, for leave to appeal to the SCA or the full bench of the High Court in terms of Uniform Rule 49. In the founding affidavit lodged in support of this application the Chief Executive Officer of the Council said:

> "I have been advised, and submit, that this matter is one in respect of which the applicants are entitled to proceed in terms of Rule 18 of the Rules of the Constitutional Court to apply to appeal directly to the Constitutional Court. The applicants nevertheless require the leave of the Constitutional Court for any appeal to it. Should this leave be refused, the applicants will have to appeal to the Supreme Court of Appeal or the Provincial Division of the High Court in terms of rule 49 of the Uniform Rules of Court. This application is therefore brought both for a certificate in terms of Rule 18(e) of the Rules of the Constitutional Court and for leave to appeal to the Supreme Court of Appeal or the Provincial Division of the High Court. The applicants undertake not to pursue that latter course of appeal unless the Constitutional Court refuses to grant them leave to appeal directly to it."

[17] In support of the application for a positive certificate the Council contended in the founding affidavit that the issue concerning the manner in which its budget had to be adopted was of great urgency for, if the wrong procedure had been followed, the budget would be invalid and expenditure under such a budget would be unauthorised. It also contended that the issue went beyond the budget for the current year and affected how amendments to the budget could be made during the year, and how budgets should be passed in the future. It was, moreover, an issue relevant to other local authorities where the details of the budget might in material respects depend upon whether a simple

majority or a two-thirds majority was necessary.

[18] In her judgment on the application for a certificate and for leave to appeal to the SCA or the full bench of the High Court,[27] Snyders J referred to the decision of this Court in *Pennington*[28] and to the absence of rules governing such an application and came to the conclusion that the procedure adopted by the Council and the appellant "in the absence of new rules in terms of section 167 of the 1996 Constitution . . . appears to be the only logical and practical way in which to proceed." The procedure adopted by the Council and the appellant in the present case meets the requirements of Constitutional Court Rule 18 and, as far as this Court is concerned, is an appropriate way of dealing with such a matter.

[19] Snyders J held that another court could come to a conclusion different to that reached by her and that the matter was of sufficient importance for leave to appeal to be granted to the SCA. She declined, however, to issue a positive certificate in terms of rule 18(e)(i) indicating that in her opinion the matter was not one in which the Constitutional Court would grant leave to appeal, or in which a ruling by the Constitutional Court was desirable.

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27 Above n 14.

28 Above n 24.

[20] The appellant, despite the negative certificate, proceeded with his application for leave to appeal to this Court, but the Council decided not to do so. The appellant lodged an application for leave to appeal in terms of rule 18(f) and (g). The appellant associated himself with the averments made by the deponent to the founding affidavit and in terms of rule 18(g)(iv) placed additional information before the Court concerning the importance to him of a final decision on the issue raised by the present litigation. He mentioned that in 38 of the 51 elected councils in Gauteng no single political party could on its own muster a two-thirds majority of the votes in the Council and that the question whether a simple majority or a two-thirds majority was needed to pass a budget was of great importance to the functioning of local government in the province. Similar problems could arise in other provinces where there were also many councils in which the size of the majority required might be crucial to the passing of the budget. The issue also affected the exercise of the powers of the member of the executive council ("the MEC") responsible for finance in each of the provinces, for his or her power to intervene and to pass a budget if a council failed to do so might well depend on whether or not a two-thirds majority is necessary, and as long as there was doubt about this, there would be doubt as to whether the relevant MEC could or should intervene. The appellant also stated that in view of the importance of the issues raised it was "all but inevitable that the matter will be brought to this Court on appeal, irrespective of the outcome of a hearing before the Supreme Court of Appeal".

[21] The respondents did not oppose this application or make any representations to this Court within the time prescribed by rule 18(h). The application for leave to appeal was then considered

by the Court in accordance with its ordinary procedures and the application was granted. After the respondents had been advised of the decision to grant leave to appeal their attorneys wrote to the registrar of this Court objecting to the decision. They said that they had at all times opposed the application for leave to appeal, that the appellant's attorneys knew that this was their attitude, that they intended to lodge opposing affidavits but had not done so because their counsel were involved in long trials out of town and certain deponents to such affidavits were overseas for part of the time that had elapsed since the application for leave to appeal had been lodged. They asked leave to lodge affidavits and representations opposing the granting of leave to appeal and for a date to be fixed for the hearing of the merits of the application for leave to appeal. They contended that the application was in effect an appeal against the decision of Snyders J "determining that the appeal from her first judgment should go to the Supreme Court of Appeal and not to the Constitutional Court", and that "in accordance with the fundamental principle of *audi alteram partem*" a decision granting leave to appeal should not be made without taking the opposing affidavits into account. In conclusion they stated:

> "As is usually the case the Respondents were expecting suitable dates to be agreed and arranged with your Court and the respective Counsel for the arguing of the application for leave to appeal, and in good time prior to that hearing the Respondents had every intention of ensuring that their Answering Affidavits were filed."

[22] It appears from the contents of this letter that the respondents' attorneys acted without regard to and apparently in ignorance of the provisions of the Constitutional Court Rules. In terms of these rules leave to appeal has to be obtained from this Court and not the High Court. The High Court does not have the power to determine that an

appeal should be heard by the SCA as opposed to this Court, and Snyders J did not purport to make such a decision. She did no more than consider whether a positive certificate should be issued in terms of rule 18(e). In the present case the application for leave to appeal to the Constitutional Court was a substantive application made to this Court in terms of rule 18 and not an appeal from the judgment given by Snyders J on the certificate. The certificate was required solely for the assistance of this Court and was not in any way dispositive of the application. It is clearly stated in rule 18(f) that an application for leave to appeal can be brought whether the certificate is positive or negative. The rules also provide that "[a]pplications for leave to appeal may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself."[29]

[23] Applications for leave to appeal are usually disposed of on the papers and it is the exception, and not the rule, for such applications to be set down for the hearing of oral argument. Time limits for opposing applications for leave to appeal are set in the Constitutional Court Rules and must be observed. If an extension of time is required provision is made for that to be secured, but applications for extensions of time should be made promptly and practitioners cannot, as the respondents' attorneys seem to have done,

[29] Constitutional Court Rule 18(i)(ii).

ignore the time limits and proceed on the assumption that they are free to lodge documents "in good time prior to the hearing". Apart from the fact that in applications for leave to appeal there may not be a hearing, requests for extensions of time limits are not mere formalities; they require justification and if the respondents had good reason to request such an extension they should have acted timeously. The application for leave to appeal had been granted by this Court prior to the belated lodging of the opposing affidavits and the request by the respondents' attorneys to set the matter down for hearing. No good reason was advanced by the respondents for their failure to advise the registrar of this Court of their intention to oppose the application for leave to appeal, or for the delay in lodging the affidavits, and no grounds existed on which it would have been appropriate to recall the order made or to set it aside. The request was therefore refused.

[24] In the circumstances of the present case, and in view of the fact that we have taken a different view to that expressed by Snyders J in her certificate, I consider it appropriate to give reasons why the application for leave to appeal was granted.

[25] In her judgment[30] Snyders J said:

> "The 1996 Constitution has now created a structure by which the existing courts also

[30] Above n 14.

> decide on matters which, in the interim constitution dispensation, had to go to the Constitutional Court, thus illustrating the intention that only cases reserved exclusively for the Constitutional Court, and appeals on constitutional issues from the Supreme Court of Appeal and confirmation of orders of invalidity and exceptional cases, in which the interests of justice require direct access to the Constitutional Court or access from the High Court, should not follow the new structure through the existing courts. I say exceptional, because I foresee that any potential litigant with a case that depends on the determination of a constitutional issue would be keen and in most cases able to make out a case that the issue is of some importance and deserving of access to the Constitutional Court, either directly or by avoiding the Supreme Court of Appeal. This would be true particularly in a young democracy as ours is. Thus the intention of channelling constitutional issues through the existing court structures, as intended by the 1996 Constitution, could be defeated and the Constitutional Court be inundated with applications for leave to appeal and matters on their merits, which would delay justice. I am therefore of the view that it is in the interests of justice that a strict approach should be adopted in order to avoid the delay of justice."

[26] Snyders J does not draw any distinction between applications for direct access to this Court and applications to appeal directly to this Court from a decision of the High Court. In *Bruce and Another v Fleecytex Johannesburg CC and Others*,[31] a judgment of this Court delivered after the decision of Snyders J in the present case, the principles which had been established in previous judgments dealing with applications for direct access were referred to. It was said:

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[31] Case number CCT 1/98; as yet unreported judgment of this Court delivered on 24 March 1998.

> "If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction."[32]

It was also pointed out that it is:

> " . . . not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given."[33]

[27] Different considerations apply to appeals directly to this Court from a decision of the High Court. In such cases this Court sits as a court of appeal and not as a court of first instance. The need for evidence to be heard will arise only in exceptional cases and the certificate in terms of rule 18(e) will alert this Court to such a possibility. The judgment of the High Court and the rule 18 certificate will identify the issues in the litigation and whether they are material or purely academic.

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32 Id para 7.

33 Id para 8.

[28] Snyders J referred to the generally accepted proposition that it is in the interests of justice to avoid delays in litigation. She expressed concern that this Court might be inundated with applications for leave to appeal unless a strict approach to such applications is adopted, and that this might result in delays in the finalisation of litigation.[34] This, however, is a matter within the control of this Court. If it is overburdened, the Court can have regard to this fact in deciding whether or not to grant leave to appeal in a particular instance. It must also be borne in mind that in cases of importance where there is a reasonable prospect of success on appeal, if leave to appeal to this Court is refused, leave would have to be granted to appeal to the SCA. That court is extremely busy and if its case load is increased by the addition of appeals in constitutional matters, that too can lead to delays in the finalisation of litigation. Indeed, in the circumstances presently existing, the burden on the SCA in having to deal with such matters is likely to be greater than the burden on the Constitutional Court, which presently has a lighter case load. This, of course, might change when the flow of litigation under the 1996 Constitution reaches this Court.

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[34] Above n 14.

[29] In his application for leave to appeal the appellant contended that the litigation would be protracted by requiring the matter to pass through the SCA before being heard by this Court, it being all but inevitable that this would happen,[35] and that the finalisation of the dispute as to the majority required to pass a budget would accordingly be delayed by denying him a right to appeal directly to this Court. The averment that it was all but inevitable that an appeal would ultimately be brought to this Court is an overstatement. The reasons given by the SCA for its decision might be so convincing that the losing party would not want to take the matter further, or if it did, that this Court would not grant it leave to do so. It must be acknowledged, however, that an appeal directly to this Court would result in the avoidance of delays and costs that would be incurred if there were to be an appeal to the SCA and then an appeal from its decision to this Court. The avoidance of such delays and costs was clearly one of the purposes for which section 167(6)(b) of the 1996 Constitution was enacted.

[30] I cannot agree with Snyders J that the granting of leave to appeal directly to this Court is likely to result in justice being delayed. That may be the case where the appeal raises constitutional issues and other issues, in which event there will ordinarily be compelling reasons for the appeal to be heard first by the SCA. But where, as in the present case, the appeal is concerned solely with the interpretation of provisions of the Constitution, a direct appeal from the High Court to this Court will often result in the saving of time and costs.

[31] What is of importance, however, and what must always be kept in mind in dealing with such matters is that the saving of costs and time are not the only factors that have to be taken into

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35 Above para 20.

account in deciding what is in the interests of justice in any given case. There may be cases where the nature of the dispute is such that it would be appropriate for the SCA to consider the matter before it comes to this Court, and in the interests of justice for it to do so.

[32] In deciding what is in the interests of justice, each case has to be considered in the light of its own facts. A factor will always be that direct appeals deny to this Court the advantage of having before it judgments of the SCA on the matters in issue. Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this Court. But where the only issues on appeal are constitutional issues the position is different. Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the SCA is bypassed.

[33] The present appeal is concerned only with constitutional issues and although it has failed, there were sufficient prospects of success to justify the granting of leave to appeal either to the SCA or to this Court. The issues raised by the appeal are of importance not only to the parties to the present litigation but to the proper functioning of local authorities in all provinces. The dispute relates to the majority required by a local authority for the adoption of or amendment to its budget, and the circumstances in which the MEC for Development Planning and Local Government is entitled to intervene to impose a budget on the local authority. These are real and not abstract issues which have given rise to dispute in Gauteng and need to be resolved as a

matter of urgency. This Court was in a position to deal with the matter promptly.[36] Its judgment is binding on all courts and will settle this contentious issue. It had the advantage of having before it a full and careful judgment on the issues given by the High Court. Hence, although the matter was one of difficulty on which the views of the SCA would have been of value, this Court was of the opinion that the other considerations calling for an early and definitive decision of the disputed issues were more compelling, and that the interests of justice required it to grant leave for the appeal to be brought directly to it.

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

YACOOB J:

[36] Judgment has in fact been given within approximately six months of the granting of leave to appeal.

~~[34]~~ The only issue in this appeal is the constitutionality of section 16(5) ("section 16(5)") of the Local Government Transition Act[1] ("the LGTA") which in effect provides that a budget of a municipal council must be approved by a two-thirds majority of that council and that, if the budget for any financial year is not approved by 30 June of that year, the member of the executive council ("the MEC") of a province responsible for local government may exercise the power to approve the budget.[2]

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1 Act 209 of 1993 as amended.

2 "Notwithstanding anything to the contrary in any law contained -

(a) any resolution of any transitional council or transitional metropolitan substructure referred to in subsection (1) pertaining to the budget of such transitional council or transitional metropolitan substructure shall be taken by a two-thirds majority of the members of such council or substructure, and any resolution of any transitional council or transitional metropolitan substructure pertaining to town planning shall be taken by a majority of the members of such council or substructure: Provided that any such transitional council or transitional metropolitan substructure may delegate the power to take any decision on any matter pertaining to town planning to the committee referred to in subsection (6) or to any other committee appointed for this purpose or to a person in its employ; and

(b) if such transitional council or transitional metropolitan substructure -

(i) on the last day of June in any financial year has failed to approve a budget for the subsequent financial year; or

(ii) on the last day of April in any financial year has failed to take steps to prepare a

budget for the subsequent financial year,
the MEC may exercise any power or perform any duty conferred or imposed upon such transitional council or transitional metropolitan substructure by this Act or any other law in relation to the approval or preparation of a budget, as the case may be."

[35] The basis of the challenge is that section 16(5) is inconsistent with the Constitution[3] in that the section violates the provisions of section 160(3)(b)[4] read with section 160(2)(b)[5] of the Constitution ("section 160(3)(b)") which requires the budget of a municipal council to be approved by a majority of the members of that council. It is also contended that the section violates certain principles which are enshrined in and enjoined by the Constitution.

[36] The dispute which gave rise to the urgent application before Snyders J in the Witwatersrand High Court was born at a meeting of the Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council ("the Council") held during May 1997 at which a vote was taken on the budget for the ensuing financial year. The event was of some importance and urgency because the financial year of the Council ran from 1 July of one year until 30 June of the next. Two-thirds of the members of the Council did not vote in favour of that budget; a majority of its members did. This result brought the differences between section 16(5) and section 160(3)(b) into sharp focus: if section 16(5) was valid and applicable, the budget would not have been

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3 Constitution of the Republic of South Africa, 1996.

4 "All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members."

5 Section 160(2)(b) reads:

> "The following functions may not be delegated by a Municipal Council:
> (a) . . . ;
> (b) the approval of budgets;
> (c) . . . ;
> (d) . . . ."

lawfully approved; conversely, if section 160(3)(b) was applicable, the budget would have been properly approved.

[37] During June 1997, the Council and the appellant applied to the court a quo for:

> " . . . an order declaring that the first applicant is entitled, by a decision supported by a simple majority of its members, to approve its budget for the financial year 1 July 1997 to 30 June 1998."[6]

6 *Eastern Metropolitan Substructure of The Greater Johannesburg Transitional Metropolitan Council and Another v Democratic Party and Others* 1997 (8) BCLR 1039 (W) at 1041.

The appellant's interest was occasioned by the circumstance that the office occupied by him had the power to approve the budget if the budget of the Council had not been approved by a specified date. The application was dismissed with costs.[7]

[38] The appellant was granted leave to appeal to this Court for the reasons set out in the judgment of Chaskalson P. The Council did not appeal.

[39] The submissions of the parties were concerned mainly with the meaning and effect of the second sentence of item 26(2) of schedule 6 of the Constitution. It is necessary to set out the whole of item 26 which provides:

> "(1) Notwithstanding the provisions of sections 151, 155, 156 and 157 of the new Constitution -
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> (a) the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force until 30 April 1999 or until repealed, whichever is sooner; and
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> (b) a traditional leader of a community observing a system of indigenous law and residing on land within the area of a transitional local council, transitional rural council or transitional representative council, referred to in the Local Government Transition Act, 1993, and who has been identified as set out in section 182 of the previous Constitution, is *ex officio* entitled to be a member of that council until 30 April 1999 or until an Act of Parliament provides otherwise.
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> (2) Section 245(4) of the previous Constitution continues in force until the

[7] Id at 1047.

> application of that section lapses. Section 16(5) and (6) of the Local Government Transition Act, 1993, may not be repealed before 30 April 1999."

[40] The submissions made on behalf of the appellant were that: (a) the second sentence of item 26(2) was no more than an injunction to Parliament prohibiting repeal of section 16(5) until 30 April 1999; (b) section 16(5) was accordingly afforded no further protection, remained fully reviewable, had to be consistent with the Constitution in order to be valid, and was invalid if it violated any part of the Constitution; (c) section 16(5) was in conflict with section 160(3)(b) and violated what were referred to as "principles" of "democratic government", "autonomous local government", "transparency in local government" and "separation of powers in provincial government" enshrined in and enjoined by the Constitution; and (d) the section was accordingly invalid.

[41] The respondents disputed the appellant's submissions summarised in (a), (b) and (d) of the previous paragraph, contending that the second sentence, by necessary implication, authorised the continuing operation of section 16(5) until 30 April 1999 notwithstanding the provisions of section 160(3)(b), and immunised the section from review in terms of the Constitution. Insofar as the appellant's submissions summarised in (c) of the previous paragraph are concerned, the respondents conceded that section 16(5) is in conflict with section 160(3)(b), took no issue with the submissions concerning the violation by section 16(5) of "principles" enjoined by the Constitution and appeared to acknowledge that the appeal should succeed if the submissions summarised in (a) and (b)

were upheld.

[42] The above summary of the submissions of the parties shows that a decision on the constitutionality of section 16(5) requires a determination of the meaning and effect of the second sentence of item 26(2) of schedule 6 in its context and, in particular, of the second sentence in the light of section 160(3)(b).

[43] It must be pointed out at the outset that section 16(5)(b) and section 160(3)(b) are clearly different from each other in the sense that there is a conflict between them read in isolation. But the question whether section 16(5) is inconsistent with the Constitution is more complex and must be determined, not by a comparison of the two provisions in isolation of the rest of the Constitution, but in the context of the Constitution as a whole.

[44] The second sentence is a part of item 26 which is in turn contained in schedule 6. This schedule contains certain transitional provisions and is introduced into the Constitution by section 241 which, under the heading "Transitional Arrangements", provides:

> "Schedule 6 applies to the transition to the new constitutional order established by this Constitution, and any matter incidental to that transition."

[45] The section either expressly or by necessary implication recognises that the Constitution aims to establish a "new constitutional order", that the new order will not

come into effect or begin to exist immediately or miraculously, that an order other than the "new constitutional order" contemplated in the section will be in existence at the time that the Constitution comes into effect, that there will be a period of transition from the order existing as at the date when the Constitution comes into effect until the new order is established, and that schedule 6 is to govern or apply to facilitate the transition.

[46] The purpose of the whole of schedule 6 is to facilitate the process of transition to the new order. The drafters must have been aware that some of the measures to apply during the transition would differ from the regime contemplated for the new constitutional order. Such a difference between a provision perpetuated during the transition by the Constitution itself and an element of the regime contemplated for a new constitutional order is therefore, by itself, no warrant for the assertion that the former is in conflict with the latter. The relevant provisions must be analysed in the context of the Constitution as a whole.

[47] Item 26 of schedule 6 sets out those transitional arrangements or statutory provisions which would apply pending the establishment of "the new constitutional order" contemplated for local government and detailed in chapter 7 of the Constitution. The fallacy in the appellant's argument is that a provision of the LGTA is compared in isolation with a provision of chapter 7 and seen to be in conflict with it whereas the comparison that is called for is between chapter 7 and item 26 of schedule 6, both provisions of the

Constitution. In the context of the Constitution as a whole, item 26 which deals specifically with the transition must be construed as being applicable during the transitional period, and conflicting provisions of chapter 7 as being not applicable until the transitional period has expired. The meaning and effect of item 26(2) must be determined in this light.

[48] The first sentence of item 26(2) keeps in force section 245(4) of the interim Constitution which provides:

> "Until a period of not less than three years has elapsed from the date on which the members of a district council, a metropolitan substructure, a transitional council, a transitional representative council or a transitional rural council as contemplated in the Local Government Transition Act, 1993, have been elected in terms of that Act, such council or substructure, as the case may be, shall not be disestablished and no change shall be made to the powers, area of jurisdiction, wards or number of seats thereof except in accordance with an Act of Parliament further regulating the local government transition process or by way of proclamation in the Provincial Gazette by the Premier of a province acting in consultation with the Minister for Provincial Affairs and Constitutional Development."

[49] Section 245(4) of the interim Constitution provides in effect that certain local government structures and powers must remain in existence and unchanged unless the procedure prescribed in that section is followed. Insofar as the section relates to the powers of a municipal council, its effect is that statutory provisions concerning those powers may be repealed by an Act of Parliament further regulating the local government

transitional process or by the Premier of the province acting in consultation with the Minister for Provincial Affairs and Constitutional Development. The provincial legislatures are precluded from making any changes or from disestablishing municipalities until the period of three years has elapsed, even though a provincial legislature has the constitutional power to establish or disestablish a municipality in the "new constitutional order" contemplated for local government.[8] The first sentence of item 26(2) means that section 245(4) of the Constitution must apply during the transitional period until the application of that section lapses. It follows that conflicting provisions of chapter 7 do not apply during the same period. The second sentence of item 26(2) is in part a proviso to the first sentence for it says that no-one may repeal section 16(5) during the transition.

[50] It is now possible to answer the question whether section 16(5) is consistent with the Constitution. It must already be apparent that the process of ascertaining this answer involves an analysis of the interaction of section 160(3)(b), section 241, the second sentence of item 26(2) and section 16(5) with each other. In other words, all these provisions must be read together in order to determine how they can best be harmonised. It is clear that section 160(3)(b) was contemplated as an element in a local government system which is to be part of the "new constitutional order" referred to in section 241. It is equally clear that section 241 renders schedule 6, of which the second sentence is a part, applicable to the transition to that order.

[8] For example section 155(6) of the Constitution.

[51] Of course, the second sentence makes it clear that section 16(5), unlike all the other provisions perpetuated by item 26, may not be repealed. But the second sentence in its context must also mean that, like section 245(4) of the interim Constitution, section 16(5) too must apply during the period mentioned. Section 16(5) applies during the transition for a fixed period until 30 April 1999; section 160(3)(b) applies after that date. Read in this way, section 16(5) and section 160(3)(b) are compatible.

[52] The difference in the formulation of item 26(1) on the one hand and of item 26(2) on the other is of little significance in the light of the construction of item 26 adopted in this judgment. It is therefore unhelpful to speculate on this difference. It is common cause that item 26(1) and item 26(2) were drafted at different times. Item 26(2) was part of the constitutional text considered by this Court during the first certification judgment,[9] which held that the chapter on local government did not comply with the constitutional principles. Item 26(1) was inserted only after the first certification judgment and, to some extent, as a result of the amendments made to the chapter on local government aimed at ensuring compliance with the constitutional principles. It may be that the reason for the difference is that some months elapsed between the date on which item 26(2) was drafted and the time when item 26(1) was later inserted but, as indicated earlier, it

[9] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

is not necessary to further speculate on this aspect.

[53] Moreover, the construction contended for by the appellant - that the drafters, by specifically preserving section 16(5) from repeal, intended it to apply during the transition only if it were on all fours with section 160(3)(b) of the Constitution, when it must have been clear to all that the sections were in conflict with each other - cannot be accepted. The proposition carries with it the inevitably absurd consequence that the protection against repeal is rendered entirely futile by the circumstance that section 16(5) will be invalid as soon as the Constitution was promulgated. The Constitutional Assembly could never have intended to protect the section from repeal at the same time as effectively invalidating it. The acceptance of the appellant's submissions would mean that the insertion of the second sentence was pointless. The literal construction of the sentence may well be the one contended for by the appellant. However such a construction would negate the clear purpose of the drafters to ensure the continuation of section 16(5) during the transition. It would also amount to this: that the drafters had no purpose at all. It accordingly cannot be adopted.

[54] The second sentence accordingly means that section 16(5) cannot be repealed and remains in force until 30 April 1999 despite the provisions of section 160(3)(b) of the Constitution which would not apply during this limited period. Section 16(5) is accordingly consistent with section 160(3)(b) of the Constitution.

[55] That it is permissible to perpetuate measures which differ from the system contemplated by the new constitutional order during the transition is evident from

the second certification judgment.[10] It was held in the course of that judgment that item 26(1) of schedule 6 complied with the constitutional principles (CPs)[11] even though that item made the LGTA applicable until 30 April 1999 even if its provisions were different from certain named sections of the Constitution. This Court said at paragraphs 84 and 85 of the judgment:

> "[84] NT 241(1) provided that the provisions of the Labour Relations Act, 1995, remained valid despite the provisions of the Constitution. NT sch 6 s 22(1)(b) contained a similar provision in respect of the Promotion of National Unity and Reconciliation Amendment Act, 1995. The provisions of AT sch 6 s 26(1)(a) are different. They do not immunise the Local Government Transition Act 209 of 1993 from constitutional review. It remains subject to constitutional review, but is not subject to the framework provisions of AT 151, 155, 156 and 157 until 30 April 1999. All other provisions of the AT apply to it and any amendment of its provisions must be consistent with the AT.
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> [85] AT sch 6 s 26(1)(a) is a transitional provision designed to enable an orderly transition to be made from the existing system of LG to a system which conforms with the requirements of the AT. It is implicit in CP XXIV that this could be done. Otherwise

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10 *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) at paras 88-95.

11 Set forth in schedule 4 to the interim Constitution.

> existing LG laws and structures inconsistent with any new scheme would be invalidated when the AT comes into force, which is likely to result in chaos. The old infrastructure would be invalid and in all probability there would be no new infrastructure to replace it. One should not impute such an intention to the framers of the CPs. There is nothing in the language of CP XXIV that requires the framework provisions to come into force immediately. On the contrary the CP contemplates that legislation will be needed to make provision for the comprehensive powers, functions and other features of LG that will be required, and in view of the known complexities of the transition to democratic LG, the drafting and implementation of such legislation are likely to present difficulties and to require time."

[56] Section 16(5) is consistent with the CPs. There is nothing in the CPs which requires section 160(3)(b) to come into operation immediately. The effect of the second sentence is to authorise the continued operation of section 16(5) for the same period during which limited protection is afforded to other provisions of the LGTA by item 26(1). The apparent plan is to ensure that the "new order" contemplated for local government by the Constitution does not come into effect piecemeal but is brought into operation as a comprehensive constitutional package.

[57] The appellant also argued that section 16(5) offends against certain "principles" implicit in the Constitution: "democratic government", "autonomous local government", "transparency in local government" and "separation of powers in provincial government". The contention is advanced in relation to the deadlock-breaking mechanism encapsulated in section 16(5) which provides for the MEC to approve a budget for the municipal council if the requisite two-thirds majority is not secured timeously. Even if it is assumed that these principles are enshrined in the Constitution, it cannot be said that a deadlock-breaking mechanism to avoid impasse is in breach

of them.

~~[58]~~ Indeed the prescribed mechanism is necessary. Without it a minority in the municipal council could quite easily hold the majority to ransom and prevent the passage of a budget resulting in a council not being able to function at all, let alone democratically, autonomously or transparently. In any event the consequences of the existence of such a mechanism are not nearly as harsh or as unfair as the appellant would have it. The provincial MEC must exercise the power in good faith; the MEC is politically accountable in relation to the exercise of the power; the exercise of the power is subject to constitutional scrutiny, more particularly against the provisions of Chapter 3 of the Constitution. The deadlock-breaking mechanism, though not perfect, is consistent with the Constitution.

~~[59]~~ The appeal must therefore fail.

[60] Before this judgment is concluded, reference must be made to an aspect of the reasoning of Snyders J which has not been endorsed by this judgment. This relates to the finding that this Court, in the second certification judgment, recognised the "principle" that transitional provisions could be of full force and effect "despite their being in violation of the Constitution and the constitutional

principles".[12] In the first place the second certification judgment was not directly concerned with the consistency of legislative provisions with the Constitution. The first certification judgment makes its clear that it is impermissible to immunise any legislative provision from constitutional review and that all statutory provisions (including legislative provisions perpetuated by the Constitution as transitional arrangements) must be consistent with the Constitution as a whole.[13] We have held above that when the Constitution is read as a whole, there is no inconsistency between the provisions of section 160(3)(b) and section 16(5). In the second certification judgment, this court did not hold that transitional arrangements could be in conflict with the constitutional principles; on the contrary, this Court held that certain contested transitional provisions were perfectly consistent with the constitutional principles.[14] In any event there is no inconsistency between section 16(5) and any of the constitutional principles.

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12 Above n 6 at 1043J.

13 Above n 9 at para 149-150.

14 Above n 10 at paras 84-5.

[61] This conclusion renders it both unnecessary and undesirable to adjudicate on a preliminary issue which would have otherwise been of some relevance. It will have been noted that the Council and the appellant did not apply for an order declaring section 16(5) invalid.[15] Instead, they relied on the invalidity of the section as the foundation for the relief claimed. It was submitted on behalf of the appellant in support of the procedure followed that an applicant who was not really interested in the declaration of invalidity of a provision of an Act of Parliament, but who sought relief consequent upon that invalidity, ought not to be put to the inconvenience, delay and expense necessarily occasioned by the additional requirement of confirmation demanded by section 172(2)[16] of the Constitution. Counsel for the appellant was inclined to concede that "a literal reading" of the Constitution militated against such a construction.

[62] It is sufficient to point out here that considerable difficulties stand in the way of the

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15 See para 37 of this judgment.

16 Section 172(2) provides as follows:

"(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision.

[63] Firstly, such a procedure appears to be incompatible with the Constitution. Section 172(1)[17] obliges a court to declare a statutory provision which is inconsistent with the Constitution invalid to the extent of the inconsistency. It was conceded by counsel for the appellant that the course chosen is at least inconsistent with the literal meaning of section 172(2)(a) of the Constitution which provides that a declaration of invalidity of an Act of Parliament by a High Court has "no force" unless it is confirmed by this Court. The grant of any order by a High Court premised on a finding of invalidity of a provision of an Act of Parliament (other than temporary relief contemplated by section 172(2)(b) of the Constitution) is tantamount to that finding being infused with "force" contrary to section 172(2)(a) of the Constitution.

[64] Secondly, the suggested procedure is likely to be a source of uncertainty and confusion about the status of a provision of an Act of Parliament. The purpose of section 172(2) is to provide certainty by requiring confirmation of an order of invalidity of a provision of an Act of Parliament by this Court as a prerequisite for any finding of invalidity being of force.

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[17] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court -
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including -
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Sanctioning the suggested procedure could nullify that purpose.

[65] Thirdly, the practice that has been urged upon this Court carries with it the distinct danger that courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant. This might mean that a provision of an Act of Parliament may be held valid for one set of circumstances and invalid for another. As Ackermann J said:

> "The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach. "[18]

[66] The delay or inconvenience which may be caused by adopting a course by which a party seeks a declaration of invalidity of a statutory provision when relief consequent to such a declaration is required is not unduly onerous. This is because the High Court can itself, if it makes a finding that a provision of an Act of Parliament is invalid, refer that finding to this Court for consideration.[19]

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18 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 26.

19 *Parbhoo & Others v Getz NO & Another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at paras 3-4.

[67] Finally, the appropriate order for costs must be determined. This Court has been reluctant to oblige a party that fails in an effort to challenge the constitutionality of legislation to pay the costs of the successful litigant.[20] This reluctance is motivated by a desire not to discourage litigants from making constitutional challenges which are of potential substance merely because of the fear of the financial consequences of failure.[21] But there is no inviolable rule that the successful litigant ought not to be awarded costs. In this case, the appellant, a member of the executive council of a province who is unlikely to be deterred by a cost order against him, brought the respondents (one of whom is a political party, and the others members of the relevant municipal council) to court, challenging a legislative provision. Before Snyders J, appellant was a co-applicant with the Council. The challenge has failed and there is no reason for the respondents to bear their own costs incurred either before the High Court or before this Court. This would indeed be unfair.

[68] The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J,

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20 See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 44.

21 See *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC); 1997(6) BCLR 692 (CC) at

O'Regan J and Sachs J concur in the judgment of Yacoob J.

paras 30 and 32; and *Sanderson* above n 20 at para 43.

YACOOB J

For the Appellant: Mr W Trengove SC and Mr M Chaskalson, instructed by Moodie & Robertson

For the Respondents: Mr PJ van Blerk SC and Mr DN Unterhalter, instructed by Strauss Scher Inc c/o Edgar Salmon & Salmon