CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 34/99

CAPE METROPOLITAN COUNCIL Applicant

versus

MINISTER OF PROVINCIAL AFFAIRS AND
CONSTITUTIONAL DEVELOPMENT First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION Second Respondent

Decided on : 15 October 1999

JUDGMENT

LANGA DP:

[1] This application by the Cape Metropolitan Council (the applicant) is a sequel to a judgment handed down by Van Zyl J (King JP and Louw J concurring) in the Cape of Good Hope High Court (the High Court) on 22 September 1999 in case no. 1128/99. The relief sought by the applicant may be summarised as follows:

1. that this application be dealt with on an urgent basis;
2. that the applicant be granted leave to appeal directly to the Constitutional Court against the judgment and orders of the High Court in case no. 1128/99; and

3. that the appeal against the judgment of the High Court be heard by the Constitutional Court before it hands down judgment in case CCT15/99 (*The Executive Council of the Province of the Western Cape v The Minister of Provincial Affairs and Constitutional Development of the Republic of South Africa and Another*) and case CCT18/99 (*The Executive Council of KwaZulu-Natal v The President of the Republic of South Africa and Others*). The two matters will be referred to as the Western Cape and KwaZulu-Natal cases respectively.

There are further prayers on the issue of costs and for alternative relief.

[2] On 29 September 1999 the applicant obtained from the High Court a positive certificate issued under rules 18(2) and 18(6) of the rules of this Court.[1] Simultaneously,

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[1] Rule 18(2) provides:
"A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, apply to the court which gave the decision to certify that it is in the interests of justice for the matter to be brought directly to the Constitutional Court and that there is reason to believe that the Court may give leave to the appellant to note an appeal against the decision on such matter."

Rule 18(6) provides:
"(a) If it appears to the court hearing the application made in terms of subrule (2) that-

(i) the constitutional matter is one of substance on which a ruling by the Court is desirable; and
(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 court concerned for further evidence; and
(iii) there is a reasonable prospect that the Court will reverse or materially alter the judgment if permission to bring the appeal is given, such court shall certify on the application that in its opinion, the requirement of subparagraphs (i), (ii) and (iii) have been satisfied or, failing which, which of such requirements have been satisfied and which have not been so satisfied.

the High Court granted the applicant leave to appeal to the Supreme Court of Appeal, such leave being conditional on a refusal by this Court to grant leave to the applicant to appeal directly to it.

[3] The present application was lodged with this Court on 30 September 1999. Before that, by letter dated 23 September 1999, the attorney acting for the applicant gave notice of his intention to bring this application to the Registrar of this Court. The respondents have filed a notice to oppose the granting of the relief claimed.

[4] The grounds upon which the applicant relies for the relief sought are set out in an affidavit deposed to by Mr Barend Kruger Kieser (Kieser) who is the Head: Legal Services, of the applicant. The affidavit was filed in support of the applicant's application in the High Court for the rule 18 certificate and for leave to appeal to the Supreme Court of Appeal.

[5] With regard to prayers 1 and 3, Kieser states that -

> "The reason why the Applicant has brought this application on an urgent basis, and

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> (b) The certificate shall also indicate whether, in the opinion of the court concerned, it is in the interests of justice for the appeal to be brought directly to the Constitutional Court."

> intends . . . bringing urgently an application for leave to appeal directly to the Constitutional Court, is that it considers that it would be desirable for the Applicant to present to the Constitutional Court its arguments on the constitutionality of the Structures Act and on the reasoning and conclusions of this Court, including its arguments based on section 151(4) of the Constitution, prior to the Constitutional Court handing down its judgment in the Western Cape and KwaZulu-Natal matters. The applicant is a local government body, and the Constitutional Court has not yet heard argument on the Structures Act - a statute which deals expressly and almost exclusively with local government matters - from an organ of state in the local sphere of government."

[6] I am satisfied, for the reasons set out hereinafter, that there is no substance to the application pertaining to prayers 1 and 3. That portion of the application can accordingly be disposed of summarily, in terms of Constitutional Court rule 11 read with rule 10(4).[2]

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[2] Rule 11 provides:

"(1) In urgent applications, the President may dispense with the forms and service provided for in these rules and may give directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure, which shall as far as is practicable be in accordance with these rules, as may be appropriate.

(2) An application in terms of subrule (1) shall be on notice of motion accompanied by an affidavit setting forth explicitly the circumstances which justify a departure from the ordinary procedures."

Rule 10(4) provides:

"When an application is placed before the President in terms of subrule (3) (c), he or she shall give directions as to how the application shall be dealt with and, in particular, as to whether it shall be set down for hearing or whether it shall be dealt with on the basis of written argument or

[7] The High Court application was argued from 28 May to 3 June 1999 and judgment was handed down on 22 September 1999. The issues canvassed in that application are similar to those which have been aired in the Western Cape and KwaZulu-Natal cases. According to Kieser's affidavit, applicant's counsel was of the view that the issues canvassed in the two cases included all, and even went beyond, those which had been raised in the High Court application. In paragraph 5 of his judgment, Van Zyl J summarises the issues before the High Court as follows:

> "The gist of the applicant's attack on the Structures Act, as it appears from the founding affidavit of Mr B K Kieser, the head: legal services of the applicant, is that it is wholly unconstitutional on two major

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summarily on the basis of the information contained in the affidavits."

> grounds. Firstly, it is in conflict with sections 155 and 160 of the Constitution, the provisions of which deal with the establishment of municipalities and their internal procedures. Secondly, it encroaches upon the autonomy of municipalities in the sense of interfering with their functional and institutional integrity, the exercise of their powers and the performance of their functions. A further ground relates to the power to designate metropolitan areas, which power is said to be inconsistent with the constitutional requirement that municipal boundaries should be determined by an independent authority."

[8] The application in the Western Cape case was instituted in this Court on 26 April 1999 and the KwaZulu-Natal case was instituted in May 1999. As the disputes in the two matters raised similar issues concerning the constitutionality of the provisions of the Local Government : Municipal Structures Act, No 117 of 1998, the matters were heard together on 24 and 25 August 1999 pursuant to directions given by the President of this Court.

[9] Judgment in these cases was already in preparation when this application for leave to appeal was lodged with this Court. The applicant was aware of the Western Cape and KwaZulu-Natal cases but manifested no interest in taking part in the proceedings. According to Kieser's affidavit, applicant's counsel watched the proceedings in this Court on the applicant's behalf. If the applicant wanted to be heard on the issues which were before the Court, it should have resorted to the procedures provided by the Rules. Rule 9 makes provision for "any person interested in any matter before the Court" to apply to be admitted as amicus curiae in those proceedings. No explanation has been given why the

applicant did not follow that course.

[10] Prayer 3 is a request to this Court not to hand down a judgment on a matter it has heard, until it has listened to the applicant's argument in the appeal sought to be brought. Such a request is unusual, and should be seen against the background of the litigation in the Western Cape and KwaZulu-Natal cases, which raised important questions and involved two provincial governments on the one hand, and the national government on the other. The issues were concerned with the authority to establish municipalities and their internal structures. Argument in the two cases, which lasted two days, was presented by three senior counsel, representing the parties. The issues raised were fully canvassed before the Court reserved its judgment. The Court's decision, which has been in preparation for some weeks, is now ready to be handed down simultaneously with this judgment. No justification exists in the present case to warrant the delay which would ensue if the relief sought by the applicant in prayer 3 were to be granted. The application in this respect must accordingly be refused.

[11] It follows from the above finding that the case for urgency cannot be sustained and the application in respect of prayer 1 must also fail.

[12] In prayer 2, the applicant requests the Court (or the President), to grant leave to appeal directly to this Court in terms of rule 18(10). The approach which the Court

should adopt in an application for leave to appeal directly to this Court has been discussed in a number of cases. The critical issue is an evaluation of what is in the interests of justice. Where, as in the present case, the issues between the parties raise constitutional matters of importance, and a direct appeal will result in a saving of costs and time, there are compelling reasons for an appeal, should there be one, to be brought to this Court.[3] The fact that this Court has recently heard argument in a similar matter is relevant in this regard.

[13] In this matter the High Court has given a positive certificate in terms of rules 18(2) and 18(6). It is contended by Kieser in his affidavit, that the appeal which it is sought to bring, is concerned with constitutional issues only. The case clearly concerns the

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[3] See *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC) para 32; 1998 (7) BCLR 855 (CC) para 32; *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) para 33; 1998 (10) BCLR 1207 (CC) para 33.

constitutionality of a statute which is fundamental to the restructuring of local government. It is desirable that finality in the present litigation should be reached quickly, in order to remove uncertainties with regard to arrangements for local government elections and the work of the Demarcation Board. I am satisfied that this Court is the appropriate forum to deal with the matter, should it be brought on appeal.

[14] In opposing the application for leave to appeal directly to this Court, the respondents have adopted the attitude that the applicant has no reasonable prospects of success on appeal. It is not necessary for me to express a view in that regard at this stage and I refrain from doing so.

[15] In the light of the judgment of this Court in the Western Cape and KwaZulu-Natal cases, the applicant should be given the opportunity of defining the matters, if any, that it wishes to pursue on appeal. The applicant is accordingly given leave to supplement its application for leave to appeal, should it wish to do so.

[16] In the circumstances, and as indicated above, the application for an order that the matter be heard on an urgent basis and that the appeal be heard by this Court before it hands down judgment in the Western Cape and KwaZulu-Natal cases must be refused.

[17] The following order is accordingly made:

1. The application in respect of prayers 1 and 3 is dismissed. The applicant is ordered to pay any costs which may have been incurred by respondents in relation to the relief claimed in prayers 1 and 3;

4. The application for leave to appeal directly to this Court is postponed, subject to the directions set out hereunder.

   2.1 Applicant is given leave to supplement its application for leave to appeal within seven (7) days from the date of this order;

   2.2 The respondents may lodge their written response to the application;

   (a) within seven (7) days of the service upon them of the supplementary matter, if any, referred to in paragraph 2.1. above, or

   (b) within fourteen (14) days of this order, if the application is not supplemented.

   2.3 The matter shall thereafter be disposed of in accordance with directions given by the President.

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

Attorneys for the applicant:	Mallinicks Incorporated, Cape Town
Attorneys for the first respondent:	The State Attorney, Cape Town
Attorneys for the second respondent:	Mogotsi Ramono, Johannesburg