CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/99

THE PREMIER OF THE PROVINCE OF THE WESTERN CAPE	First Applicant
THE SPEAKER OF THE PROVINCIAL PARLIAMENT OF THE WESTERN CAPE	Second Applicant
versus	
THE ELECTORAL COMMISSION	First Respondent
THE CHIEF ELECTORAL OFFICER	Second Respondent

Heard on	:	26 May 1999
Order issued on	:	26 May 1999
Reasons furnished on	:	2 September 1999

JUDGMENT

MOKGORO J:

1 On 26 May 1999, and at the conclusion of oral argument in this matter, the following order was unanimously made by the Court:

> 10. The number of seats in the Western Cape Provincial Parliament is governed by section 13 of the Constitution of the Western Cape 1998, namely 42.
> 20. The determination made by the first respondent on 17 March 1999, namely that after the election scheduled for 2

June 1999 the Western Cape Provincial Parliament will have 39 seats, is invalid.

30. The respondents are to pay the costs of the application."

At the time, it was intimated that reasons for the order would be furnished later. These are the reasons.

2 In preparation for the second democratic election in the history of the country, the Electoral Commission ("the Commission") made a determination of the number of seats for each provincial legislature.[1] For the Western Cape, the number, based on a formula of one representative per hundred thousand inhabitants, was set at 39 seats.[2] The provincial government of the Western Cape, however, contended that in terms of section 13 of the Constitution of the Western Cape[3] ("the provincial constitution"), the province is entitled to a total of 42 seats. Much correspondence passed between the parties in an effort to resolve the conflict, but without success. On 20 May 1999 the applicants, at the eleventh hour,[4] approached this Court for a

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1 The determination was made after public consultation on 17 March 1999.

2 In terms of section 105(2)of the Constitution, a provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined by a formula prescribed by national legislation. The formula is set out in schedule 3 of the Electoral Act 73 of 1998 ("the Act"). In terms of that formula, the accepted statistical data reflected a population figure of 3 956 875 inhabitants, entitling the Western Cape to 39 seats in the provincial legislature.

3 Constitution of the Western Cape, 1997.

4 The application was lodged with the Court on 20 May 1999, 13 days before the election. On 19 April 1999 a letter was written by the New National Party (of which the first applicant is the provincial leader) indicating that their view of the matter was that the issue was governed by the Western Cape Constitution, and that representations to that effect would be made at the meeting of 17 March. The Commission, however, persisted in their attitude in respect of the position they had adopted. At that stage it would have been far more appropriate for the application to have launched these proceedings. The more the undue delay, the more it ran the risk of causing disruption to the electoral process. Counsel for the applicants contended however that if there was blame for tardiness in bringing these proceedings, the fault should not lie solely at the door of the applicants who, she submitted, were bona fide in their efforts to resolve the

declarator that would vindicate their position. With the Commission as first respondent, the matter was urgently set down for hearing on 26 May 1999.

3 The applicants argued that this Court had exclusive jurisdiction to hear the matter by virtue of section 167(4)(a) of the Constitution of the Republic of South Africa (the Constitution), which provides:

> "Only the Constitutional Court may . . . decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;"

Alternatively, in light of the urgent nature of the matter, the applicants sought leave to obtain direct access to this Court in terms of rule 17.[5]

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dispute without resorting to legal action. She submitted that it was equally within the power and responsibility of the respondents to have sought the declarator. Regardless of who is to blame, or who is more to blame, it is inappropriate for a matter of this nature, with its potential repercussions, to have been brought so late.

[5] Rule 17 was promulgated in pursuance of section 167(6) making provision for direct access to this Court if it is in the interests of justice and with leave of the Court.

4 It is not clear that section 167(4)(a) governs the current situation. It may be that the Commission and its Electoral Officer are organs of state as defined by section 239[6] of the Constitution. However, it is not clear that they are organs of state "in the national or provincial sphere" as contemplated by section 167(4)(a). If one has regard to the use of the concept "sphere" in the Constitution,[7] it seems that what is contemplated in section

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6 As one of the definitions listed in section 239, the following is provided:

> " 'organ of state' means-
> (a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution-
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation,
> but does not include a court or a judicial officer".

7 For example, section 40 provides:

> "(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. (2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter

167(4)(a) is a dispute between different spheres of government, whether national or provincial. This Court has held that the Commission is an independent institution and does not form part of government.[8] Moreover, it clearly does not form part of national government in contradistinction to provincial government. It is doubtful therefore that the respondents constitute organs of state *in the national or provincial sphere,* as provided for in section 167(4)(a).

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provides."

See also sections 41-4, 55, 76, 151, 158, 182, 195, 205-6, 214-7, 238-9. In each of these sections, the term "sphere" is used either implicitly or expressly as referring to a "sphere of government".

8 See *The New National Party of South Africa v The Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at paras 74-6.

5 Furthermore, there are sound considerations of policy for a narrower reading of section 167(4)(a). It would be undesirable if, whenever there is a dispute between any of the many institutions that are defined as organs of state in section 239, such disputes had to come to this Court and this Court only. The most obvious of these considerations is that exclusive jurisdiction holds with it the consequence that this Court acts as court of first and final instance, a situation which should be avoided for the reasons we have expressed in other decisions.[9] However, as there is merit in the applicants' alternative submission in relation to jurisdiction, we do not need to decide this question. The case before us dealt with a single crisp issue of constitutional interpretation, which this Court has had an opportunity to consider before;[10] the declaration sought raises no practical problems of any magnitude; the parties were already before the Court and prepared to argue; and the matter was urgent as contended. Accordingly, the clear

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9 See *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 7-8 and cases referred to there.

10 *Ex Parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997* 1998 (1) SA 655 (CC); 1997 (12) BCLR 1653 (CC); *Ex Parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997* 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) at paras 10-18 and 51. The meaning of the word "structure" used in section 143 was also considered in *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (4) SA 1098 (CC); 1996 (11) BCLR 1419 (CC) at para 5. The question of finality of certification is also raised and discussed in those judgments, but see in this regard para 43 of *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).

demands of the interests of justice required this Court to grant direct access and hear the matter on an urgent basis.

6 The applicants claimed that their right to have 42 seats in the provincial legislature flowed directly from section 13 of the provincial constitution. This section provides quite simply that "[t]he Provincial Parliament consists of 42 elected members." Such a provision, they submitted, was regulated by section 143 of the Constitution which, in relevant part states:

> "(1) A provincial constitution . . . must not be inconsistent with this Constitution, but may provide for-
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> (a) provincial legislative . . . structures and procedures that differ from those provided for in [chapter 6 of the Constitution]; or
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> (b) . . .
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> (2) Provisions included in a provincial constitution . . . in terms of [paragraph] (a) . . . of subsection (1)-
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> (a) must comply with the values in section 1 and with Chapter 3; and
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> (b) may not confer on the province any power or function that falls-
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> (i) outside the area of provincial competence in terms of Schedules 4 and 5; or
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> (ii) outside the powers and functions conferred on the province by other sections of the Constitution."

The applicants contended that a province is permitted to originate legislative structures and procedures that differ from those provided for in the Constitution by providing for such structures and procedures in its provincial constitution. Thus, they argued, section 13 of the provincial constitution is not subject to the requirements of section 105(2) of the

Constitution.

7 The respondents disagreed. In their submission, section 105(2) of the Constitution was the legal standard governing the situation. Section 105(2) states:

> "A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation."

Their argument was that the number of members of every provincial legislature is to be determined in terms of a formula prescribed by national legislation. Such legislation, which includes the formula, had been passed in the form of the Act. The formula, provided for by section 114[11] read with item 2 to schedule 3[12] of the Act, prescribed the number of seats for the Western Cape as a number equal to 39. In the result, there was a conflict between a provision in the provincial constitution and national legislation. Such conflicts, they contended, fell to be resolved in favour of the national legislation as required by section 147(1)(a) of the Constitution which states:

> "If there is a conflict between national legislation and a provision of a provincial

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11 Section 114: "Composition of National Assembly and provincial legislatures
The formulas referred to in sections 46 (2) and 105 (2) of the Constitution are set out in Schedule 3."

12 Item 2 to schedule 3: "Formula for determining number of members of provincial legislatures
By taking into account available scientifically based data and representations by interested parties, the number of seats of a provincial legislature must be determined by awarding one seat for every 100 000 of the population whose ordinary place of residence is within that province, with a minimum of 30 and a maximum of 80 seats."

> constitution with regard to . . . a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution"

Accordingly, in the respondents' submission, the provisions of the Act take precedence over the provisions of the provincial constitution.

8 The succinct legal issue in this case, therefore, is whether section 105(2) and the legislation passed pursuant thereto, has any application to the composition of a provincial legislature which is provided for in a provincial constitution.

9 It does not. Section 143(1) permits provincial constitutions to provide for different legislative structures and procedures for provinces who choose to establish their own distinctive legislatures. It permits such differences subject to the qualification in subsection 2(a) and (b).[13] They must comply with the founding values in section 1 and the principles of cooperative government in Chapter 3 of the Constitution. Furthermore, a provincial constitution may not bestow powers beyond those conferred upon the province by the national Constitution. The respondents correctly did not contend that any of these qualifications had been violated. If a provincial constitution regulates the procedures and structures of a provincial legislature and in so doing it does not violate section 143(2), then the provisions of chapter 6, including section 105(2), have no application to that province. One might loosely refer to these provisions of chapter 6 as default provisions: they provide the framework for provincial legislative and

[13] See para 6 above.

executive structures and procedures where none is provided for by a provincial constitution. If section 105(2) has no application, then neither does any legislation authorised pursuant thereto. Any difference in this regard that there might be between the prescripts of national legislation passed pursuant to constitutional authorisation and a provincial constitution is therefore not a conflict envisaged to be resolved by section 147. It is a difference that is exempted from the application of that section because it is sanctioned by another provision of the Constitution.

10 This is not a novel proposition. The issue was squarely before us in the judgment delivered by this Court during the certification process of the Western Cape Constitution.[14] In the course of that judgment the Court unanimously held the following at paragraph 51:

> "The ANC and the national government also object to [section 13], which provides that the provincial parliament shall consist of 42 members. The basis of the objection was that it was inconsistent with NC 105(2) . . . The objectors also argued that because the NC provides that national legislation must prescribe the formula in terms of which the number of seats of provincial legislatures will be calculated, it was not competent for a provincial legislature to regulate this matter in its constitution. Neither argument is valid. The number of members of a legislature is clearly a part or aspect of a legislative structure or procedure, in respect of which NC 143(1)(*a*) permits a provincial constitution to provide something different."

Once a province has determined its own legislative structures in terms of section 143, such structures cannot be altered by national legislation. It is clearly the intention of the

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[14] Above n 10.

Constitution to exempt provisions of a provincial constitution relating to legislative or executive structures or procedures from the application of the constitutional default provisions. In this case, it is the 42 seats determined by section 13 of the provincial constitution and provided for by section 143 of the Constitution, and not the 39 determined in terms of the Act, which prevail.

11 The respondents also submitted that if the Western Cape legislature was entitled to have 42 as opposed to 39 members in its legislature, it would infringe the right to equality and to vote in free and fair elections. Equality would be violated, so they argued, because the province would ultimately have more seats in relation to its population size. The Western Cape would be out of step with the rest of the provinces and the Republic generally, and would create a situation where the voting strength would be unequal. This in turn would violate the right to free and fair elections. It was further contended that this situation would place an extra burden on the fiscus.

12 There is no merit in any of these arguments. Because we have a proportional system of representation, the additional number of seats does not increase the strength of the vote cast in the Western Cape. The outcome of the election will entitle the parties to be proportionally represented in the provincial parliament. That is the case irrespective of the number of seats.

13 The "bloated" Western Cape parliament will not be able to exercise illegitimate or unequal power in the National Council of Provinces. There the number is fixed at 10 members per

province.[15] Votes cast in the Western Cape will not only have equal effect within that province, but also equal effect in relation to other provinces within the National Assembly. The differences between provinces do not extend beyond the specific boundaries of any province. Similarly, because of the minimum and maximum limits stipulated in section 105(2), relative to its population size the Northern Cape has more seats and Kwa-Zulu-Natal less seats than they would have in terms of the strict application of the formula. There is therefore no violation of equality or of the right to vote in free and fair elections. The complaint about burdening the fiscus is met by the fact that the provincial constitution was passed by a two-thirds majority, thus democratically and constitutionally accepting its size and its resulting fiscal implications.

14 What is the effect then of the determination made under the Act as far as the Western Cape is concerned? It is invalid. Were the Western Cape to amend its constitution by removing section 13 so that the provincial constitution no longer regulated the number of seats in the provincial legislature, the Commission would then be empowered in terms of the Electoral Act read with section 105(2) of the Constitution to make an appropriate determination.

15 In this matter, the parties agreed that costs should follow the result.

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[15] This is governed by sections 60-2 of the Constitution.

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

For the applicants: J Kentridge instructed by Mallinicks Inc., Cape Town.

For the respondents: IAM Semenya SC with P Mokoena instructed by Pule, Selebogo & Partners, Marshalltown.