CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/01

IN RE: THE CONSTITUTIONALITY OF THE
MPUMALANGA PETITIONS BILL, 2000

Heard on : 16 August 2001

Decided on : 5 October 2001

JUDGMENT

LANGA DP:

Introduction

[1] The Premier of the province of Mpumalanga, acting under the provisions of section 121 of the Constitution, has referred the Mpumalanga Petitions Bill, 2000 to this Court for a decision on its constitutionality. Section 121 of the Constitution states:

> "(1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.
>
> (2) If, after reconsideration, a Bill fully accommodates the Premier's reservations, the Premier must assent to and sign the Bill; if not, the Premier must either—
>
> (a) assent to and sign the Bill; or
>
> (b) refer it to the Constitutional Court for a decision on its constitutionality.
>
> (3) If the Constitutional Court decides that the Bill is constitutional, the Premier

must assent to and sign it."

[2] The picture that emerges from the affidavit filed in support of the referral is the following: when the Bill was submitted to the Premier for his assent and signature, he had reservations concerning the constitutionality of the powers conferred on the Speaker by clauses 18 and 19. Acting under section 121(1) of the Constitution, the Premier referred the Bill back to the legislature for reconsideration, specifying his reservations in respect of these two clauses only. He also recommended that certain other typographical and grammatical errors be corrected. The legislature made most of the amendments and corrections suggested but failed to address the Premier's reservations concerning the functions and powers given to the Speaker under clauses 18 and 19.

[3] The Premier has now asked this Court to consider two issues. The first is whether the Mpumalanga provincial legislature (the legislature) had the competence in terms of the Constitution to pass the Petitions Bill. The second is whether it is permissible in terms of the Constitution, and whatever conventions may be applicable, for the Bill to require the Speaker to make regulations under the Bill (clause 18) and to fix the date on which the Bill is to come into operation (clause 19).

[4] Submissions defending the constitutionality of the Bill were received from the Speaker of the legislature as well as from his counterpart in Gauteng. The latter had applied to join and was admitted as a party in the proceedings.

Issue not referred to the legislature for reconsideration

[5] During argument before us there was uncertainty as to whether the question of the legislature's competence to pass the Bill had also been referred by the Premier to the legislature for its reconsideration. The document specifying the Premier's reservations had not been filed with this Court. Full argument was however presented to us on the merits of the issue. At the request of the Court, counsel undertook to ascertain whether or not the issue had been referred by the Premier to the legislature. We were subsequently advised that it had not. The issue was therefore raised for the first time only in papers before the Court. The legislature has accordingly not had an opportunity to consider this aspect of the Premier's reservations.

[6] Counsel for the parties urged the Court during argument to deal with the merits of this issue, despite the Premier's omission to refer it to the legislature. What must be determined first, however, is whether the Court has the jurisdiction to decide upon an objection which the Premier has not referred to the legislature, but raises it for the first time in this Court. The answer to this must depend on the nature of the Court's function under section 121.

The Court's function in proceedings under section 121

[7] The nature of the Court's jurisdiction in proceedings under section 79 of the Constitution[1]

---

[1] Section 79 of the Constitution provides:

> "(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
>
> (2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

was considered in *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill*[2] (the *Liquor Bill* case). That section is concerned with the referral of Parliamentary Bills by the President in circumstances that correspond to those set out in section 121. The provisions are identical in all but two respects: section 79 refers to the President and Parliament while section 121 is concerned with the Premier and the provincial legislature; secondly, the requirement in section 79(3) that the President's reservations be submitted to the National Council of Provinces in certain circumstances is obviously not repeated in section 121. It is a fundamental principle that a Court adheres to its previous decisions.[3] Since there is no difference in substance between the considerations applicable to the procedures set out in sections 79 and 121 of the Constitution, this Court is bound by its previous decision in the *Liquor Bill* case unless the decision is shown to have been clearly wrong. None of the parties argued that the decision should be reconsidered. In that case, the Court identified "three related questions" which required clarification in the light of the President's invocation of the section 79

---

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if—
(a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
(b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—
(a) assent to and sign the Bill; or
(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it."

2 2000 (1) BCLR 1 (CC); 2000 (1) SA 732 (CC).

3 *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (1) BCLR 1(CC); 1997 (2) SA 97 (CC) at para 8.

procedure. Only the first of these is relevant for present purposes and it was expressed as follows:

> "Is the Court required to consider only the reservations the President has expressed or can and should it direct its attention more widely?"[4]

It was decided that the constitutionality of the Bill must be considered in the light of the reservations expressed by the President, and further that the referral provision then under consideration -

> ". . . must thus be read as . . . empowering the Court to make a decision regarding the Bill's constitutionality only in relation to the President's reservations."[5]

[8] The Court characterised the procedure as follows:

---

4 *Liquor Bill* above n 2 at para 11.

5 Id at para 14.

> "The provision envisages a series of steps, initiated by the President, in which Parliament is itself an active participant. The President can refer a Bill to this Court *only after Parliament has unavailingly reconsidered it in the light of his reservations. The attitude of the National Assembly (or, where appropriate, Parliament) to the Bill's constitutionality is therefore also a material factor in this Court's determination* and it is for this reason that this Court's Rules permit all political parties represented in Parliament as of right to make written submissions relevant to the determination of the Bill's constitutionality. It follows that in deciding on the Bill's constitutionality the Court must consider the reservations of the President as well as any submissions relevant to them by any party represented in Parliament."[6] (My emphasis.)

The remarks above are equally applicable to a referral by the Premier under section 121.

[9] The question of what should happen when the Premier raises a reservation in this Court without prior referral to the legislature was not pertinently raised in the *Liquor Bill* case. There are, however, strong constitutional and functional reasons why such a referral is not contemplated by section 121 of the Constitution. What is envisaged is consideration by this Court of a Bill that has gone through a number of steps, which include communication by the Premier of his or her reservations to the legislature and its reconsideration of the Bill in the light of those reservations. The Court's function to adjudicate upon the Bill commences only after this political process has been exhausted and it is limited to a consideration of the Premier's reservations together with the responses of the parties represented in the legislature. The role of the legislature would be undermined if the Premier's reservations could be entertained by this

---

6 Id at para 19.

Court without having been referred to the legislature for its consideration.

[10] We are accordingly empowered to consider only those reservations which have been referred by the Premier to the legislature. This approach is consistent also with the provisions of Chapter 3 of the Constitution which require institutions to behave with comity towards one another and not to resort to litigation prematurely in order to resolve constitutional disputes. It is moreover of some importance that section 121(2) permits the Premier to refer a matter to this Court only if the reservations referred to the provincial legislature have not been fully accommodated and obliges the Premier to sign the Bill if they have. Section 79(2) provides similarly with regard to the President and a Parliamentary Bill.

[11] I accordingly conclude that this Court does not have jurisdiction to consider the constitutionality of any provision in a Bill raised by a Premier, unless the Premier's reservation concerning such provision has been referred to the legislature as envisaged by subsections (1)and (2) of section 121 of the Constitution. Limiting the Court's jurisdiction in this manner can cause prejudice to no-one. All other constitutional remedies remain intact. Sections 80 and 122 of the Constitution permit members of the legislature, after an Act of Parliament or of a provincial legislature as the case may be has been signed, to apply to the Constitutional Court for an order declaring that all or part of the legislative instrument in question is unconstitutional. Speedy and effective interim relief is also provided in such a case. Sections 80(3) and 122(3) of the Constitution provide in identical terms as follows:

> "The Constitutional Court may order that all or any part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the

application if—

(a) the interests of justice require this; and

(b) the application has a reasonable prospect of success."[7]

[12] The protection does not end there. Any individual whose rights under the Bill of Rights are infringed or threatened may approach a high court for an order declaring offending provision(s) of an Act of Parliament or of a provincial legislature to be constitutionally invalid under section 172(2)(a).[8] Although such order would have no force until confirmed by the

---

7 Section 80(3) deals with the referral of an Act of Parliament and section 122(3) is concerned with a provincial Act.

8 Section 172(2)(a) of the Constitution states:
"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

Constitutional Court, such person would be entitled, in a proper case, to appropriate temporary relief, as provided for under section 172(2)(b).[9]

[13] In reaching the conclusion that the Court is precluded from dealing with the question of the legislature's competence to pass the Petitions Bill, I have not overlooked the fact that in the *Liquor Bill* case, the Court explicitly left open the question -

---

the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

9 Section 172(2)(b) of the Constitution states:
"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."

> "[w]hether it may ever be appropriate for the Court upon a presidential referral to consider other provisions which are manifestly unconstitutional, but which are not included in the President's reservations. . . ."[10]

Although the issue here is slightly different, the principle involved is the same. Here it is not the absence of a reservation by the Premier. The reservation is before the Court, but defectively so, because there has been no compliance with the constitutional requirement that it should first be referred to the legislature for reconsideration. The reasoning in the preceding paragraphs is, however, equally applicable to the question left open in the *Liquor Bill* case. No room exists, in referral proceedings under sections 79 and 121 of the Constitution, for a consideration by the Court of issues that have not been raised in compliance with the Constitution by the President or the Premier. The question left open in the *Liquor Bill* case must therefore be considered closed.

[14] Before proceeding to consider the next issue, one last word is necessary on the subject of the Court's jurisdiction in referral proceedings. The Court should have certainty as to the precise scope of the reservations referred to Parliament or the relevant legislature by the President or the Premier, as the case may be. Accordingly, the document in terms of which the President or Premier conveys his or her reservations to Parliament or the provincial legislature ought to form part of the referral to this Court under the provisions of sections 79 or 121. Had the document

---

10 *Liquor Bill* above n 2 at para 15.

been filed, a good deal of uncertainty and expenditure of Court time would have been avoided.

The Speaker's functions under clauses 18 and 19

[15] The second question concerns clause 18 of the Bill which provides that "the Speaker must make regulations required for carrying out the provisions of the Act" and clause 19, which confers on the Speaker the power to fix a date for the coming into operation of the Bill. I deal with the two provisions in turn.

(a) Clause 18

[16] Two issues arise from this provision. First, a similar power is conferred upon the Premier under clause 17(9) of the Bill.[11] It was submitted in written argument on behalf of the Premier that the power to make regulations cannot be vested in both the Speaker and the Premier. This point was conceded by counsel for the Speaker who stated that the word "Premier" in clause 17(9) was erroneous and should be read as "Speaker". We were not told, however, how or where the mistake was made, in passing the Bill or merely in transcribing it. In the latter event the transcription can simply be corrected. Even assuming that the Bill as adopted by the legislature contained the error, that would not mean that the conflict between the two provisions gives rise to unconstitutionality. If indeed the two provisions are in conflict, which need not be decided here, the effect of the conflict would be a question for judicial interpretation. The legislature is of course free to correct any error it may have committed.

---

[11] Clause 17(9) provides:

> "The Premier may supplement this procedure by way of regulations."

[17] Second, it was contended by the Premier that in terms of the Constitution and by virtue of the doctrine of separation of powers, the power to make regulations is a power that may only be vested in the Premier or a member of the executive since, in terms of section 125 of the Constitution, the executive power of the province vests in the Premier. The Premier also drew attention to section 116 which permits a provincial legislature to -

> "(a) determine and control its internal arrangements, proceedings and procedures; and
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

According to him, the regulations which the Speaker was required to frame under the Bill amounted to the determination and control of the legislature's internal arrangements, proceedings and procedures. He contended further that what the provision required of the Speaker was no more than the making of "rules and orders" concerning the legislature's business. This, he argued, was a matter which the legislature could not delegate but which must be regulated as contemplated by section 116.

[18] There is no merit in either of these arguments. The Constitution does not provide that only members of the executive should make regulations. Neither section 104 which deals with provincial legislative authority nor section 125 which provides for the provincial executive authority regulates the framing of regulations, nor does it require that legislative power be delegated to the executive only.

[19] The Premier's complaint is also directed at the delegation of the legislature's legislative or rule-making authority to the Speaker. Regulations are a category of subordinate legislation framed and implemented by a functionary or body other than the legislature for the purpose of implementing valid legislation. Such functionaries are usually members of the executive branch of government, but not invariably so. A legislature has the power to delegate the power to make regulations to functionaries when such regulations are necessary to supplement the primary legislation. Ordinarily the functionary will be the President or the Premier or the member of the executive responsible for the implementation of the law. In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*, Chaskalson P stated that:

> "In a modern state detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies."[12]

The factors relevant to a consideration of whether the delegation of a law-making power is appropriate are many. They include the nature and ambit of the delegation, the identity

[12] 1995 (10) BCLR 1289 (CC); 1995 (4) SA 877 (CC) at para 51.

of the person or institution to whom the power is delegated, and the subject matter of the delegated power.[13]

[20] The legislation in this case concerns petitions to the legislature. It has been enacted to give substance to the legislature's responsibility for oversight of the executive and to facilitate public involvement in the legislative and other processes of the legislature. The Bill, if and when it becomes a provincial Act, is to be implemented by the provincial legislature, including the Speaker, and not by the provincial executive. It would be inappropriate for the executive to regulate the former function, and wholly appropriate for the legislature to regulate both functions itself through its Speaker who by virtue of his or her office should have the necessary expertise and is fully accountable to the legislature. The objection to this power being delegated to the Speaker is thus not valid.

(b) Clause 19

[21] The clause provides that the "Petitions Act . . . comes into operation on a date to be determined by the Speaker by proclamation in the Provincial Gazette". The Premier contends that the clause is a breach of the separation of powers doctrine as the power to fix the date of the

[13] These factors were some of those identified by Mahomed DP in the *Western Cape* case, id at para 136. The difference of opinion expressed in the judgments in that case concerning the extent to which Parliament may delegate plenary legislative powers has no relevance to the case currently under consideration.

coming into operation of an Act is one conventionally performed by a member of the executive only, usually the President or a provincial Premier.

[22] This power turns, in my view, on the proper interpretation of section 123 of the Constitution which provides that a provincial Act ". . . takes effect when published or on a date determined in terms of the Act". The power was correctly characterised by the Full Bench of the Transvaal High Court in *Pharmaceutical Manufacturers Association of SA and Another In re: Ex parte President of the Republic of South Africa and Others,* where the following was said:

> "Legislative power, which includes the power to determine when the particular measure should come into operation, is conferred by the Constitution upon Parliament and not upon the President, whether as the head of State or as head of the Executive. In terms of s 81 of the Constitution, a Bill assented to and signed by the President thereby becomes an Act of Parliament, which must be 'published promptly' and it takes effect 'when published or on a date determined in terms of the Act'. It thus lies within the constitutional power of Parliament, and not the Constitutional power of the President (whether as head of State or as head of the Executive), to determine when enactments should take effect. If Parliament says nothing at all on the subject in any particular case, then, by default, the enactment will take effect upon publication. On the other hand it may determine, whether by specifying a particular date or providing a mechanism for that date to be fixed, some other date upon which the enactment shall take effect."[14]

These remarks apply with equal force to the relationship between the Premier of a province and the provincial legislature.

---

[14] 1999 (4) SA 788 (T) at 796G - I.

[23] The power conferred on the legislature by the Constitution is a special one which enables the legislature to appoint a functionary to determine when the law comes into force. It lies between law-making and administration.[15] Its purpose is to delay the operation of the legislation to enable the necessary steps to be taken in order to make the legislation effective before the law comes into force. The functionary best placed to make such determination is ordinarily the head of the executive responsible for the implementation of the legislation. There is however no provision of the Constitution that requires that it be the President or the Premier. The choice of the person is left to the legislature. It would obviously be inappropriate for a legislature to designate a person whose functions are not related to matters which have to be resolved before the law is brought into force. It is unlikely that this will ever happen and it is not necessary to decide what the position would be if it did. I would likewise have grave reservations were a legislature to confer this power upon a person not accountable to it in some constitutionally recognised way, or who was not in a position to determine when the Act could effectively be brought into force. That too need not be considered in this case.

[24] In this case the legislature conferred a power upon the Speaker to determine when the Bill should come into force as a provincial Act. That functionary is intimately involved in important steps which must be taken before the legislation is brought into force, being responsible for the promulgation of regulations that are evidently a pre-requisite to the effective implementation of the legislation. The Speaker is accountable to the legislature and is well placed to determine

---

15 See *Pharmaceutical Manufacturers Association of South Africa and Another In re: Ex parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC) at para 79.

when the Act can effectively be brought into force. The Petitions Bill creates duties and obligations which are internal to the functioning of the legislature. Since the steps that have to be taken must be taken by the legislature, the Speaker is clearly an appropriate functionary to determine whether or not this has been done. The objection to this provision can therefore not succeed.

[25] One further matter should be mentioned. The Premier has referred to the doctrine of the separation of powers and to conventions in relation to the powers conferred on the Speaker. The allocation of powers to the Speaker to determine the date of commencement of the Bill, does not implicate the doctrine of separation of powers. As stated earlier, the operation of the doctrine is not absolute and this Court held that in time our courts would work out a peculiarly South African model of the doctrine.[16] With regard to the conventions, it is unnecessary to consider their place, if any, under the Constitution. Whatever separate existence they might have cannot prevail against express or implied provisions of the Constitution.

Order

[26] It is declared that-

Clauses 18 and 19 of the Mpumalanga Petitions Bill, 2000, which require the Speaker of the provincial legislature to make regulations under the Bill and to fix the date on which the Bill is to come into operation are not unconstitutional on the grounds advanced by the Premier.

---

16 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) at para 60.

LANGA DP

Chaskalson P, Ackermann J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Langa DP.

For the Premier of Mpumalanga:	PC van der Byl SC and MM Oosthuizen instructed by the State Attorney, Pretoria.
For the Speaker of the Mpumalanga Legislature:	MSM Brassey SC and NH Maenetje instructed by Cheadle Thompson & Haysom Inc., Johannesburg.
For the Speaker of the Gauteng and the Gauteng Legislature:	RM Wise SC and M Khoza instructed by Nicholls, Cambanis and Associates, Johannesburg.