IN THE SUPREME COURT
OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 562/98

In the matter between:

THE GAUTENG PROVINCIAL LEGISLATURE
APPELLANT
AND
J D KILIAN AND 29 OTHERS
RESPONDENTS

CORAM : NIENABER, HOWIE, SCHUTZ and ZULMAN JJA
et MTHIYANE AJA

DATE OF HEARING : 9 NOVEMBER 2000
DATE OF JUDGMENT : 29 NOVEMBER 2000

Powers of the Speaker of the Gauteng Legislature to give an undertaking in regard to costs concerning the resolution of a dispute as to the constitutionality of a Bill by the Constitutional Court in terms of ss 98(2)(d) of the Constitution of the Republic of South Africa Act 200 of 1993

JUDGMENT

ZULMAN JA

[1] The thirty respondents were at the relevant time members of the appellant (the Gauteng Provincial Legislature ("the legislature"). They constituted at

least one-third of the total membership of that body. Pursuant to the provisions of ss 98(9) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution") they petitioned the Speaker of the legislature requiring him to request the Constitutional Court to exercise its jurisdiction in terms of ss 98(2)(d) of the interim Constitution.

[2] The subsections provide as follows:-

> "98(2) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including-
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> .....
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> .....
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> (d) any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to subsection (9);
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> .....
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> .....
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> (9) The Constitutional Court shall exercise jurisdiction in any dispute referred to in subsection (2)(d) only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who shall make such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or such provincial legislature, as the case may be, requiring him or her to do so."

[3] The request was directed towards resolving a dispute which had arisen as to the constitutionality of certain provisions of the Gauteng School Education Bill, then awaiting adoption or rejection by the legislature. The Speaker communicated the request to the Constitutional Court. The Constitutional Court declared that the provisions of the Bill were not inconsistent with the interim Constitution. It declined to make any order as to the costs of the

parties.

[4] Prior to embarking upon the litigation in the Constitutional Court the respondents sought an undertaking from the Speaker that their costs would be paid by the legislature. The respondents contend that such an undertaking was given. The appellant denies this and alleges that what was given was a mere ruling. After the proceedings before the Constitutional Court were concluded the respondents sought to recover their taxed costs from the legislature. When payment of such costs was not made proceedings were instituted in the Transvaal Provisional Division of the High Court for their recovery. An exception to the particulars of the respondents' claim having been dismissed, the trial then proceeded, in which certain of the respondents gave evidence. The court *a quo* (Van Dijkhorst J) granted judgment in favour of the respondents for the amount of their taxed costs together with interest and costs. The legislature, with the leave of the court *a quo*, appeals against that order.

[5] In order to determine whether an enforceable undertaking was given or an inconsequential ruling, it is necessary to refer to the following undisputed facts.

[6] On 7 September 1995 the petition by one-third of the members of the legislature previously referred to was lodged with the Speaker in terms of s 98(9) of the interim Constitution.

[7] On 3 October 1995 the Speaker sent a memorandum concerning the petition to the secretary and legal advisor of the legislature in which he stated:

> "SUBJECT: PETITION TO THE CONSTITUTIONAL COURT EDUCATION BILL
>
> Please be informed that this petition should be handled as follows:
>
> 1. Should the Constitutional Court request the Speaker to hear oral or legal argument from both parties on this petition the Legislature will bear the legal costs of counsel appointed by each side to represent its case. Please note that as there are two sides i.e. the petitioners and those opposing the petitions, only one counsel representing each side will be paid for by the Legislature. Should individual members or parties decide on their own specific legal representative outside the group they then have to foot the bill for the same.
>
> 2. Should the Legislature appoint counsel for both sides, each side will nominate their counsel.
>
> 3. The Legislature shall not pay for members who use the *amicus curiae* procedure and such members will have to meet their own costs."

[8] In a letter dated 13 October 1995 addressed by the registrar of the Constitutional Court to the Speaker, the views of the President of the Constitutional Court are set out as follows:-

> "Education policy is a matter of considerable public interest. Where it is alleged that provisions of a Bill dealing with educational policy are unconstitutional, the Court would want to allow every opportunity to the objectors and interested parties to place their views before the Court."

[9] Arising from this letter various discussions were held with the Deputy Speaker and the Speaker concerning, inter alia, the payment of costs of attorney

and counsel to represent the petitioners before the Constitutional Court.

[10] The Speaker ruled that the legislature would make payment of the petitioners' costs, such costs to cover the cost of an attorney, counsel and senior counsel. This ruling was confirmed by the Deputy Speaker at a meeting held on 11 October 1995.

[11] On 16 October 1995 Mr Richard Mdakane representing the ANC members of the legislature wrote the following note to the Speaker:

> "On behalf of ANC MPL's I wish to lodge an objection to your apparent decision allowing the Gauteng Legislature to finance counsel for parties supporting the petition to the Constitutional Court on the School Education Bill. It is our view that they constitute a minority within the Legislature and it is therefore inappropriate that Legislature monies should be used to finance activities which are contrary to the democratic wishes of the vast majority of MPL's and the constituencies they represent."

[12] In a memorandum dated 17 October 1995, sent by the Speaker to senior whips and leaders of all parties in the legislature, notice was given that a meeting would be held to discuss the payment for legal representation for the petitioners and non-petitioners in the dispute concerning the provisions of the Gauteng School Education Bill. The memorandum records that:-

> "A concern has been raised by the Government and members of the ANC that payment of such counsel would be a misuse of Legislative funds."

[13] The envisaged meeting was held on 19 October 1995. The minutes record

that it was the Speaker's initial opinion that his office represented the legislature, and therefore both petitioners and non-petitioners, and that "it would therefore be appropriate for the office to pay one legal team for each of the parties to the dispute."

[14] The legal department of the legislature sought the opinion of the state attorney. His opinion as expressed in a letter of 24 October 1995 was that he could "see no basis in principle for the Legislature not to pay the legal costs when a portion of its members (whether a majority or minority) exercise their Constitutional rights". The letter concludes by advising an investigation of the possibility that the question of costs in the matter be put to the Constitutional Court to be dealt with in terms of s 98(8) of the interim Constitution.

[15] Under cover of a letter dated 25 October 1995 the respondents' attorneys sent a copy of a memorandum dated 24 October 1995 prepared by counsel submitting that the ruling of the Speaker that the legislature should bear the legal cost of the petitioners in regard to the determination of the dispute by the Constitutional Court, was correct. In the memorandum which was circulated to all members of the legislature attention is drawn to the views of the President of the Constitutional Court to which I have referred. In addition the following is

stated:

> "7. Should members of a Provincial legislature exercising their Constitutional right under section 98(9) to petition the Speaker to refer disputes concerning the Constitutionality of a Bill to the Constitutional Court be required to bear their own costs in regard to the determination of the disputes, this would effectively deter members of a Provincial legislature from raising issues of Constitutionality and thereby effectively serving the electorate and constituencies which they represent. It should be borne in mind that the Gauteng Government has at its disposal the wealth, machinery and expertise available to the State in order to ensure that its submissions are fully and properly placed before the Constitutional Court. 7
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> In this regard the Petitioners have been given to understand that the Speaker and the Gauteng Government have already consulted two senior counsel who specialise in Constitutional Law as well as other Constitutional experts.
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> 8. The objection raised on 16 October 1995 by RICHARD MDAKANE on behalf of the ANC members of the Provincial legislature to the decision of the Speaker that the Petitioners' costs be borne by the Gauteng Provincial Legislature, is without merit. It is the Constitution which is supreme, and not the ANC as the majority party. The fact that the ANC holds a majority in the Provincial legislature and the Petitioners constitute a minority, is irrelevant; the essential question is whether the provisions of the Bill objected to are unconstitutional or not, and the view which the ANC majority may hold cannot be decisive of that question."

[16] Thereafter the Speaker addressed a letter dated 27 October 1995 to the attorneys for the respondents. He also sent copies to other political parties represented in the legislature as well as to all members of the legislature. The letter is fundamental to the respondents' case and is the basis of the undertaking upon which they rely. The letter, which is on the letterhead of the office of the Speaker, reads as follows:

> "RE: PETITION ON EDUCATION BILL - LEGAL COSTS
>
> Dear Sirs
>
> The Gauteng Legislature is prepared to pay attorneys' reasonable fees (including Counsel's charges) either as agreed or as taxed.
>
> It is clear that there is no agreement between the various political parties making up the body of Petitioners as to the employment of one firm of attorneys and one set of Counsel to represent all the Petitioners as a body. In fact, the memorandum written by myself and dated 3 October 1995 was clearly predicated on the assumption that the Petitioners would be acting as one body and would utilise the services of one legal team.
>
> It is also clear that those of the Petitioners who are members of the Freedom Front, have appointed one

set of attorneys whereas those of the Petitioners who are members of the Democratic Party and National Party have appointed another set of attorneys and Counsel.

It appears to us, prima facie, that the appointment of attorneys and Counsel has not yet been approached on the basis of unanimity between the Petitioners but, to some extent, along party political lines.

We see no basis for agreeing to pay the costs incurred by members of the Legislature as members of a political party, rather than as members of the Legislature. It is not reasonable or even warranted at this stage at least that the Legislature should incur any costs other than those incurred on behalf of a body of members of the Legislature, acting as such, unless the Constitutional Court orders us to do otherwise.

In summary therefore our undertaking is to pay the costs, agreed or taxed as aforesaid, of one set of attorneys and Counsel.

We suggest you make available to your attorneys a copy of this letter, and that they then confirm with us if they so then desire, the contents hereof.

Upon conclusion of the matter, their accounts may be submitted to Gauteng Legislature for payment in accordance with the aforegoing.

Notwithstanding the hereinbefore mentioned decision by myself, there remains a dispute within the Legislature regarding the responsibility for legal costs.

In this connection I deem it appropriate that the Constitutional Court should be invited to make a determination on this matter. Accordingly members of the Legislature who wish to place arguments to the Court on this matter are invited to do so.

It follows therefore that the validity of my decision will be subject to the determination of the Court.

Yours faithfully
(Sgd) T. G. Fowler." (Emphasis supplied)

The letter was drafted by a private firm of attorneys and senior counsel engaged by the Speaker although the last three paragraphs were added by the Speaker himself. Senior counsel's advice to the Speaker (not counsel who appeard either in the Constitutional Court or this court) was that "subject to certain qualifications, that it would only be fair that their costs should be borne by the Legislature. In requiring that the Bill be referred to the Constitutional Court, the petitioners acted, not in their personal capacities, but ***qua*** members of the Legislature. They acted in a representative capacity and there would be no good reason why they should

have to bear the costs themselves."

[17] On 30 October 1995 the respondents' attorneys replied to the Speaker's letter of 27 October 1995. They indicated that:

> "In the light of the comments made in the penultimate and last paragraphs of your letter and particularly because of the fact that you are not prepared to unreservedly accept responsibility for the legal fees of the petitioners you leave us no alternative but to approach the court for a declaratory order in this regard." They went on to contend that the Speaker's failure to accept responsibility for payment of the petitioners' legal fees frustrates the petitioners in the proper preparation of their case.

[18] On the next day the Speaker, by way of a memorandum, informed the whips of the various parties of the receipt of the aforementioned letter. He attached a copy of the letter and advised that he did not intend opposing the threatened application to court but would leave it to members who were not parties to the petition to decide whether to oppose the application.

[19] On 31 October 1995 the petitioners had second thoughts. Their attorneys wrote to the Speaker advising him that they had reconsidered the matter and on

their understanding that the legislature undertook to pay the reasonable fees of one firm of attorneys and one set of counsel representing the petitioners as a body, they would not approach the court for a declaratory order, but that appropriate argument would be addressed to the Constitutional Court on the question of costs, in so far as the Constitutional Court might be prepared to hear such argument and make a determination as envisaged by the Speaker. There was no reply to this letter.

[20] The matter was thereafter heard in the Constitutional Court. The same counsel who appeared before us was briefed by the Speaker to argue the matter of costs. The Constitutional Court was not prepared to hear him as the Speaker was not a party to the proceedings.

[21] Judgment was delivered by the Court on 4 April 1996. The Court refused to award costs against the unsuccessful petitioners who are the respondents before this Court. The issue of the undertaking given by the Speaker in the letter of 27 October 1995 was not raised in the Constitutional Court and the judgment of that Court does not seek to deal with the issue which is now before this Court.

[22] The respondents' attorneys then drafted a bill of costs and presented it to the Speaker. The state attorney acting on behalf of the Speaker informed the respondents' attorney that he had been instructed to oppose the taxation of the bill of costs and that as there had been no award of costs by the Constitutional Court, the Speaker would not accept liability for payment of the costs or agree to the taxation thereof on an attorney and own client basis.

[23] The respondents' attorneys then advised the state attorney that they would proceed with taxation of the bill of costs, would ask the taxing master to tax the bill on an attorney and own client scale and would thereafter issue summons to recover the costs if they were not paid. The bill was thereafter taxed on the attorney and own client scale without any further notification to the state attorney.

[24] Section 98(9) of the interim Constitution afforded a pre-emptive power to the Speaker of a provincial legislature to request the Constitutional Court, upon receipt of a petition by at least one-third of all the members of that legislature, to exercise jurisdiction in regard to any dispute referred to in ss 98 (2)(d) of the

interim Constitution. Section 98(2)(d), in turn, conferred jurisdiction on the Constitutional Court to deal with a dispute concerning the Constitutionality of any bill before a provincial legislature. Interpretation of s 98(9) is, of course, a matter outside this Court's jurisdiction (see s 101(5)) but its scope and purpose appear clearly enough from two cases decided in the Constitutional Court. In *Ex parte Gauteng Provincial Legislature : In re Dispute Concerning The Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995,* 1996 (3) SA 165 (CC) concerning the referral to which the present issue relates, Mahomed DP said at para 36 at 182F - 183C:

> "It was submitted by Mr *Trengove* that the costs of the proceedings before us should be paid by the petitioners if they are unsuccessful in their attack on the impugned provisions. We were referred, in this regard, to the well-known rule in the Supreme Court that ordinarily, and subject to the discretion of the Supreme Court, costs should follow the result and the losing party should be directed to pay the costs of the successful party.[7] There are obviously attractive grounds of policy which support such an approach in ordinary litigation between litigants in the Supreme Court and in the magistrates' Courts. It does not follow, however, that it should also be the general rule in the Constitutional Court and more particularly the rule in cases brought to the Constitutional Court in terms of s98(9) of the Constitution at the request of the Speaker. A litigant seeking to test the Constitutionality of a statute usually seeks to ventilate an important issue of Constitutional principle. Such persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the Court takes a view which is different from the view taken by the petitioner. This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs be paid by the losing party.
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> 7. *Fripp v Gibbon & Co* 1913 AD 354 at 357-8; *Merber v Merber* 1948 (1) SA 446(A) at 452."

The other case is *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill* 83 *of 1995*, 1996 (3)SA 289 (CC) at 308 D-H, in which

Chaskalson P, said:

> [43] "We were asked by counsel for the Minister to lay down guidelines for the referral of issues to this Court under s 98(2)(d) and (9) of the Constitution. It was submitted that it would have been more appropriate for this matter to have been referred to the Court after the debate on its provisions had been completed.....
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> [44] It would no doubt have been better in the circumstances of this case if the objectors had raised the Constitutional issue during the debate and deferred lodging the petition with the Speaker until after the government's attitude to the disputed clauses had been clarified. If this procedure had been followed the disputed issues might have been resolved within Parliament. Parliament controls its own proceedings and there may be good reasons for the procedure whereby the petition was lodged at the commencement of the debate. The procedure to be followed in such matters is within the domain of Parliament and in my view it would not be appropriate for this Court to make any suggestions to Parliament in that regard."

The pre-emptive power conferred by s 98(9) was thus obviously designed to facilitate good governance in the public interest and was not simply a general power allocated to the Speaker. The determination of a *bona fide* dispute concerning the constitutionality of a Bill, in advance of the Bill becoming law, was clearly a determination in the interests of the provincial legislature and its effective and efficient functioning. Moreover, the petitioners acted at all relevant times not in their personal capacities, but in their capacities as members of the legislature and, absent a special order such as referred to by Mahomed DP, were not personally liable for costs.

[25] Did the Speaker have the requisite power to give the undertaking in question and did he do so? Any reliance upon a contractual undertaking brought about by the making of an offer by the Speaker and the acceptance

thereof by the respondents was wisely abandoned by counsel for the respondents. The act of the Speaker was not one properly to be categorised as a contractual undertaking. On a proper construction of the undertaking evidenced in the letter of 27 October 1995, viewed in the light of the circumstances in which it came to be given, it amounted to a clear undertaking by the Speaker, enforceable without the need for acceptance, to pay the petitioners' costs. As correctly pointed out by Van Dijkhorst J, "it states so in so many words". Indeed, the appellant in its plea categorised the action of the Speaker as an "undertaking". The last three paragraphs of the letter of undertaking detracted in no way from the undertaking. They did not make it provisional. Plainly, if the Speaker acted *ultra vires* in giving the undertaking, it could not be enforced. However, he clearly intended that in the absence of a determination by the Constitutional Court that the undertaking was *ultra vires*, it would stand.

[26] As to his authority, in my view the Speaker was empowered to give the undertaking. Firstly, in giving the undertaking he acted in his official capacity. As to that capacity, Sir William Holdsworth, in his monumental work on the history of English law, draws attention to the fact that the

Speaker of the House of Commons is the representative and spokesman "of the House in its collective capacity" (*A History of English Law* - Volume IV 176 n6). Referring to Redlich's *Procedure of the House of Commons*, Holdsworth comments that the position of the Speaker in relation to the law "is strikingly similar to the relation of a judge to the common law and to the rules of his court"; the orders of the Speaker are a regular part "of the apparatus of the House"; these orders "cover almost the whole field of the regulation of its business" (vol II 433, vol VI 89). Kilpin, *Parliamentary Procedure in South Africa* (3rd Ed (1955) 153), refers to Sir Erkine May's nine editions of his treatise, *The Law, Privileges, Proceedings and Usage of Parliament* where the point is made that the duties of the Speaker of the House of Commons "are as various as they are important". Kilpin concludes his discussion of the Speaker's duties by referring to a letter of 6 December 1905 by a Mr Speaker Lowther in which it is stated that: "The Speaker is the interpreter and custodian of the rights and privileges of the members of the House." Kilpin then states that:-

> "The plain fact is that Mr Speaker's duties are too numerous to set out in detail. In the Union of South Africa they are specifically referred to in the South Africa Act, the Powers and Privileges of Parliament Act, the Electoral Act and the Standing Rules and Orders of the House of Assembly, but they depend so much on tradition that no better summary can be given than that which May originally wrote."
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> (p 153)

[27] The Speaker's common law powers therefore includes the power to regulate the business of the legislature and its business was the legislative

process.

[28] Secondly, as far as the interim Constitution conferred powers on the Speaker, regard must be had to s 131(2) read with s 41(3) to (10). Section 41(3) declared that the Speaker of the National Assembly was vested with all the powers and functions assigned to him or her by the Constitution, an Act of Parliament and the rules and orders. A provincial Speaker acted *mutatis mutandis* under the same authority. In so far as national legislation is concerned, s 31(1) of the Powers and Privileges of Parliament Act 91 of 1963 provides that the control of the expenditure and the appropriation of moneys for the service of Parliament "shall be vested in the Speaker" and that his "authorization for such expenditure and appropriation of moneys" be taken subject to the provisions of the section, "to be in all respects good, valid and effectual."

[29] It follows that the Speaker in this case, like the Speaker of Parliament, had the authority to direct the expenditure of moneys for the legislature's services in relation to the legislative process. The court *a quo* correctly held, therefore, that the determination of the dispute concerning the constitutionality of a bill in its formative process is a determination in the interests of the provincial

legislature and its effective and efficient functioning. As such it is part and parcel of the legislative process. It follows that the costs incurred in order to bring about a resolution by the Constitutional Court of the disputes which have arisen within the legislature are costs which should properly be borne as part of the costs of administration of such provincial legislature. The Speaker was thus empowered to give an undertaking on behalf of the legislature to pay the costs of the minority incurred in the referral of a pending bill to the Constitutional Court under the interim Constitution.

[30] I believe that the Speaker in this case was guilty of an obvious about-face. Having given the undertaking, he bowed to political pressures to renege upon it. Notwithstanding the fact that the Speaker may be removed by the legislature or that his decisions may be overridden by it, he should not submit to such pressure. He is required by the duties of his office to exercise, and display, the impartiality of a judge. Having obtained persuasive and authoritative legal advice he chose to ignore it. Not only that. He attempted to justify himself in evidence with the unconvincing, and unbecoming, protestation that he had never given an undertaking but had merely issued a ruling.

[31] Counsel for the appellant contended that because no notice of taxation had been given that there was no basis for recovering the taxed amount of the costs from the appellant. This contention is also without merit. It was not disputed that the fees and disbursements in the bill which was taxed were reasonable after taxation and were regarded as such by the taxing master. The taxation was between attorney and own client. The clients were the plaintiffs. There is no obligation in law upon a taxing master to require notification of non-parties to a taxation. The state attorney had in any event been informed of the fact that a bill was to be taxed but indicated that he was not prepared to participate in such taxation.

In the circumstances the appeal is dismissed with costs.

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R H ZULMAN JA

NIENABER JA)
HOWIE JA) CONCUR
SCHUTZ JA)
MTHIYANE AJA)