IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 36/95

In the matter between:

THE PREMIER OF KWAZULU-NATAL	**FIRST APPLICANT**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR FINANCE, AUXILIARY SERVICES AND PUBLIC WORKS (KWAZULU-NATAL)	**SECOND APPLICANT**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR TRADITIONAL AND ENVIRONMENTAL AFFAIRS (KWAZULU-NATAL)	**THIRD APPLICANT**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT AND HOUSING (KWAZULU-NATAL)	**FOURTH APPLICANT**
THE EXECUTIVE COUNCIL OF THE PROVINCE OF KWAZULU-NATAL	**FIFTH APPLICANT**

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIRST RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**SECOND RESPONDENT**
THE MINISTER FOR PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**

HEARD ON: 15 November 1995
DELIVERED ON: 29 November 1995

JUDGMENT

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[1] **MAHOMED DP.** The First Applicant, who is the Premier of KwaZulu-Natal, seeks an order declaring unconstitutional various amendments to the Constitution of the Republic of South Africa, Act No. 200 of 1993 ("the Constitution") which were purportedly effected by the Constitution of the Republic of South Africa Second Amendment Act, No. 44 of

1995 ("the 1995 Constitutional Amendment"). The First Applicant is supported in this attack by the remaining Applicants.

[2] This matter was initiated by way of an application for direct access to the Constitutional Court in terms of rule 17 of the Rules of the Court, read with section 100(2) of the Constitution. The application for direct access was granted.

[3] The provisions of the Constitution which it is claimed were invalidly amended by the 1995 Constitutional Amendment are sections 149(10); 182; 184 and 245. Certain amendments to the Local Government Transition Act 209 of 1993 (" the Transition Act") were also attacked, but these attacks were abandoned in the course of oral argument on behalf of the Applicants. I propose to deal *seriatim* with each of the attacks made on the amendments to the Constitution.

Section 149(10)

[4] Prior to its amendment in terms of the 1995 Constitutional Amendment section 149(10) read as follows:

> "There shall, subject to Section 207(2), be paid out of and as a charge on the Provincial Revenue Fund of a province to the Premier and to a member of an Executive Council of such province such remuneration and allowances as may be prescribed by or determined under a law of the provincial legislature."

[5] After the purported amendment, this section reads as follows:

> "There shall, subject to Section 207(2), be paid out of and as a charge on the Provincial Revenue Fund of a province to the Premier and to a member of an Executive Council of such province such remuneration and allowances as may be determined by the President."

[6] Section 207(2) of the Constitution was not amended and reads as follows:

> " (2) The Commission shall make recommendations to Parliament, the provincial legislatures and local governments regarding the nature, extent and conditions of the remuneration and allowances of the members of all elected legislative bodies of the national government and of provincial and local governments, including members of the Provincial Houses of Traditional Leaders and the Council of Traditional Leaders."

The Commission referred to in this section is the Commission on Remuneration of Representatives to be established by an Act of Parliament pursuant to section 207(1) of the Constitution.

[7] In the heads of argument of the Applicants it was submitted that the purported amendment to section 149(10), sought to be effected by the 1995 Constitutional Amendment, is in conflict with section 135(4) of the Constitution, which provides that:

> " (4) There shall, subject to section 207(2), be paid out of and as a charge on the Provincial Revenue Fund of a province to a member of the legislature of that province such remuneration and allowances as may be prescribed by or determined under a law of the provincial legislature."

[8] Mr Gordon SC, who appeared for the Applicants (together with Mr Dickson SC), wisely abandoned this ground of attack during his oral argument before us. The attack was clearly untenable because even if section 135(4) of the Constitution was to be read as if it was in conflict with section 149(10) (I doubt very much that it was), an amendment to the Constitution in conflict with another part of the Constitution would simply have the effect of a *pro tanto* amendment or repeal, by implication, of the earlier provision as long as the amendment was adopted in compliance with the forms and procedures prescribed by the

Constitution.[1] The same considerations apply to the suggestion in the heads of argument of the Applicants that the amendment to section 149(10) was in conflict with section 155 of the Constitution and section 207(2) of the Constitution.

[9] An attack was also made in the Applicants' heads of argument on the amendment to section 149(10) effected by the 1995 Constitutional Amendment, on the ground that the amendment "offends Constitutional Principle XVIII(2)" contained in the fourth schedule to the Constitution.

[10] This ground of attack was not pressed by Mr Gordon in oral argument, but he did not expressly abandon it.

[11] The relevant Constitutional Principle provides that:

> "The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a Constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution."

[12] The reliance on Constitutional Principle XVIII(2) appears to me to have been misconceived. Constitutional Principle XVIII(2) deals with a future Constitution which must conform to the Constitutional Principles contained in Schedule 4. It does not deal with amendments to the present Constitution at all. This is perfectly clear from the status and purposes of Schedule 4, articulated in section 71 of the Constitution.[2] The makers of

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[1] *Freeman v Union Government* 1926 TPD 638 at 651; *The Executive Council of the Western Cape Legislature and Others v The President of the Republic of South Africa and Others*, 1995(10) BCLR 1289 (CC) at paragraph 58.

[2] *supra* n.1, at paragraphs 40 and 41.

the Constitution expressly applied their minds to what part of the Constitution could be amended and what could not[3] and what procedures had to be followed [4] when the Constitution was amended. It refrained from protecting section 149(10) from amendment or from prescribing any special procedures before that section could be amended.

It therefore follows that the impugned amendment to section 149(10) cannot successfully be attacked simply on the ground that it "offends Constitutional Principle XVIII(2)". It is, for the purposes of this case, unnecessary to decide whether a constitutional amendment which has substantially the effect of destroying or abrogating the very essentials upon which the Constitutional Principles are premised, would be constitutionally permissible merely because the procedures prescribed by section 62 were followed. The impugned amendment to section 149(10) does not fall within such a category. Indeed, the amendment to section 149(10) cannot even be said to reduce the powers and functions of the provinces in respects which make them "substantially less" or "substantially inferior", nor can it be said that the impugned amendment is by necessary implication excluded by any other Constitutional Principle.

[13] The main thrust of the attack on the purported amendment to section 149(10) which counsel on behalf of the Applicants advanced at the hearing of this matter was that it was not competent without following the special procedures prescribed by section 62(2) of the Constitution. It was argued that the effect of the amendment was to amend the legislative

[3] Section 71.

[4] Section 62.

competence of a province to pay to its Premier and to members of its Executive Council such remuneration and allowances as were prescribed and determined under a law of a provincial legislature. The KwaZulu-Natal provincial legislature, we were reminded, had indeed passed an Act called the KwaZulu-Natal Legislature Remuneration Act No 2 of 1994 providing *inter alia* for the salaries and allowances to be paid to the Premier and members of the Executive Council of the KwaZulu-Natal province and this Act had pre-dated the impugned amendment to section 149(10).

[14] Section 62 of the Constitution reads as follows:

> "**Bills amending Constitution**
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> **62.** (1) Subject to subsection (2) and section 74, a Bill amending this Constitution shall, for its passing by Parliament, be required to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses.
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> (2) No amendment of sections 126 and 144 shall be of any force and effect unless passed separately by both Houses by a majority of at least two-thirds of all the members in each house: Provided that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature."

[15] It was common cause that the amendment to section 149(10) was passed at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of both Houses. It was also common cause that if the procedures prescribed by section 62(2) of the Constitution were indeed applicable, they had not been followed. It was contended on behalf of the Applicants that this was incorrect. The procedures prescribed by section 62(2), it was argued, should have been followed.

[16] The crucial issue which therefore needs to be determined is whether section 62(2) was applicable when the purported amendment to section 149(10) of the Constitution was passed.

[17] Counsel for the Applicants contended that what the amendment to section 149(10) was doing was indeed to amend the legislative and executive competence of a province and that it could not do so without the consent of the relevant provincial legislature because of the proviso to section 62(2) of the Constitution. Since the amendment to section 149(10) does not amend sections 126 or 144, the argument of Mr Gordon must be premised on the proposition that the proviso to section 62(2) is an independent and substantive impediment to the powers of Parliament and it therefore needs to be complied with in all cases where the legislative and executive competence of a province is sought to be amended. Mr Gauntlett SC, who appeared for the Respondent (together with Mr Moerane SC and Mr Heunis), disputed this premise. He argued that what the proviso to section 62(2) seeks to achieve is a qualification to the substantive part of section 62(2). The substantive part of section 62(2), he submitted, is limited to amendments to sections 126 and 144 only. Such amendments, he contended, need to be passed separately by both Houses of Parliament by a majority of at least two-thirds of all the members in each House. The proviso, he argued, therefore simply meant that where sections 126 or 144 are amended by an amendment to the boundaries of a province or the legislative or executive competence of a province, the consent of the relevant provincial legislature is an additional requirement.

[18] In support of the submission that this is what a proviso to a substantive provision means, counsel for the Respondents relied on the case of *R v Dibdin,*[5] the judgments of this Court in the case of *S v Mhlungu and others*[6] and the *Western Cape Legislature* case. [7] Paragraph 32 of the report of the judgment in *Mhlungu's* case states that "a proviso qualifies the substantive part". This was also the reasoning of Fletcher Moulton LJ in the case of *R v Dibdin*[8], in which the learned Judge stated that:

> "The fallacy of the purported method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which its stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment."[9]

[19] In the *Western Cape Legislature* case Chaskalson P, in considering the submissions that Proclamations R58 and R59 of 1995 were inconsistent with the proviso to section 62(2), stated that-

> "Section 62(2) is a clause dealing with Constitutional Amendments and the proviso must be read as qualifying the substantive part of the clause and not as an independent constitutional requirement applicable to any legislation dealing with provincial powers and functions."[10]

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[5] (1910) P. 57 at 125.

[6] 1995 (7) BCLR 793 (CC); 1995(3) SA 867 (CC).

[7] *supra* n.1, at para. 49.

[8] *supra* n.5.

[9] Followed in *Government of the Republic of Namibia v Cultura 2000* 1994(1) SA 407 (NmSC) at 417I-418A. See also *Ex parte Parington* (1844) 6 QBD 649 at 653; *Re Brocklbank* (1889) 23 QBD 461; *Hill v East and West India Dock Company* (1884) 9 App.Cas 448.

[10] *supra* n 1. at para 49. In that case it was pointed out that section 62 dealt with constitutional amendments and that the proviso to section 62(2) could not be relied on to extend the scope of this provision to one which dealt with ordinary legislation.

[20] Mr Gordon countered the Respondents' argument by pointing out that the observation made by Chaskalson P in the *Western Cape Legislature* case, which I have quoted[11], was made in the context of an attack on certain Proclamations which, unlike the present matter, did not involve an amendment to the Constitution and that the mind of the Court was not directed to the meaning of the proviso in the present context. He correctly contended that the ordinary rule pertaining to the interpretation of a proviso to a substantive section, which is set out in *Dibdin's* case,[12] is not an invariable rule, and that the context and object of such a proviso in a particular statute might justify giving to a particular proviso the meaning of an independent and substantive content. There is clear support for that approach in the authorities.

> "A proviso is usually enacted in order to qualify something contained in the preceding enactment. But it does not necessarily follow that they were enacted solely for those purposes. Halsbury *Laws of England* 3rd ed vol 35 para 604 says:
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> > "The danger of construing a proviso, which is merely a limitation on the enactment to which it is attached, as if it were a general limitation extending to other enactments or were itself a positive enactment, has often been pointed out. The substance, and not the form must, however, be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely qualifying that which goes before it"
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> Maxwell on *Interpretation of Statutes* 12th ed at 190 says:
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> > "If, however, the language of the proviso makes it plain that it was intended to have an operation more extensive than that of the provision which it immediately follows, it must be given such wider effect."
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> See too Craies on *Statute Law* 7th ed at 219."[13]

[21] Following on this approach, Mr Gordon referred to the fact that the proviso to section 62(2) referred also to the "boundaries" of the province which could not be amended

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[11] *supra* n. 10.

[12] *supra* n. 5.

[13] *S v Rosenthal* 1980 (1) 65 (A) at 81E-H; *S.A. Textile and Allied Workers Union v Skipper International* 1990(4) SA 842 (A) at 847; *Strydom v Die Land- en Landboubank van S.A.* 1972(1) SA 801 (A).

without the consent of a relevant provincial legislature. He argued that since there was no reference to the amendment of boundaries in the substantive part of section 62(2), it could not be said that the object of the proviso was to qualify or limit something that was being regulated by the substantive part and that the proviso should therefore be interpreted as an independent and substantive enactment. There is obvious substance in this argument. The authorities which hold that a proviso to an enactment must ordinarily be interpreted so as to qualify the substantive part of the enactment, do not deal with a proviso which is *prima facie* capable of extending the subject matter of the substantive part of such and enactment.[14]

[22] There are, however, formidable considerations which suggest a different interpretation.What the substantive part of section 62(2) seeks to regulate are amendments to sections 126 and 144 of the Constitution. These sections refer to the legislative competence and the executive authority of provinces. The competence of a province to legislate in respect of a particular province must necessarily be affected if the boundaries of that province are amended and it is this necessary relationship between the boundaries of a province and its legislative competence which the makers of the Constitution might have had in mind in referring to "boundaries" in the proviso to section 62(2). The reference to "boundaries" in this context might arguably have been made *ex abundante cautela.*[15]

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[14] *supra*, n. 13.

[15] *R v Abel* 1948 (1) SA 654 (A) at 662; *Minister of Finance and Another v Law Society, Transvaal* 1991 (4) SA 544 (A) at 557E-G; *C. Ltd. v The Commisioner of Taxes* 1962 (1) SA 45 (S.R.) At 46G-H; *Maphosa v Wilke en Andere* 1990 (3) SA 789 (T) at 799A-C.

If the proviso to section 62(2) was intended as a substantive and independent provision divorced from the substantive part of section 62(2), it is difficult to appreciate why it was put in the form of a proviso to section 62(2) and why nothing was said about whether the uni-cameral requirement of section 62(1) or the bi-cameral requirement of section 62(2) would apply in the circumstances which operated when the proviso became applicable as an independent provision.

[23] It is in my view, however, unnecessary to decide whether Mr Gordon's interpretation of the meaning of the proviso to section 62(2) is correct, or whether the proviso should be read as a qualification to the substantive part to section 62(2). There is force in both arguments, but even assuming in favour of the Applicants that the proviso to section 62(2) bears the meaning contended for by Mr Gordon, it does not seem to me to be of assistance to him unless the amendment to section 149(10) by the 1995 Constitutional Amendment can be said to offend a condition contained in the proviso. What the proviso says is that-

> "... the boundaries and the legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature."
> (My underlining)

What is contemplated by the proviso is legislation which is targeted at one or more provinces but not one which is of equal application to *all* provinces. In order to be hit by the proviso, the purported amendment need not necessarily diminish "the legislative and executive competences of a province." It is equally effective against laws which might increase or qualify such competences. But, what is crucial is that if the law applies to all provinces, it is outside the proviso. This is my difficulty with the reliance which Mr

Gordon places on the proviso to section 62(2). In its terms, the impugned amendment to section 149(10) does not, and does not purport to, target any particular province or provinces. It is of equal application to all the provinces. It therefore does not require the consent of the KwaZulu-Natal provincial legislature or any other provincial legislature. This removes the basis for the only complaint in terms of section 62(2) made by Mr Gordon against the enactment of the amendment to section 149(10). That complaint was simply that the consent of the KwaZulu-Natal provincial legislature was not obtained for the amendment.

Section 182 of the Constitution

[24] Section 182 of the Constitution after its amendment in 1995 reads as follows:

> "**Traditional authorities and local government**
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> **182.** The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in Chapter 10, shall *ex officio* be entitled to be a member of that local government, provided that he or she has been identified in a manner and according to guidelines prescribed by the President by proclamation in the *Gazette* after consultation with the Council of Traditional Leaders, if then in existence, or if not, with the Houses of Traditional Leaders which have been established, and shall be eligible to be elected to any office of such local government."

(The words underlined above were introduced by the 1995 Constitutional Amendment.)

[25] It was contended in the Applicants' heads of argument that

> "the amendment offends the division of powers identified in Section 126 as read with Schedule 6 of the Constitution in the functional areas of local government and traditional authorities both on a legislative and executive level".

This submission was also, wisely, not pressed in argument. It appears to assume that section 126, read with Schedule 6 of the Constitution, gives to a province the exclusive

legislative competence to deal with matters which fall within the functional areas specified in Schedule 6. This is a plainly incorrect assumption. Section 126(1) (read with Schedule 6) does give to a provincial legislature the jurisdiction to make laws dealing, *inter alia*, with indigenous law, customary law and local government. But it is made expressly clear by section 126(2A) that Parliament also has that power. There can therefore be no objection *per se* to the fact that the amendment to section 182 deals with matters in respect of which a provincial legislature also has power to make laws. (The problem of any conflict between laws of a provincial legislature and Parliament is dealt with separately in section 126(3)).

[26] In the Applicants' heads of argument it was also submitted that the amendment "interfered" with the assignment of the administration of the KwaZulu Amakhosi and Iziphakanyiswa Act No. 9 of 1990 by the First Respondent to a competent authority designated by the First Applicant.

[27] The amendment to section 182 of the Constitution does not appear to me to constitute any "interference" with the legislative or executive competence of the provincial government in terms of sections 126 or 144. But even if it did, this does not constitute by itself a reason why the amendment to section 182 should be declared unconstitutional. The mere fact that the administration of a particular Act has previously been assigned by the First Respondent to an authority designated by the First Applicant does not preclude Parliament from making a law dealing with the manner in which traditional leaders who are to be *ex officio* members of the local government, are to be identified. This was eventually

conceded in argument by Mr Dickson on behalf of the Applicants. In my view, even if a Parliamentary amendment impacts upon the terms of such an assignment of the administration of an Act, the real issue is whether or not the amendment to section 182 constitutes also an amendment to sections 126 or 144.

[28] The amendment to section 182 does not in any way purport to be an amendment to sections 126 or 144. It is therefore a constitutional amendment which does not require compliance with section 62(2) at all. The procedure which is prescribed, and which was in fact followed, is the procedure set out in section 62(1). The attack must therefore fail.

[29] This analysis makes it irrelevant to consider whether or not the Act of Parliament amending section 182 would not in any event prevail over any relevant legislation of the KwaZulu-Natal Provincial Assembly in terms of section 126(3), but there is nevertheless a very formidable argument in support of the conclusion that the need for objective guidelines for the identification of traditional leaders falls within the terms of section 126(3)(b) of the Constitution.

[30] Faced with these difficulties, Mr Gordon was again driven to rely on his interpretation of section 62(2) and his submission that the proviso to section 62(2) was an independent enactment which operated whenever there was to be a constitutional amendment and even in those cases where such an amendment did not amend sections 126 or 144. I have already dealt with this argument. It does not help the Applicants' case because the proviso is not of any application where a particular province or provinces are not targetted. The

impugned amendment to section 182 is an amendment to the Constitution which applies to all provinces and not to a particular province or provinces.

Section 184(5) of the Constitution

[31] Prior to the 1995 Constitutional Amendment section 184(5) read as follows::

> "5(a) Any parliamentary Bill pertaining to traditional authorities, indigenous law or the traditions and customs of traditional communities or any other matters having a bearing thereon, shall after having been passed by the House in which it was introduced but before it is passed by the other House, be referred by the Secretary to Parliament to the Council for its comments;
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> (b) The Council shall within thirty days as from the date of such referral, indicate by written notification to the Secretary to Parliament its support for or opposition to the Bill together with any comments it wishes to make;
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> (c) If the Council indicates in terms of paragraph (b) its opposition to the Bill, the other House shall not pass the Bill before a period of thirty days as from the date of receipt by the said Secretary of such written notification has lapsed;
>
> (d) If the Council fails to indicate within the period prescribed by paragraph (b) whether it supports or opposes the Bill, Parliament may proceed with the Bill."

(The Council referred to in this section is the Council of Traditional Leaders contemplated by section 184(1) of the Constitution.)

[32] After the 1995 Constitutional Amendment it takes the following form:

> "(a) Any Parliamentary Bill pertaining to traditional authorities, indigenous law or the traditions and customs of traditional communities or any other matters having a bearing thereon, shall if it is passed by the House in which it was introduced after the Chairperson and members of the Council have been elected and the Council has commenced its functions, and if the Council is then able to function, before it is passed by the other House, be referred by the Secretary to Parliament to the Council for its comments.
>
> (aA) If the Council is not in existence by the 28th February 1996 any parliamentary Bill referred to in paragraph (a) shall after having been passed by the House in which it was introduced but before it is passed by the other House, be referred to those Houses contemplated in Section 183 which have then been established, and the further provisions of this sub-section shall then *mutatis mutandis* apply."

[33] The first attack on the amendment to section 184(5) made in the Applicants' heads of argument is the same attack as that which was made on the amendment to section 182(2). It is substantially based on the premise that an amendment to a Constitution cannot validly be made if it is in conflict with some section of the Constitution. It was correctly abandoned in argument.

[34] The second attack made on section 184(5) is based on the argument that when section 184(5) was sought to be amended, the Bill providing for that amendment did not comply with the procedural requirements of section 184(5), in its unamended form, and more particularly, that this Bill was not referred to the Council of Traditional Leaders. Counsel for the Applicants submitted that-

> " the amendment provides for the retrospective recognition of a bill, which when passed, did not comply with the formal preconditions to its validity provided for by Section 184(5) and in this sense is unconstitutional"

[35] In my view this attack on the amendment to section 184(5) is unsound. Section 184(5) does provide for a Parliamentary Bill (pertaining to Traditional Authorities, indigenous law or the traditions and customs of Traditional Authorities) to be referred to the Council of Traditional Leaders, but such Bills would simply constitute ordinary legislation and not a constitutional amendment. Section 184(5)(a) can competently be amended either expressly or by implication without requiring any special procedures authorizing its own amendment or repeal. Like all amendments to the Constitution such an amendment must of course comply with the procedures prescribed by section 62(1), but the attack on the amendment to section 184(5)(a) on this ground is not based on section 62(1) of the

Constitution at all. Section 184(5) is, however, not a self-entrenching section. If it was, quite different considerations might have perhaps applied.[16]

[36] I have given some thought to the suggestion made in the Applicants' affidavits that the real objection to the amendment to section 184(5) is that it "provides for the retrospective recognition of a Bill". It is perfectly true that, in terms of section 15 of the 1995 Constitutional Amendment, the amendment to section 184(5) is deemed to come into operation on 1 May 1994. In that sense it can be said to be retrospective because the amendment itself was signed by the First Respondent on 20 September 1995. Mr Dickson, who led the attack of the Applicants on this ground, was, however, unable to advance any authority for the proposition that no retrospective constitutional amendment was competent. There is nothing in the Constitution which precludes such a amendment and I do not know of any principle on which such a restriction on Parliament's power of Constitutional Amendment can properly be based.

[37] The suggestion in the affidavit of the Applicant is that the purpose of the impugned amendment is to validate another bill called "the Remuneration of Traditional Leaders Bill" which has been passed by both Houses of Parliament but has not yet been assented to by the President. Even if this suggestion be correct, it is irrelevant to the constitutional attack made on the amendment to section 184(5). The suggestion might conceivably justify an attack on the "Remuneration of Traditional Leaders Bill" if, and when, it is ever

[16] *Western Cape Legislature* case, supra n.1., at para 58; *Collins v Minister of the Interior and Another* 1957 (1) SA 552 (A); *Mpangeli and Another v Botha and Others* (1) 1982 (3) SA 633 (C); *Mpangeli and Another v Botha and Others* (2) 1982 (3) SA 638 (C).

assented to by the President, but it can have no bearing on the constitutionality of the amendment to section 184(5) effected by the 1995 Constitutional Amendment.

Sections 245(1) and (2) of the Constitution

[38] There was an attack on behalf of the Applicants on the amendments to sections 245(1) and (2) which were said to be "of minor substance but ... the principle is of vital importance."

[39] Sections 245(1) and (2) in their unamended forms, read as follows:

> "**Transitional arrangements: Local government**
>
> **245.** (1) Until elections have been held in terms of the Local Government Transition Act, 1993, local government shall not be restructured otherwise than in accordance with that Act.
>
> (2) Restructuring of local government which takes place as a result of legislation enacted by a competent authority after the elections referred to in subsection (1) have been held, shall be effected in accordance with the principles embodied in Chapter 10 and the Constitution as a whole."

[40] By virtue of the amendment to these sections by the 1995 Constitutional Amendment, these sections now read as follows:

> "**Transitional arrangements: Local government**
>
> **245.** (1) Until 31 March 1996, local government shall not be restructured otherwise than in accordance with the Local Government Transition Act, 1993 (Act no. 209 of 1993).
>
> (2) Restructuring of local government which takes place as a result of legislation enacted by a competent authority after 31 March 1996 shall be effected in accordance with the principles embodied in Chapter 10 and the Constitution as a whole."

[41] Before the impugned amendment, section 245(1) had ensured that once elections had been held in terms of the Transition Act, local government could be restructured otherwise than in accordance with the Transition Act. Such restructuring outside the terms of the

Transition Act could, in terms of section 245(2) of the Constitution, take place in terms of laws enacted by "a competent authority" (which would include a provincial legislature), but that could not be done before the local government elections were held. The effect of the amendment to sections 245(1) and (2) was to make it incompetent for any such competent authority to undertake any such restructuring until 31 March 1996, even if elections had been held earlier. For this reason it was contended that the result of the amendment to sections 245(1) and (2) was to "interfere with a power which the KwaZulu-Natal legislature had in terms of section 126, read with Schedule 6". The conclusion which counsel for the Applicants sought to draw from these submissions was set out in counsel's heads of argument in the following terms:

> "There has accordingly occurred an extension of national legislation within the field of competence of the provincial legislatures without fulfilment of the conditions referred to in Section 126(3) of the Constitution."

[42] I have difficulty with the argument in this form. The need for national legislation to regulate the conduct of the first local government elections in South Africa seems to me to be capable of falling within the terms of section 126(3)(b). Indeed, it is common cause that some national legislation was necessary to avoid the proviso to section 179(1) of the Constitution which required that local government elections had to take place on the same day throughout the country. (In KwaZulu-Natal, and in parts of the Western Cape it was not possible to hold elections on the same day as the rest of the country which held its elections on 1 November 1995.)

[43] What counsel for the Applicants was again driven to rely on was section 62(2). He suggested that the requirements of the proviso to section 62(2) were not complied with.

I have considerable difficulties with such a suggestion. In order to have any relevance, the Applicants had to establish that the amendment to section 245 constitutes an amendment to section 126 and that if it does, the procedures prescribed by section 62(2) were not complied with. The first problem is that the amendment to section 245 in no way purports to amend section 126. A provincial legislature still has the legislative competence to make laws for the province with regard to the matters specified in Schedule 6. That competence, articulated in section 126(1), is not amended by the amendment to section 245. Nor is Schedule 6 amended. The provincial legislature continues to have legislative competence with regard to such matters as indigenous law, customary law and local government. All that the amendment to section 245 does is to provide a cut-off date for the continued restructuring of local government in terms of the Transition Act. Previously there was no such date. Indeed, the cut-off date was determined by the date of the elections which could have been determined to be a date far beyond 31 March 1996.

[44] I also have considerable reservations about the assumption that an amendment to section 245, which undoubtedly complies with the Constitution's own procedures for the amendment of that section, must be held to be invalid simply because the amendment might have some indirect consequence for the date from which a provincial legislature might effect amendments to structures of local government in its own area. There is nothing in section 245 or 126 which supports any such suggestion. The makers of the Constitution expressly applied their minds to those provisions of the Constitution which could not be amended at all. This was set out clearly in section 74(1). Similarly, when they wanted a special procedure to be followed in the amendment of a specific section, they said this

clearly, in section 62(2) and expressly stated in section 74 that any other amendments to Chapter 5 of the Constitution had to comply with the provisions of section 74(2). They therefore deliberately refrained from making section 245 immune from any amendment or subjecting any such amendment to the special procedures prescribed by section 62(2).

[45] During the course of argument, counsel for the Applicants acknowledged that elections in the province of KwaZulu-Natal were scheduled to be held on 27 March 1996 and the effect of the impugned amendment to section 245 was therefore only to delay by four days the right of the provincial legislature of that province to restructure local government otherwise than in terms of the Transition Act. He argued, however, that the competence of the amendment to the Transition Act was nevertheless a matter involving an important principle because if section 245 could be amended so as to delay this power of the provincial legislature for three days, it could also be delayed for ten years. Developing this argument, counsel contended that amendments to the Constitution had to be made within the "spirit" of the Constitution.

[46] I have difficulty in appreciating how this "spirit" of the Constitution is violated in the instant case. What section 245 of the Constitution originally contemplated was that provincial legislatures would be free to restructure local government otherwise than in accordance with the Transition Act, immediately after the elections which were to be simultaneously held throughout the country. When that was delayed in certain of the provinces the date upon which the provincial legislatures could restructure local

government there was similarly extended to approximately the date when such elections would be completed and new local governments were properly in place.

[47] The reliance upon the "spirit" of the Constitution is, in my view, misconceived. There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an "amendment" at all. That problem has engaged the Indian Supreme Court for some years[17] and it has been held that the power of amendment of the Constitution, vested in the Legislature, could not be employed-

> "to the extent of destroying the basic features and structure of the Constitution."[18]

As said by Chandrachud J in the *Raj Narain* case,[19] in dealing with the effect of a previous judgment,-

> "[The Constitution] did not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution... The power to amend did not include the power to abrogate the Constitution... The word 'amendment' postulates that the old Constitution must survive without loss of identity, ... the old Constitution must accordingly be retained though in the amended form, and therefore the power of

[17] *I.C. Golak Nath v Punjab* (1967) 2 SCR 762; *Kesavananda v The State of Kerala* (1973) SC 1461; *Minerva Mills Ltd v The Union of India* (1980) SC 1789; *Indira Nehru Gandhi v Raj Narain* (1975) SC 2299.

[18] *Seervai*, Constitutional Law of India (3rd ed) page 2665, para 30.46 and page 2697, para 30.82; *Basu*, Shorter Constitution of India (10th ed) pages 1033, 1035 and 1036.

[19] *supra* n.17.

> amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution."[20]

[48] Pursuant to this approach the Indian Supreme Court has held, *inter alia*, that the supremacy of the Constitution itself[21], the rule of law,[22] the principle of equality,[23] the independence of the judiciary[24] and judicial review[25] are all basic features of the Indian Constitution which cannot be so "amended".

[49] It is unnecessary to pursue this line of authorities. Even if there is this kind of implied limitation to what can properly be the subject matter of an amendment to our Constitution, neither the impugned amendment to section 245 nor any of the other amendments to the Constitution placed in issue by the Applicants in the present case can conceivably fall within this category of amendments so basic to the Constitution as effectively to abrogate or destroy it.

[50] In the result, although the Applicants have succeeded in prayer 1 of their notice of motion granting them direct access to this court, the remaining prayers contained in paragraphs 2, 3, 4, 5 and 6 should be, and are, dismissed.

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[20] *Raj Narain's* case, *supra* n. 17, at 2461.

[21] *State of Rajasthan v The Union of India*, (1977) SC 1361, para's 35 and 44.

[22] *Raj Narain's* case, *supra* n.17, at 2369-2371.

[23] *Raj Narain's* case, *supra* n.17, para's 680, 682.

[24] *Gupta v Union of India* (1982) SC 149.

[25] *Kesavanada's* case, *supra* n. 17, at 1565, 1609, 1648, 1860.

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

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