Premier of KwaZulu-Natal and others v President of the Republic of South Africa and others

Case CCT 36/95

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

An application was made for direct access to the Court to obtain an order declaring unconstitutional amendments to ss 149(10), 182, 184(5) and 245 of the Constitution by the Constitution of the Republic of South Africa Second Amendment Act 44 of 1995. The application for direct access was granted.

The amendment to s 149(10) permits the President, rather than the relevant provincial legislature, to determine the remuneration of the Premiers and members of the Executive Councils of provincial governments. The principal attack on the validity of the amendment was that the proviso to s 62(2) of the Constitution read with s 144 required the consent of a province when the legislative or executive competence of that province was amended by Parliamentary legislation. The consent of the KwaZulu-Natal legislature was not obtained to the amendment to s 149(10). The Court held that the proviso to s 62(2) contemplates legislation targeted at one or some but not all of the provinces. The impugned amendment to s 149(10) applied equally to all the provinces and therefore fell outside the proviso to s 62(2).

The amendment to s 182 of the Constitution provided that the President could determine guidelines for the identification of traditional leaders who would ex officio become members of a local government within their area of jurisdiction. Prior to the amendment no such guidelines were required. It was again contended that the amendment was required, and failed, to comply with the proviso to s 62(2). The Court held that s 182 had been correctly amended in accordance with s 62(1) and that it was not required that the amendment comply with the proviso s 62(2) for the same reasons as set out above in relation to s 149(10).

The amendment to s 184(5) of the Constitution altered the procedure for the referral to traditional leaders of legislation dealing with traditional leaders and indigenous law. Previously, such legislation was required to be referred to the Council of Traditional Leaders. However no such Council had been established. The amendment required legislation to be referred to such Provincial Houses of Traditional Leaders as had been established and were functioning at the time of introduction of the legislation. It was argued that the amendment did not comply with the requirements of the unamended s 184(5) in that the Bill amending the section was not referred to the Council of Traditional Leaders. The Court rejected this argument, holding that the provisions of s 184(5) need only be complied with when ordinary legislation relating to traditional authorities or indigenous law is passed, but that amendments to s 184(5) of the Constitution need not comply with s 184(5). Section 62(1) was the only section that had to be complied with and it had been. It was held that the fact that the effect of the amendment was to validate retrospectively a Bill which had been passed by Parliament but which had not been referred to the Council of Traditional Leaders as required by s 184(5)

(the Remuneration of Traditional Leaders Bill 1995) was irrelevant to the validity of a constitutional amendment to s 184(5).

The amendment to s 245 provided that until 31 March 1996 local government could not be restructured otherwise than in accordance with the Local Government Transition Act, even if local government elections were held prior to that date. Previously, s 245 provided that local government could be restructured by a 'competent authority' after elections had taken place. It was contended that the amendment impermissibly extended national legislation within the field of provincial legislative competence. The Court held that both Parliament and the provinces were competent authorities to legislate in this field. The Court was of the opinion that a Parliamentary law in this regard would arguably have prevailed over provincial legislation as the law had become necessary because of the postponement of local government elections in certain areas. The amendment had not amended s 144 or s 126 and therefore s 62(2) was not engaged. Despite the fact that the amendment had complied with the procedural requirements of the Constitution, the Court nevertheless stated that a purported amendment to the Constitution, following the correct procedures, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution might not qualify as an amendment at all and may therefore may be constitutionally impermissible. However, none of the amendments in question fell within that category.

The application was therefore dismissed.

The judgment of the Court was delivered by Mahomed DP and was concurred in by all the other members of the Court.