



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Khohliso v The State and Another**

**CCT 12/14**

**Date of hearing: 21 August 2014**  
**Date of judgment: 2 December 2014**

---

### **MEDIA SUMMARY**

---

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

Today the Constitutional Court handed down judgment in an application for confirmation of an order by the Eastern Cape Local Division of the High Court, Mthatha (High Court) declaring sections of the former Republic of Transkei's Decree No. 9 (Environmental Conservation) of 1992 constitutionally invalid.

Ms Khohliso, the applicant, is a traditional healer from Tsolo in the former Transkei (now part of the Eastern Cape Province). She was convicted in the Tsolo Magistrate's Court of possession of two vulture's feet in violation of Decree No. 9. She successfully appealed her conviction in the High Court. That Court found these provisions unconstitutional, because they are inconsistent with the presumption of innocence and the right to equality.

The Constitution provides that this Court must confirm any order of invalidity granted by a High Court concerning a provincial Act, Act of Parliament, or conduct of the President, before that order has any force. Ms Khohliso approached this Court to confirm the High Court's ruling, contending that Decree No. 9 constituted a provincial Act which needed to be confirmed. The second respondent, the MEC for Economic Development, Tourism and Environmental Affairs, Eastern Cape, contends that this Court does not have to confirm the declaration of invalidity because Decree No. 9 does not constitute a provincial Act.

In a unanimous judgment by Van der Westhuizen J, the Constitutional Court held that Decree No. 9 is not a provincial Act or any other type of law that requires confirmation by this Court. The purpose of confirmation is to promote comity between the branches of government. Thus an Act of Parliament, provincial Act or conduct of the President can

only be effectively and finally invalidated when this Court determines that it is inconsistent with the Constitution. Law that does not fall into those categories does not require confirmation by this Court.

In determining whether a pre-democratic law (such as Decree No. 9) constitutes a provincial Act, the Court primarily considers how the relevant provincial Legislature has treated it since 1994. If the law has been endorsed by the Legislature, it will have the same status as a provincial Act and any order of invalidity in respect of it will have to be confirmed by this Court. Evidence of endorsement includes amending the law in a way that indicates an intention that it continue to apply in the province, or by incorporating the law by reference into a democratic provincial Act. If there is insufficient evidence that the provincial Legislature has endorsed the law post-1994, the Court will assess whether the origin of the law and its territorial application point to it having the status of a provincial Act.

In this case there was no endorsement of Decree No. 9 by the Eastern Cape Provincial Legislature. The origin of the Decree was also not provincial, as it was passed by a so-called independent republic. It only applies to a portion of the Eastern Cape, namely the former Transkei. There is parallel legislation governing the same subject matter in other parts of the province.

Accordingly, Decree No. 9 is not a provincial Act and this Court is not required to confirm the High Court's order. That order, therefore, had immediate effect from the date it was granted by the High Court.