

Certification of the Constitution of the Republic of South Africa, 1996

Case CCT 23/96

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.

Since 27 April 1994 South Africa has functioned under an interim constitution, the Constitution of the Republic of South Africa, 1993. The negotiating parties designed the Interim Constitution as a bridge between the old order and the new, to regulate the governance of the country under a government of national unity while a popularly mandated Constitutional Assembly (CA) drafted a new constitution. The Interim Constitution also served to mark out the further transitional steps to be taken.

One of these steps was that the CA had to adopt the new draft constitution within a period of two years and by a majority of at least two-thirds of the CA's members. A second requirement was that the constitutional text had to comply with a set of Constitutional Principles agreed to by the negotiating parties and set out in Schedule 4 to the Interim Constitution. A third requirement of the Interim Constitution was that the constitutional text has no legal force unless the Constitutional Court certifies that all the provisions of the text comply with the Constitutional Principles. The Court must determine whether every requirement of the Principles has been satisfied by the provisions of the text and whether any provision in the text conflicts with the CPs. The Court's powers and functions in regard to certification of the text are confined to this determination.

The CA adopted the new constitutional text, the Constitution of the Republic of South Africa 1996, timeously and with the requisite majority. The Chairperson of the CA then transmitted the text to the Court for certification. The CA and all political parties represented in the CA were entitled to present oral argument to the Court. In addition the public at large was invited to submit representations relevant to the question of certification of the text. Many written submissions were received and over a period of nine days the CA, five political parties and certain other bodies and persons who had filed relevant submissions were afforded an opportunity to advance oral argument to the Court.

The Court's judgment is divided into eight chapters, each dealing with a particular main topic under various subheadings. Having sketched the background and context of the certification exercise, the judgment explains the Court's approach to its task and then deals with each identified issue bearing on the question of certification. In the main, these relate to the provisions in the Bill of Rights and their entrenchment; to the separation of powers between the executive, legislative and judicial branches of the state, including the independence of the judiciary; to the relationship between the legislative and executive tiers of government at the national, provincial and local levels, with special reference to the individual and collective powers and functions of the provinces; to the position of traditional leadership and customary law; and to the functions and independence of 'watchdog' institutions of state.

In Chapter III of the judgment the Court deals with a wide variety of questions relating to the Bill of Rights, ranging from 'horizontal', the position of juristic persons and the limitations clause, to labour relations, the property clause, socio-economic rights, language and education, access to information and marriage and family rights.

A major focus of the judgment is on provincial government issues, more specifically whether the constitutional text provides for 'legitimate provincial autonomy' and whether 'the powers and functions of the provinces' under the proposed constitution are 'substantially less than or substantially inferior' to those provinces enjoy under the Interim Constitution. Both issues are directly related to specific requirements of the Constitutional Principles. Chapters V and VII, comprising about half of the judgment, deal with these issues.

The Court's ultimate finding was that the constitutional text cannot be certified as complying fully with the Constitutional Principles. The following instances of non-compliance were identified:

Section 23, which fails to comply with the provisions of CP XXVIII in that the right of individual employers to engage in collective bargaining is not recognised and protected.

Section 241(1), which fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review.

Schedule 6 s 22(1)(b), which fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review.

Section 74, which fails to comply with -

CP XV in that amendments of the NT do not require 'special procedures involving special majorities'; and

CP II in that the fundamental rights, freedoms and civil liberties protected in the NT are not 'entrenched'.

Section 194, which fails in respect of the Public Protector and the Auditor-General to comply with CP XXIX in that it does not adequately provide for and safeguard the independence and impartiality of these institutions.

Section 196, which fails to comply with -

CP XXIX in that the independence and impartiality of the PSC is not adequately provided for and safeguarded; and

CP XX in that the failure to specify the powers and functions of the Public Service Commission renders it impossible to certify that legitimate provincial autonomy has been recognised and promoted.

Chapter 7, which fails to comply with -

CP XXIV in that it does not provide a 'framework for the structures' of local government;

CP XXV in that it does not provide for appropriate fiscal powers and functions for local government; and

CP X in that it does not provide for formal legislative procedures to be adhered to by legislatures at local government level.

Section 229, which fails to comply with CP XXV in that it does not provide for 'appropriate fiscal powers and functions for different categories of local government'. To the extent set out in the judgment the provisions relating to the powers and functions of the provinces were held to fail to comply with CP XVIII.2 in that 'such powers and functions are substantially less than and inferior to the powers and functions of the provinces in the IC.'

The Court emphasised that the constitutional text represents a monumental achievement. The basic structure of the proposed constitution is sound and the overwhelming majority of the requirements of the Constitutional Principles have been satisfied. The instances of non-compliance that have been identified should present no significant obstacle to the CA in formulating a text which complies fully with those requirements.

Judgment was delivered by the full Court.