

Explanatory Note

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*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.*

The matter involved a challenge to s 113(1) of the Defence Act, which provides for a limited time period for the institution of a civil action against the Minister of Defence and requires that written notice be given to the Minister one month in advance of any action. The issue of the constitutionality of the subsection was referred to the Constitutional Court by the Transvaal Provincial Division in terms of s 102(1) of the Constitution. The Court held that the referral was incompetent and remitted the matter to the Transvaal Provincial Division. The Court did not consider the merits of the challenge to s 113(1).

In terms of s 102(1) a provincial or local division of the Supreme Court may refer a case to the Constitutional Court where (1) there is an issue which may be decisive for the case (2) the issue falls within the exclusive jurisdiction of the Constitutional Court (3) the referring court considers it to be in the interests of justice to refer the issue to the Constitutional Court.

The Constitutional Court held that the issue was within its exclusive jurisdiction since a provision of an Act of Parliament was under attack. However, the two other requirements of s 102(1) were not satisfied and the referral was therefore incompetent. The Court held that the referring court had failed to make the necessary findings as to the applicability of the Constitution to the issues before it. Therefore, the constitutionality of s 113(1) could not be said to be potentially decisive of the case, nor was the referral in the interests of justice. In respect of the interests of justice requirement, the Court held that this involved a value judgment and that while deference was due and was usually paid to the value judgment of a referring court, it did not bind the Constitutional Court. Thus, the Court held, it was not compelled to decide a premature issue.

The Court refused to grant the parties direct access to the Court to remedy the incompetent referral. While direct access could be granted in exceptional circumstances where a referral was incompetent, the Court found no such exceptional circumstances in this case. In any event, the constitutionality of s 113(1) had been raised in the matter of *Mohlomi v Minister of Defence* CCT 41/95 which had been heard together with this case and in which judgment was pending.

The judgment of the Court was delivered by Didcott J and was concurred in by the other members of the Court.