CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/96

CERTIFICATION OF THE CONSTITUTION OF THE PROVINCE OF KWAZULU-NATAL, 1996

Heard on: 25, 26 and 27 June 1996

Decided on: 6 September 1996

JUDGMENT

FULL COURT:

[1] In terms of section 160(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 (the "interim Constitution") a provincial legislature is entitled to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members. Before such a constitution can have the force of law, this Court must certify, under section 160(4) of the interim Constitution, that none of its provisions is inconsistent with any provision of the interim Constitution, including the Constitutional Principles set out in Schedule 4.

[2] On 15 March 1996, the Legislature of the province of KwaZulu-Natal ("KZN") unanimously adopted a Constitution (the "provincial Constitution") for that province. This represented the culmination of a lengthy process of political negotiation between

the various parties represented in that Legislature. On 25 March, and acting in terms of rule 16(1) of the Rules of the Constitutional Court, the Speaker of the KZN Legislature submitted to this Court a copy of the provincial Constitution together with a certificate in which he stated *inter alia* that the Constitution had been passed by the requisite majority and formally requested this Court to perform its certification functions under section 160(4) of the interim Constitution. Under rule 16(3), the President of this Court issued directions to the Speaker to inform parties that sought to object to the certification, that they were to lodge grounds of objection with this Court, before written argument was submitted. In response the African National Congress ("ANC") and the Government of National Unity ("GNU") provided an abbreviated list of objections.

[3] At the hearing of the matter, the ANC, the GNU and the Speaker of the KZN Legislature, the latter together with the provincial Premier, were represented by counsel. The ANC and GNU contended that the provincial Constitution was inconsistent with the interim Constitution, including the Constitutional Principles and should not be certified. The Speaker and Premier claimed the converse, that the provincial Constitution was not inconsistent and should be certified. Written objections to the certification were received from the King's Council of KZN.[1] There was no appearance on its behalf. We

[1] The objections were directed to the following provisions in Chapter 9 of the provincial Constitution: Clause 1(3)(a) (the size of the King's Council); 1(4)(b) (the powers and functions of the Monarch); 1(4)(c) (the Monarch is expressly required not to be involved in party politics); 1(6) (the provision that the actions of the Monarch are to be countersigned by the Premier and by the appropriate competent Minister); 1(7) (the budget of the Monarch and the Royal Household); 1(9) (provisions relating to the minority and incapacity of the Monarch); 1(11) (the establishment and administration of the Royal Guard); clause 2(1) (recognition, protection and application of traditional and customary law); clause 3(1) (the size of the House of Traditional Leaders) and 3(3) (certain powers of the House of Traditional

have given due consideration to its objections. None of them relates to matters which this Court can properly consider in exercising its powers of certification under section 160 of the interim Constitution. Section 160(3)(b) provides that, in the case of KZN, its provincial Constitution shall make provision for the institution, role, authority and status of a traditional monarch in the province, but the interim Constitution does not prescribe to the Legislature of KZN how such provision is to be made. The provisions made in the provincial Constitution in this regard, some of which have been objected to, can consequently not be said to be inconsistent with any of the provisions of the interim Constitution or the Constitutional Principles. The objections, submissions and recommendations made by the King's Council raised issues that should more properly be directed to or be dealt with by the KZN Legislature and do not relate to the certification process.

[4] At this stage of the constitutional history of South Africa, all law-making power throughout the country is derived from the interim Constitution. The power of a provincial legislature to adopt its own Constitution is to be found in section 160 of the interim Constitution. It is there provided, in subsection (1), that:

> "The provincial legislature shall be entitled to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members."

Leaders). Various submissions were advanced in support of these objections and certain recommendations made.

This power is additional to the legislative competence which is conferred on provincial legislatures by sections 125 and 126 of the interim Constitution, but is expressly limited in section 160(3):

> "A provincial constitution shall not be inconsistent with a provision of this Constitution, including the Constitutional Principles set out in Schedule 4: Provided that a provincial constitution may-
>
> > (a) provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province; and
> > (b) where applicable, provide for the institution, role, authority and status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal."

The reference to "legislative structures and procedures" clearly relates to the structures and procedures which may be necessary or appropriate for the proper functioning of the provincial organs of government.

[5] On a proper interpretation of section 160, while a provincial constitution may not be inconsistent with any provision of the interim Constitution, in terms of the proviso to subsection (3), the legislative and executive structures and procedures may differ from those provided for in the interim Constitution. We would emphasise however, that whatever meaning is ascribed to "structures and procedures" they do not relate to the fundamental nature and substance of the democratic state created by the interim Constitution nor to the substance of the legislative or executive powers of the national

Parliament or Government or those of the provinces.

[6] The provisions of section 160 which confer constitution making powers upon a province are not to be viewed in isolation, but rather to be interpreted within the context of the other provisions of the interim Constitution relating to provincial powers. Section 160(3) is negatively formulated and, read with section 160(4), indicates in peremptory terms what provisions a provincial constitution may not contain. They are, subject to the proviso, provisions which are "inconsistent with a provision of this Constitution, including the Constitutional Principles set out in Schedule 4". It is clear, therefore, that in determining what provisions relating, for example, to legislative and executive powers may or may not be embodied in a provincial constitution, regard must be had to all provisions in the interim Constitution and Constitutional Principles.

[7] Section 125(2) of the interim Constitution vests the legislative authority of a province in the provincial legislature "subject to this Constitution". Section 125(3) limits the territorial jurisdiction of a provincial legislature to "the territory of the province" subject to any exceptions which may be provided for by an Act of Parliament (ie the Parliament of the Republic in terms of sections 36 and 37). Sections 126(1) and (2) read with Schedule 6, prescribe the "matters" with regard to which a provincial legislature "shall be competent . . . to make laws for the province". In the event of both a provincial legislature and Parliament passing legislation in terms of the interim Constitution, dealing with a matter referred to in these subsections, subsections (3), (4)

and (5) of section 126 prescribe the circumstances under which a provincial law will prevail over an Act of Parliament and vice versa.

[8] From all the foregoing it is evident, beyond any doubt, that in order to determine whether a provision in a provincial constitution dealing with, for example, provincial legislative power, can be certified, such provision must be compared with all the above provisions (and indeed any other provision in the interim Constitution relating to legislative power) and a determination with regard to inconsistency made. More simply stated, a province cannot by means of the bootstraps of its own constitution confer on its legislature greater powers than those granted it by the interim Constitution. The same principle must apply, *mutatis mutandis,* to all other powers, of whatever nature, asserted by a province in the provisions of its constitution. Certification requires a two step approach in regard to such provisions. The first is an enquiry as to whether the interim Constitution or a Constitutional Principle deals, expressly or impliedly, with the power in question and how it deals with it. The second is the determination whether the provision in a provincial constitution is inconsistent with such comparable provision or any other relevant provisions in the interim Constitution or Constitutional Principles.

[9] It is also useful, at this stage, to comment briefly on the nature of and the interrelationship between the legislative powers of Parliament and the provincial legislatures. In terms of section 37 of the interim Constitution, Parliament has general plenary power to legislate for the Republic. That plenary power is not confined to

specific functional areas.[2] The legislative competence of provincial legislatures is different and is derived from section 126(1), read with Schedule 6 and section 126(2) as described above.[3] It is not, however, an exclusive legislative competence but one which is exercised concurrently with Parliament.[4] Section 126 restricts neither Parliament's plenary legislative competence nor its last mentioned concurrent competence to legislate; it merely provides in subsections (3) and (4) how a conflict or potential conflict that may exist between an Act of Parliament and provincial legislation is to be resolved and which of the conflicting provisions is to prevail.[5] If the conflict is resolved in favour of one of the conflicting laws the other is not invalidated, "it is subordinated and to the extent of the conflict rendered inoperative."[6] A law so subordinated is not nullified;

> "it remains in force and has to be implemented to the extent that it is not inconsistent with the law that prevails [and] [i]f the inconsistency falls away the law would then have to be implemented in all respects."[7]

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2 *Ex parte Speaker of the National Assembly: In re: Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC) para 13.

3 Id and para 7 supra.

4 *Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC); 1995 (12) BCLR 1561 (CC) para 25; *Ex parte Speaker of the National Assembly: In re: Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* supra n 2 para 13.

5 *Ex parte Speaker of the National Assembly: In re: Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* supra n 2 paras 14 and 15 for an explanation of how such conflict is to be resolved.

6 Id para 16.

7 Id para 19.

The inconsistency could fall away and the provisions of the subordinated law become fully operative if the prevailing law were to be repealed or appropriately amended. In effect the consequence of subordination is that the subordinated law, or relevant provision thereof, goes into abeyance.[8]

[10] The certification process required by section 160(4) would appear to be a unique feature of the constitution making procedures adopted in this country. The subsection provides that:

> "The text of a provincial constitution passed by a provincial legislature, or any provision thereof, shall be of no force or effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subsection (3), subject to the proviso to that subsection."

It follows from this provision that this Court can only make one of two orders pursuant to the certification process - an order certifying that none of the provisions of a provincial constitution is inconsistent with the interim Constitution and the Constitutional Principles set out in Schedule 4 thereof or, if it is unable to reach this conclusion, an order that it declines so to certify. In the latter case, the constitution has to be reconsidered and a new or amended constitution has to be passed by the provincial legislature, if it still wishes to pass a constitution for the province.

8 Which the Oxford English Dictionary describes as: "A state of suspension, temporary non-existence or inactivity; dormant or latent condition liable to be at any time revived."

[11] The purpose of section 160(4) is manifestly to ensure that a provincial constitution complies with the provisions of section 160(1) and (3) and thereby to place that issue beyond question. It is to ensure that there is finality with regard to the regularity and legality of a provincial constitution. The people of the province should not be left in a state of uncertainty as to their rights or obligations under their provincial constitution.

[12] We were pressed to have regard to the fact that the provincial Constitution was passed unanimously by the KZN Legislature. However, that cannot in any way influence the duty imposed on this Court by the provisions of section 160(4) of the interim Constitution. This apart, the ANC and GNU have strenuously attacked many of the provisions in the provincial Constitution. Why the ANC voted in favour of it we do not know and counsel were not in a position to enlighten us.

[13] In our opinion there are fundamental respects in which the provincial Constitution is fatally flawed. Those flaws can appropriately be considered under three heads:

1. Usurpation of National Powers;
2. The Consistency Clauses; and
3. The Suspensive Conditions.

We consider each in turn.

Usurpation of National Powers

[14] In a number of provisions, the provincial Constitution purports to usurp powers and functions of Parliament and the national Government. This process begins in Chapter 1 dealing with "Fundamental Principles". The majority of these principles are those that one would expect to find and would be appropriate in a national constitution. Clause 1(1), for example, provides that:

> "The Province of KwaZulu Natal is a self-governing Province within the Republic of South Africa."

That purports to be an operative provision of the provincial Constitution and not a record of a fact or an aspiration. It is clearly beyond the capacity of a provincial legislature to pass constitutional provisions concerning the status of a province within the Republic. After all, the provinces are the recipients and not the source of power. In *The National Education Policy Bill* case Chaskalson P, writing for the Court and after emphasising the distinction between the history, structure and language of the United States Constitution which brought several sovereign states together in a federation and that of our interim Constitution, explained the powers of the provinces under the interim Constitution as follows -

> "Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those

> powers that are specifically conferred on them under the Constitution."[9]

There is no provision in the interim Constitution which empowers a province to regulate its own status.

[15] This is but one of a number of examples, all of which demonstrate the purported assertion by the KZN Legislature of a power which it manifestly does not have. Such a provision as well as others referred to below, fall outside the constitution making power conferred by section 160, because they are inconsistent with the provisions of the interim Constitution and thus breach the provision in section 160(3) expressly limiting a province's constitution making power and constituting a condition precedent to certification stipulated in section 160(4). They would appear to have been passed by the KZN Legislature under a misapprehension that it enjoyed a relationship of co-supremacy with the national Legislature and even the Constitutional Assembly.

[16] Clause 1(5) of Chapter 1 purports to arrange the relationship between the province and the national Government. Clause 1(6) purports to confer autonomous powers in respect of local government. Clause 1(8) states that the provincial Constitution sets out the basis of the interaction between the province and the rest of the Republic. The provincial Constitution is replete with other examples of this attempted usurpation of power.

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9 Supra n 2 para 23.

[17] Chapter 3 contains a bill of rights. There can in principle be no objection to a province embodying a bill of rights in its constitution. Section 160(1), which confers a general and unlimited right on a provincial legislature to pass a constitution, subject only to the inconsistency qualification in section 160(3), neither prescribes nor proscribes any form or structure or content for such constitution. A significant feature of most constitutions adopted since the Second World War is the embodiment of a justiciable bill of rights; it is indeed a significant feature of the interim Constitution itself. Under these circumstances it would require the clearest indication in the interim Constitution that no bill of rights, of any nature, could be embodied in a provincial constitution duly passed pursuant to section 160(1). There is no indication of any such proscription. It is unnecessary for present purposes to decide whether a general principle should be established that an inconsistency can arise in provincial legislation if national legislation evinces an intention to "cover the field" along the lines of that developed, for example, in Australia.[10] Even assuming that to be the position, there is no indication in the interim Constitution that Chapter 3 was intended to deal "completely, exhaustively or exclusively" with fundamental rights at all levels of government. The only limitation on the content of a provincial constitution is the inconsistency provision in section 160(3);

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10 See generally Blackshield, Williams and Fitzgerald *Australian Constitutional Law Theory* (The Federation Press NSW 1996) 473 and *Ex parte McLean* (1930) 43 CLR 472, 483 where it was stated that -

> "[t]he inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter." (Emphasis supplied)

but where the interim Constitution itself embodies a bill of rights it cannot be argued that the mere presence of a bill of rights in a provincial constitution is, without more, inconsistent with the interim Constitution or the Constitutional Principles.

[18] It is equally clear, however, that it is constitutionally impermissible for any provision to be embodied in a provincial bill of rights which is inconsistent with any provision of the interim Constitution (which includes any provision in Chapter 3 itself) or the Constitutional Principles. It is inadvisable to attempt to formulate any comprehensive rule for determining exactly what provisions may, in conformity with section 160, be embodied in a provincial bill of rights. Nevertheless some basic principles must be laid down in order to evaluate the attack directed at the bill of rights in the provincial Constitution.

[19] The powers of a provincial legislature to enact a bill of rights are limited in different ways. In the first place the legislature cannot provide for the provincial bill of rights to operate in respect of matters which fall outside its legislative or executive powers. Bills of rights, with the exception of provisions which may not always be regarded as capable of direct enforcement (such as, for example, certain of the types of provisions which have come to be known as "directive principles of state policy") are conventionally enforced by courts of law striking down or invalidating, for example, legislation and administrative action even when such power of review is not expressly

granted in the constitution or bill of rights concerned.[11]

[20] Chapter 8 of the provincial Constitution purports to make provision for a provincial constitutional court and clause 1(4)(b) thereof empowers the provincial constitutional court to declare "a law of the Province" unconstitutional. But a provincial bill of rights or other constitutional provision could not authorise the striking down of a law with regard to a matter in respect whereof the province had no legislative power in terms of section 126(1) of the interim Constitution, because such provision would be in conflict with such section and accordingly in breach of the inconsistency provision of section 160(3). The KZN Legislature appears to have been aware of this source of conflict, for in Chapter 14 clause 2(8) it purports to limit the enforcement of the "human rights recognised and protected in this Constitution" (obviously a reference to the Chapter 3 rights which are described as "Fundamental Rights, Freedoms and Duties" in the chapter heading) to the "sphere of competence and to the powers and functions of the Province" with a similar limitation on the power of judicial review referred to above. Whether this purported limitation has in truth and in fact been successful will be dealt with later.

[21] In respect of a law which a province may competently make pursuant to the provisions of section 126(1) of the interim Constitution, there can, in principle, be no

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11 The best known example is the US Constitution and Bill of Rights; see *Marbury v Madison* 5 US 137 (1803).

reason why the province may not limit its powers or confer rights, provided such provisions do not conflict with other provisions of the interim Constitution. The possibility that a provincial law may be subordinated to a national law in terms of section 126(3) and (4) presents no problem in this regard, because if and when the subordination comes into operation the provincial law or relevant provision thereof goes into abeyance and is no longer operative. A provision in a provincial bill of rights would have no impact on the prevailing national law in such circumstances because the operation of the provincial bill of rights is limited to constitutionally valid powers of the province. When the subordination of the provincial law ceases, its provisions become operative again and the relevant provision in the provincial bill of rights would again apply to it.

[22] In the second place a province would be precluded from incorporating any provision in its bill of rights which is "inconsistent with" any similar provision in Chapter 3 of the interim Constitution. This is so because section 7(1) of the interim Constitution expressly provides that Chapter 3 binds all legislative and executive organs of state "at all levels of government". All the provisions in this Chapter must be applied, for example, to all provincial legislation. Any provision in any provincial law, including a provincial constitution, which purported to limit the operation of the national bill of rights in any way would be in conflict with section 7(1) of the interim Constitution and would not meet the section 160(3) inconsistency qualification.

[23] A provincial bill of rights could (in respect of matters falling within the province's powers) place greater limitations on the province's powers or confer greater rights on individuals than does the interim Constitution, and it could even confer rights on individuals which do not exist in the interim Constitution. An important question is whether such provisions would be "inconsistent with" ("onbestaanbaar met") the provisions of the interim Constitution.

[24] It is important to stress that we are here dealing with the concept of inconsistency as it is to be applied to provisions in a provincial bill of rights which fall within the provincial legislature's competence but which operate in a field also covered by Chapter 3 of the interim Constitution. For purposes of section 160 there is a different and perhaps even more fundamental type of inconsistency, namely where the provincial legislature purports to embody in its constitution, whether in its bill of rights or elsewhere, matters in respect whereof it has no power to legislate pursuant to the provisions of section 126 or any other provision of the interim Constitution. For purposes of the present enquiry as to inconsistency we are of the view that a provision in a provincial bill of rights and a corresponding provision in Chapter 3 are inconsistent when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each without disobeying either.[12] There is no principial or practical reason why such

[12] See generally *Federated Engine-Drivers' and Firemen's Association of Australasia v Adelaide Chemical and Fertilizer Company Limited and Others* (1920) 28 CLR 1, 12, 17; *Clyde Engineering Company Limited v Cowburn* (1926) 37 CLR 466, 503; *Missouri, Kansas & Texas Railway Company*

provisions cannot operate together harmoniously in the same field.[13]

[25] On this approach the sorts of provisions in a provincial bill of rights referred to in paragraph 23 above would not be inconsistent with the provisions of Chapter 3 of the interim Constitution, because both sets of provisions could be obeyed at the same time without disobeying either. In applying the test it must be borne in mind that the potential conflict in obedience arises when the provision in the provincial constitution has to be observed. The lesser limitation of power and the lesser right in Chapter 3 of the interim Constitution, postulated above, would be obeyed in the act of obeying the greater limitation of provincial power and the greater right in the provincial bill of rights, whereas there would be no room for inconsistency in respect of a new right, provided such new right did not, because of its particular nature or formulation, have the effect of eliminating or limiting a right protected in the interim Constitution.[14] In view of the comprehensive nature of the rights in Chapter 3 of the interim Constitution it may transpire that the ambit of a provincial bill of rights is a very limited one, but this is not a matter on which we are called upon to express any view at this stage.

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v Haber 169 US 613, 623 (1897); Blackshield, Williams and Fitzgerald *Australian Constitutional Law Theory* (1996) supra n 10, 473 et seq; *Ex Parte McClean* supra n 10; *Commercial Radio Coffs Harbour Limited v Fuller and Another* (1986) 161 CLR 47; Hogg *Constitutional Law of Canada* 3 ed (1992) para 16.1-16.4; *Smith v The Queen* (1961) 25 DLR (2d) 225, 246; *Multiple Access Ltd v McCutcheon et al* (1983) 138 DLR (3d) 1.

13 See generally Brennan "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights" (1986) 61 *New York University Law Review* 535; *Gustafson v Florida* 414 US 260, 266 (1973); *The People v Brisendine* 13 Cal 3d 528; *People ex rel Arcara v Cloud Books Inc* 68 NY 2d 553, 557, 558 (1986); *Bellanca v New York State Liquor Authority* 54 NY 2d 228, 235 (1981).

14 Compare the *Clyde Engineering* case supra n 12, 475.

[26] By way of summary it can therefore be stated that there are two principal ways in which provisions in a provincial bill of rights could be inconsistent with the interim Constitution. Firstly, where the provision relates to a matter falling outside the power of the province, the inconsistency in this instance being in respect of section 126 of the interim Constitution. Secondly, where the provision, although relating to a matter within the province's power, is inconsistent with a provision in Chapter 3 of the interim Constitution. It needs to be emphasised that in the first case an inconsistency can occur even if the provincial bill of rights were to repeat *verbatim* a corresponding provision in Chapter 3 of the interim Constitution; the inconsistency not being between the respective corresponding provisions, but between the provision in the provincial bill of rights and section 126. There are many instances of this in the provincial Constitution.

[27] The way is now clear to consider whether any provision in the bill of rights (Chapter 3) of the provincial Constitution is inconsistent with the interim Constitution or the Constitutional Principles because it purports to usurp powers or functions of Parliament. The contents of a right to a fair trial are, for instance, referred to in some detail in clause 19(3). Similarly, in clause 21, labour relations are dealt with in some detail. In clause 31 one finds detailed provisions for states of emergency and their suspension. These are all examples of areas falling patently outside the domain of competence of provincial legislatures. Another attempt to usurp national power is the provision in Chapter 3 clause 30(3) where, amongst others, it is asserted that the entrenchment of the rights in terms of the provincial Constitution shall not be construed

as -

> "denying the existence of any other rights or freedoms recognised or conferred by the Constitution of the Republic of South Africa . . . to the extent that they are not inconsistent with this Constitution."

This bears all the hallmarks of a hierarchical inversion. The provincial Constitution is presented as the supreme law recognising what is or is not valid in the national Constitution. It has no power to do so.

[28] The fundamental question which still remains is whether, in respect of the provincial bill of rights, the purported usurpations referred to are saved by clause 1(8) of Chapter 14 which in express terms limits the "enforcement" of the rights in the bill of rights "to the sphere of competence and to the powers and functions of the Province." In our view it does not, for two reasons. Firstly, it is a general provision and as such would not normally prevail over the specific and unambiguous provisions referred to above;[15] it is inconceivable that the drafters intended to give extensively with the one hand, as they have done in all the instances referred to above, and then to take it all away again instantly with the other. Secondly, and even if, as a matter of construction, clause 1(8) of Chapter 14 could in some way prevail over the provisions in question, this would still not render them certifiable. It is a device virtually identical to the

[15] On the basis of the maxim *generalia specialibus non derogant;* see *S v Mhlungu & Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) and *S v Botha & Andere* 1994 (4) SA 799 (W).

consistency device fully dealt with below in paragraphs 36 and 37 below and cannot, for the reasons there given, pass certification muster. It is a similar unconstitutional attempt to avoid certification and likewise cannot be countenanced for the same reasons; to postpone the question, for example, as to whether a province can, in any circumstances, declare a state of emergency to some later date, probably not until the state of emergency is in fact declared, simply cannot be countenanced. It would similarly run diametrically counter to the very purpose of certification, as already explained. The people of KZN are entitled to know now, at certification, and not at some uncertain future date, precisely what their bill of rights comprises, what in fact it is.

[29] In this context it must also be stressed, however, that the limitation embodied in clause 1(8) of Chapter 14 cannot, in all the circumstances of its possible application, be treated as an unacceptable inconsistency device. The subclause seems somewhat out of place in a chapter purporting to deal with "Final and Transitional Arrangements" when its purported impact is on Chapter 3. It would not, however, be impermissible for a provincial legislature which is concerned to ensure scrupulously that a provincial bill of rights did not conflict with the interim Constitution to provide for such a limitation in its bill of rights. The purpose would be to ensure, with the greatest care, that the bill of rights does not exceed the legislative powers of the province in either of the senses referred to above.

[30] It must be acknowledged that the preparation of a provincial bill of rights aimed at avoiding these problems could present extremely difficult and complex drafting problems. It might not be possible, without cumbersome prolixity, to formulate each right in such a way so as to make unmistakeably clear that it only applies to matters within the powers of the province. In these circumstances a general limiting provision would be appropriate and permissible. But not in respect of provisions in a bill of rights which are not capable of being construed in a manner which would bring them within the sphere of competency of a province. Such provisions patently purport to usurp national powers and will not, for the reasons mentioned, be saved by such a general limitation.

[31] The bill of rights in the provincial Constitution is deeply flawed in the many respects already mentioned and will have to be thoroughly redrafted should the KZN Legislature still wish to embody a bill of rights in a provincial constitution. We consider that our certification task in relation to the bill of rights goes no further than identifying its seriously flawed provisions.[16] It would be inappropriate for us in this judgment to embark on what would in effect be a definitive commentary on the provincial bill of rights for the guidance and benefit of the KZN Legislature, with the implication that a bill of rights enacted in conformity with such commentary would pass a later certification process as a matter of course. This would be tantamount to us drafting a bill of rights

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16 See section 160(4) of the interim Constitution and compare with section 71(2).

for the province. We consider that in the present circumstances the general principles we have outlined provide sufficient guidance for the provincial Legislature. In these circumstances the fact that we have identified specific offending provisions in the bill of rights is not to be construed as a finding that there are no other.

[32] In clause 1(2) of Chapter 5, exclusive legislative powers are conferred upon the KZN Legislature. In clause 1(4) executive authority is "conferred" upon the province in certain circumstances. It is unnecessary even to consider whether this conflicts with any corresponding powers of the national Legislature or executive in the interim Constitution for the simple reason that a province has no authority at all to "confer" any legislative or executive authority, of whatsoever nature, on itself. All such power emanates exclusively from the interim Constitution.

[33] A related and equally serious attempted usurpation of power is the provision made
in Chapter 8 for the establishment of a constitutional court for KZN and in clause 2(7) of Chapter 14 for the functions of such court to be performed by the provincial division of the Supreme Court pending its establishment. Chapter 8 clause 1(3) purports to confer on such constitutional court exclusive power to decide on the constitutional nature of a dispute and clause 1(4) exclusive jurisdiction to decide disputes in constitutional matters between organs and powers "established or recognised in terms of this Constitution" and to "declare a law of the Province unconstitutional". The

interim Constitution nowhere confers any power on a province to establish courts of law, whatever their jurisdiction may be. Chapter 7 of the interim Constitution establishes and makes comprehensive provision for court structures. It is also made explicitly clear by sections 101(3)(c), (d) and (e) respectively that it is the provincial or local division of the Supreme Court as established by the interim Constitution which has jurisdiction to enquire into the constitutionality of "any law applicable within its area of jurisdiction, other than an Act of Parliament"; jurisdiction in relation to disputes of a constitutional nature between local governments or between a local government and a provincial government; and jurisdiction in respect of the determination of questions whether any matter falls within its jurisdiction. The KZN Legislature simply does not have the power it purports to exercise in Chapter 8 of the provincial Constitution.

[34] Clause 2(1) of Chapter 5 proclaims that "[t]his Constitution recognises" the exclusive legislative and executive authority of the "national Government" over certain matters and clause 2(2) similarly purports to recognise the "competence" of the "national Parliament" in certain respects. These assertions of recognition purport to be the constitutional acts of a sovereign state. They are inconsistent with the interim Constitution because KZN is not a sovereign state and it simply has no power or authority to grant constitutional "recognition" to what the national Government may or may not do.

[35] At the cost of repetition, none of the powers to which we have referred falls

within those conferred upon provincial legislatures by the interim Constitution, either under sections 126 read with Schedule 6 or section 160. We have not attempted to detail all the offending provisions. It is not necessary to do so.[17]

The Consistency Clauses

[36] These clauses in the provincial Constitution provide that certain of its provisions are of no force or effect if inconsistent with the interim Constitution or the Constitutional Principles. Thus, in Chapter 1 clause 1(9) it is provided that:

> "This Constitution, to the extent that it is not inconsistent with the Constitution of the Republic of South Africa, 200 of 1993, shall be the supreme law of the Province . . ."

Chapter 4 clause 1(1) provides that:

> "Any provision of this Constitution . . . including the allocation of powers and functions, but excluding the provisions relating to legislative and executive structures and procedures as set out in section 160(3) of the Constitution of the Republic of South Africa Act, 200 of 1993, which is inconsistent with the Constitution of the Republic of South Africa, Act 200 of 1993 , shall have no force and effect."

The submission, on behalf of the Speaker and the Premier, was that these provisions have the consequence that there can be no inconsistency between the provincial Constitution and the interim Constitution because any provision which is inconsistent is thereby rendered of no force and effect. That, indeed, is the apparent purpose of this

[17] Id.

device. More particularly it would effectively preclude this Court from testing any provision in the provincial Constitution against the requirements of section 160(3). Its application, no doubt, would be to immunise the provisions of that Constitution from the obligatory discipline of the constitutional certification process. We would be prevented from saying that a provision so immunised is not inconsistent with provisions of the interim Constitution. The objectives of finality and certainty would thereby be defeated. A province is only given powers to make a constitution which can objectively be tested by the Constitutional Court against the interim Constitution and the Constitutional Principles. It is given no constitutional power to make a constitution which effectively avoids that process. If it makes a constitution with that effect it acts *ultra vires* its powers in terms of the interim Constitution and such provisions are to such extent inconsistent with the interim Constitution.

[37] If the consistency clauses were to succeed as an immunisation device, the procedural consequences would be in conflict with the certification required by section 160. If a provincial legislative or executive act were to be challenged under the provisions of the provincial Constitution at some time in the future, a competent court would be called upon, in effect, to perform exactly the same process as we are now performing in the present certification process, ie it would have to consider whether the relevant provision of the provincial Constitution was consistent with the interim Constitution or the Constitutional Principles. And that could happen decades hence at a time when the interim Constitution has been replaced by a new constitutional text

pursuant to the provisions of sections 71 to 73A of the interim Constitution. Such a process is patently at variance with the certification process prescribed. On these grounds the consistency clauses are bad and cannot be certified.

[38] There are indeed circumstances, more fully considered in paragraphs 29 and 30 above, when it would be appropriate and permissible to use some form of inconsistency qualification in a provincial constitution to ensure scrupulously that a provision in it remains within the bounds of the provincial legislative competence. It would then function along the lines of an interpretative device similar to section 35(1) of the interim Constitution. This would be permissible when there has been a genuine effort to remain within such bounds; not when they have been flagrantly and obviously exceeded and the provision is nothing other than a device to avoid the express requirements of section 160(4).

The Suspensive Conditions

[39] Various provisions in the provincial Constitution suspend the coming into operation of substantial portions of the provincial Constitution until a later date or on certain conditions. Firstly, Chapter 4 clause 1(2) provides that Chapters 5 and 8 will come into effect only when the interim Constitution is replaced by the final Constitution and then only to the extent that their provisions are consistent with the final Constitution and provided further that the powers of KZN "shall not be substantially reduced." Chapter 5 purports to allocate legislative and executive powers and functions between

the national and the provincial Governments and to lower levels of government. Chapter 8 provides for the establishment and functioning of a provincial constitutional court. Secondly, Chapter 14 clause 2(12)[18] needs to be considered. Its provisions do not, strictly speaking, suspend the coming into operation of any provisions of the provincial Constitution but the subclause in question embodies a device the effect whereof is closely analogous to that employed in the previously mentioned clause and it is appropriate to deal with it in the same context. Thirdly, Chapter 15 contains four separate sets of provisions which make the coming into operation of substantial parts of the provincial Constitution conditional upon (a) various provisions, relating *inter alia*, to legislative and executive powers and functions and to security and police, not being inconsistent with the Constitution referred to in Chapter 5 of the interim Constitution; or, (b) certain resolutions of a particular nature <u>not being taken</u> by the provincial Parliament within a certain period of time; or (c) certain resolutions of a particular nature <u>being taken</u> by the provincial Parliament after the provisions affected by such resolution have been approved by a Constitutional Commission; or, (d) similar resolutions on similar conditions <u>being taken</u> after the House of Traditional Leaders has in addition been consulted in respect of the provisions affected. These will be dealt with below.

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[18] The text whereof reads-

> "The provisions of this Constitution shall have no force and effect if and to the extent that they are not consistent with the constitution referred to in Chapter 5 of the Constitution of the Republic of South Africa, Act 200 of 1993, provided that the powers and functions of this Province with regard to its legislative authority and its power to pass a constitution are consistent with the constitution referred to in Chapter 5 of the Constitution of the Republic of South Africa, Act 200 of 1993, and further provided that such powers are not substantially inferior to those provided for in the Constitution of the Republic of South Africa, Act 200 of 1993."

[40] It was argued that, if allowed, this further device would circumvent the certification process by preventing this Court from examining the provisions suspended until the coming into operation of the final Constitution. And, of course, even if we were permitted to do so, we could not test the provisions suspended against the final Constitution. There is not yet one in operation. The foregoing, without more it was contended, demonstrates the defectiveness of this second device.

[41] We are by no means certain that when the only qualification to a provision is its suspension to a future certain time or even until the occurrence of some future uncertain event such provision cannot, in a certain sense, be amenable to the certification process. If the contents of the provision are otherwise clear they can linguistically form the object of the comparison which lies at the heart of the section 160(4) enquiry into inconsistency with the interim Constitution and the Constitutional Principles. Without wishing to extend private law analogies too far, it is well established that in the field of contract an agreement subject to a suspensive condition is already a binding agreement, that its terms are clearly established and that, for example, a provisional creditor may, even before the condition precedent has been fulfilled, institute proceedings to protect such creditor's provisional right.[19] But what is clear is that merely to suspend part of the text

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[19] See eg *Odendaalsrust Municipality v New Nigel Estate GM Co Ltd* 1948 (2) SA 656 (O) 665-8 and *Tuckers Land & Development Corporation (Pty) Ltd v Strydom* 1984 (1) SA 1 (A) 20-2.

of a provincial constitution that is inconsistent with the interim Constitution, cannot save the constitution from the consequence of such inconsistency.

[42] Section 160(4) of the interim Constitution provides that the "text" of a provincial constitution passed by a provincial legislature "shall be of no force and effect" unless the Constitutional Court certifies it in accordance with the provisions of that subsection read with subsection (3). A suspended provision is part of the text, and it does not cease to be such simply because its operation is suspended until a future date, or is made contingent upon the happening of a future event. The text of the provincial Constitution is to be evaluated and certified as an integrated whole, because the meaning and effect of one particular clause can be crucially dependent on that of another. If certain clauses of the text come into operation after others, then the fact that certain clauses are inoperative for a period of time may well influence the effect and meaning of those parts of the text which do come into operation immediately upon certification in the absence of the suspended clauses.

[43] The device of suspension in effect requires the Constitutional Court to do two exercises in the certification process. It must satisfy itself not only that the text is certifiable as it stands when it comes into operation immediately upon certification (ie without the suspended clauses), but also that it is certifiable if the suspended clauses come into operation. Notionally it may well be possible to carry out the textual and other comparisons necessary for certification on both approaches, but it does involve a double exercise. A difficult question arises in this regard, namely, whether on the proper

construction of section 160 it contemplates such a double exercise. It is unnecessary, for purposes of the present certification judgment, to answer this question, because all the suspensive conditions detailed above embody other provisions which render the suspensive condition objectionable and inconsistent with the provisions of the interim Constitution.

[44] Chapters 5[20] and 10,[21] the operation of the words "of the Province" in section 2(1) of Chapter 6 [22] and section 1 of Chapter 13 [23] have been suspended until the coming into force of the new constitutional text to be drafted in terms of Chapter 5 of the interim Constitution. It is indisputable that these provisions are in fact inconsistent with the interim Constitution. It was contended, however, that the suspension avoided the inconsistency, and that their validity was saved by a provision that they "shall come into force and effect only if, and to the extent that they are not inconsistent with" the new constitutional text.[24] This contention fails for two reasons. Firstly, because the text of the suspended provisions is inconsistent with the text of the interim Constitution, and secondly, because section 160 empowers a provincial legislature to adopt a constitution for the constitutional order governed by the interim Constitution, but does not empower

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[20] Ch 4 cl 1(2) and Ch 15 cl 1(1)(a).

[21] Ch 15 cl 1(1)(c).

[22] Ch 15 cl 1(1)(b).

[23] Ch 15 cl 1(1)(d).

[24] Ch 15 cl 1(1).

it to do so for a future constitutional order which will come into existence only after the interim Constitution has ceased to be in force.

[45] The provisions of Chapters 1 and 3 and certain provisions of Chapter 9 are suspended for a period of six months from the commencement of the KZN Constitution, and will not come into force if during that period a resolution to that effect is passed by forty per cent of the members of the provincial Legislature;[25] at the same time it is provided that Chapter 8 and certain provisions of Chapters 9, 12 and 13 will have no force and effect unless they are approved during that period by the provincial Legislature by two-thirds of all its members after consideration of the relevant provisions by a Constitutional Commission;[26] and certain other provisions of Chapter 9 only if, in addition, the House of Traditional Leaders has been consulted.[27]

[46] Apart from the fact that certain of the provisions of these suspended sections are also inconsistent with the interim Constitution,[28] they cannot be said to be part of a constitution ripe for certification in terms of section 160. Section 160 contemplates the certification of a constitutional text that has been adopted; not one that might be adopted or might be repudiated dependent on decisions still to be taken. At the time of the submission of the KZN Constitution to this Court for certification, a final decision on

[25] Ch 15 cl 1(2).

[26] Ch 15 cl 1(3)(a).

[27] Ch 15 cl 1(4)(a).

[28] See paras 14, 16, 27, 32, 33, 34, 36 and 37 above.

important provisions of the constitutional text had not yet been taken; in truth, the decision on such provisions had been deferred for later determination by the provincial Legislature, and the constitution in the form in which it was submitted for certification was inchoate, and lacking in finality. The request that the text be certified before a final decision has been taken on these material provisions is premature, and on this ground alone the Constitution cannot be certified.

Conclusion

[47] From the foregoing discussion, it is apparent that the provincial Constitution is fatally flawed and cannot be certified under the provisions of section 160(4) of the interim Constitution. Our analysis has been directed to the flaws relating to what we have categorised as the usurpation of national powers, the consistency clauses and the suspensive conditions. It is necessary to emphasise that our discussion does not purport to be an all-embracing one, for to have done so would have been supererogatory, given the widely flawed nature of the provincial Constitution. It should therefore not be seen as definitive, either in regard to the three categories we have identified or in other respects. Should the KZN Legislature decide to adopt a new or amended provincial constitution, and in the interest of avoiding disputes over the future certification of a replacement, account will no doubt be taken of the detailed objections lodged this time and on which we pass no judgment now.

Order

[48] We are unable to and therefore decline to certify that the text of the Constitution of the Province of KwaZulu-Natal, 1996 adopted on 15 March 1996 by the KwaZulu-Natal Legislature is not inconsistent with the provisions of the Constitution of the Republic of South Africa, Act 200 of 1993 and the Constitutional Principles which constitute Schedule 4 to the said Constitution.

Chaskalson P

Mahomed DP

Ackermann J

Didcott J

Goldstone J

Langa J

Madala J

Mokgoro J

O'Regan J

Sachs J

Kriegler J

For the Speaker of the KwaZulu-Natal Legislature and the Premier of KwaZulu-Natal:	P Hodes SC, J Kruger SC and D Unterhalter instructed by Friedman & Falconer
For the African National Congress:	W Trengove SC, G Marcus SC and M Chaskalson instructed by Von Klemperer Davis & Harrison Inc.
For the Government of National Unity:	JJ Gauntlett SC, JC Heunis and IV Maleka instructed by the State Attorney, Cape Town