IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA

Case No.CCT/24/94

In the matter between:

ZANOMZI PETER ZANTSI

And

THE COUNCIL OF STATE, First Respondent

THE CHAIRMAN OF THE COUNCIL OF STATE Second Respondent

And

THE MINISTER OF DEFENCE, CISKEI Third Respondent

Heard on: 16 May 1995

Delivered on: 22 September 1995

Judgment

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[1] **Chaskalson P:** I agree with the judgment of Trengove AJ and will confine my remarks to the application of Section 102(8) of the Constitution. This Section provides:

> If any division of the Supreme Court disposes of a matter in which a constitutional issue has been raised and such court is of the opinion that the constitutional issue is of such public importance that a ruling should be given thereon, it may, notwithstanding the fact that the matter has been disposed of, refer such issue to the Constitutional Court for a decision.

Before an issue can be referred to this Court in terms of Section 102(8) three requirements must be satisfied. First, a constitutional issue must have been raised in the proceedings; secondly, the matter in which such issue was raised must have been disposed of by the Supreme Court[1]; and thirdly, the division of the Supreme Court which disposed of the matter must be of the opinion that the constitutional issue is of sufficient public importance to call for a ruling to be made thereon by this Court.

[2] In the United States of America, and as long ago as 1885, Matthews, J said:

> [N]ever... anticipate a question of constitutional law in advance of the necessity of deciding it; ... never... formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.[2]

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1 It is not clear when and in what circumstances a matter can be said to have been "disposed of" within the meaning of section 102(8), particularly if the possibility exists that an appeal may be noted. We heard no argument on this and it is not necessary to deal with that issue in this judgment

2 *Liverpool, New York and Philadelphia Steamship Co. v Commissioners of Emigration* 113 US 33, 39 (1885).

This rule, though not absolute, has ordinarily been followed by courts in the United States of America since then.[3] Although the United States jurisprudence is influenced by the "case" and "controversy" requirement of Article III of the US Constitution, the rule stated by Matthews, J is a salutary rule which has been followed in other countries.[4]

[3] It is also consistent with the requirements of section 102 of our Constitution and the decision of this Court in *S v Mhlungu and Others*[5] where Kentridge AJ said:

> I would lay it down as a general principle that where it is possible to decide any case, civil or criminal,

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3 *Burton v US* 196 US 283, 295 (1905); *Ashwander v Tennessee Valley Authority* 297 US 288, 341 (1936); *Joint Anti-Fascist Refugee Committee v McGrath* 341 US 123, 154-5 (1951); *Kremens Hospital Director v Bartley* 431 US 119, 133-4 (1977).

4 H.M. Seervai, *Constitutional Law of India:* Vol I 3ed (1983) para. 11.200 cites Chandrachud CJ in the *Rajasthan* case (1978) 1 S.C.R.1, for the proposition that "in the field of constitutional adjudication...the court will decide no more than needs to be decided in any particular case." See also Casey,J: *Constitutional Law in Ireland*, 2ed (1992), 284 where the author discusses cases in which the Supreme Court adopted the view that "Constitutional issues must be reached last".In *Law Society of Upper Canada v Skapinker* (1984) 8 CRR 193,214 the Supreme Court of Canada held that "[t]he development of the Charter as it takes its place in our constitutional law must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken." See also: *Borowski v Canada* 57 DLR (4th) 231,where a similar approach was adopted by the Supreme Court of Canada to the related question of "mootness".

5 1995 (7) BCLR 793 (CC), 821F-G para 59; 1995(3) SA 867 (CC), 894 para 59; see also *S v Vermaas* 1995 (7) BCLR 851 (CC), 858F-H para 13 (CC); 1995 (3) SA 292 (CC).

without reaching a constitutional issue, that is the course which should be followed.[6]

[4] The same principle underlies the provisions of section 102(5) which require appeals from a provincial or local division of the Supreme Court to be dealt with first by the Appellate Division and, where possible, to be disposed of by that Court without the constitutional issue having to be addressed. It is only where it is necessary for the purpose of disposing of the appeal, or where it is in the interest of justice to do so, that the constitutional issue should be dealt with first by this Court.[7] It will only be necessary for this to be done where the appeal cannot be disposed of without the constitutional issue being decided; and it will only be in the interest of justice for a constitutional issue to be decided first, where there are compelling reasons that this should be done.

[5] This rule allows the law to develop incrementally. In view of the far reaching implications attaching to constitutional decisions, it is a rule which should

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6 *Ibid* para 59; see also *Prokureursorde van Transvaal v Kleynhans* 1994 (4) BCLR 48 (T), 51C-52C; 1995 (1) SA 839 (T), 849D-850D.

7 Section 102(1) of the Constitution and Constitutional Court Rule 23(3).

ordinarily be adhered to by this and all other South African courts before whom constitutional issues are raised. It is within this context that the provisions of section 102(8) should be viewed and interpreted.

[6] Section 102(8) of the Constitution applies only to cases which have been disposed of. A referral of the moot issue in such circumstances is the exception, and it follows that the section should be invoked only in exceptional circumstances. In other words, there must be a compelling public interest that requires the reference to be made.[8]

[7] It is not ordinarily desirable for a court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest, and section 102(8) should not be invoked in order to refer to this court an issue which was not relevant to the case which had

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[8] In *Borowski v Canada supra* note 3, the Canadian Supreme Court held that although the general policy or practice was that courts may decline to decide cases which merely raise hypothetical or abstract questions, they had a discretion to depart from that general practice. According to the court, it was undesirable to lay down precise criteria for the exercise of such discretion except to emphasize that the court has to take into account the rationale behind the the general policy against deciding moot issues. First, in an adversary system, issues are best decided in the context of a live controversy. The second consideration is based on concern for judicial economy and the last is that it is generally undesirable and possibly an intrusion into the role of the legislature for a court to pronounce judgments on constitutional issues in the absence of a dispute affecting the rights of the parties to the litigation. The court ultimately dismissed the appeal stating that, "[t]he mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved."

to be decided.[9] In the present case, it is not clear from the judgments of the Ciskei Provincial Division whether the issue concerning the jurisdiction of provincial and local divisions of the Supreme Court generally, as distinct from the jurisdiction of the Ciskei Provincial Division, was in fact raised during the proceedings,or whether it was raised only in the judgments. But even if the issue was raised during the proceedings it was not, as appears from the judgment of Trengove AJ, relevant to the case which had to be decided. Section 102(8) should therefore not have been invoked.

[8] The issue has, however, become one of public importance as a result of the judgments given by the Ciskei Supreme Court. The judgments held that provincial and local divisions of the Supreme Court have jurisdiction to enquire into the validity of Acts of Parliament passed prior to the 27th April 1994. For the reasons given by Trengove AJ this is not correct, and to avoid the uncertainty that might otherwise result from such judgments, it has been necessary for this Court to deal with that issue. This Court is not,

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9 Compare in this regard the refusal of the courts to entertain applications for a declaration of rights in respect of abstract or hypothetical issues in *Anglo-Transvaal Collieries v SA Mutual Life Assurance Society* 1977(3) SA 631 (T),635E-636F confirmed on appeal *sub nom SA Mutual Life Assurance Society v Anglo-Transvaal Collieries* 1977 (3) SA 642 (A), 655D and 658H.

however, obliged to, and will not ordinarily decide issues, which are not correctly referred to it under Section 102(8).

A. CHASKALSON

PRESIDENT OF THE CONSTITUTIONAL COURT

[Mahomed DP, Ackerman, Didcott, Kriegler, Langa, Madala, Mokgoro, O'Regan, Sachs JJ and Trengove AJ concur in the judgment]

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And

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Heard on: 16 May 1995

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Judgment

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[9] **Trengove AJ:** In this matter the Ciskei provincial division (Pickard JP and Heath J) referred the following issue to this court for a decision in terms of section 102(8) of the Constitution of the Republic of South Africa, 1993 ("the Constitution"), namely:

> Whether or not provincial and local divisions of the Supreme Court have jurisdiction to inquire into the constitutionality of

acts of the legislatures of South Africa (as it then was) and the TBVC States which were passed prior to the commencement of the *new South African Constitution*.

(See: *Zantsi v The Chairman of the Council of State and Another* 1994 (6) BCLR 136 (Ck), 171; 1995 (2) SA 534 (Ck), 569).

Mr D P de Villiers, with Mr T Deva Pillay, appeared for Third Respondent and Mr W H Trengove, with Mr L Mpati and Mr K Mathee, as *amici curiae* for the Applicant at the request of this court. We are indebted to them for their assistance.

[10] The factual background of the referral can be summed up as follows. The Applicant was dismissed from employment in the Ciskei Defence Force on 22 April 1991. He intended instituting action against Third Respondent for alleged wrongful dismissal but was debarred from doing so by reason of his failure to comply with the provisions of section 71 of the Defence Act, 17 of 1986 (Ciskei). In terms of this section, civil proceedings had to be instituted within a period of six months after the cause of action had arisen.

[11] Applicant subsequently sought an order in the court a quo declaring section 71 to be unconstitutional on the ground that it was in conflict with article 1(2) of the Ciskei Bill of Rights, set out in Schedule 6 to the Republic of the Ciskei Constitution Decree, 45 of 1990. The article provided that "all persons shall be equal before the law".

[12] The application proceedings were initiated in June 1993, but the matter only came before the court for argument on some date (which does not appear from the papers before us) after 10 June 1994. At that stage the three Respondents no longer existed. Counsel however agreed that any order made in favour of Applicant would be regarded as an order against appropriate organs of the state under the Constitution.

[13] At the outset of the hearing, Pickard JP, raised the question-

> ... whether or not this court has now the jurisdiction to declare Act 17 of 1986 (Ciskei) or any portion thereof to be unlawful, unenforceable or invalid by virtue of its provisions being in conflict with fundamental rights protected in either the erstwhile Ciskei Constitution Decree or the South African

Constitution. (at 140J; 538I-J)

Counsel stated that they were of the view that the court had the necessary jurisdiction to deal with the application. Applicant's cause of action had arisen during 1991, proceedings had been initiated, and *litis contestatio* had occurred during 1993, whereupon the court had jurisdiction to deal with the dispute, which jurisdiction still endured.

[14] In opposing the application on the merits, counsel for respondents contended that the decision of the Ciskei Appeal Court in *Chairman of the Council of the State* v *Qokose* 1994 (2) BCLR 1 (Ck AD); 1994 (2) SA 198 (Ck AD), handed down on 10 June 1994, was binding on the court *a quo*. In that case the provisions of section 48 of the Police Act, 32 of 1983 (Ciskei), which were similar to those of section 71, were held to be valid and not unconstitutional.

[15] I now refer very briefly to views of the court *a quo* on the issue of jurisdiction raised by the learned Judge President at the beginning of the hearing, and its finding

on the merits of the application. Pickard JP was of the opinion that the question of jurisdiction revolved around the interpretation of the expression "Act of Parliament" in sections 101(3)(c) and 98(2)(c) of the Constitution. By various processes of reasoning, to which I need not now refer, the learned Judge came to the conclusion at 147F (545G) that-

> ... the only proper interpretation of the provisions of section 101(3)(c) would then be to interpret the expression "Parliament" to mean "Parliament as created by this Constitution".

He accordingly concluded at 147J to 148A (546A-B) that-

> ... on a proper interpretation of the provisions of s 101 of the Constitution, a provincial or local division of the Supreme Court has jurisdiction to adjudicate upon the constitutionality of any "Act" passed by any legislative body, other than Parliament of the new South Africa as created by Chapter 4 of the new South African Constitution.

[16] In a separate judgment, Heath J, agreed with the conclusion arrived at by Pickard JP and gave fairly extensive reasons for doing so. In considering the question of jurisdiction, the learned Judge referred in

some detail to a number of judgments in other divisions which had considered whether provincial or local divisions had jurisdiction to grant interim relief pending an approach to the Constitutional Court to contest the validity of a statutory provision. I do not consider it necessary to refer to any of these judgments because none of them deals with the issue raised in the referral.

[17] As to the merits of the application, the court *a quo* was of the opinion that *Qokose's* case was distinguishable as the appeal had been heard prior to the commencement of the Constitution, and had consequently been decided without reference to, or consideration of, its provisions. The court held that it was therefore not bound by the appeal court's decision in that case. The court found that section 71 was unconstitutional for reasons set out in *Matinkinca and Another v Council of State, Ciskei and Another* 1994 (1) BCLR 17 (Ck); 1994 (4) SA 472 (Ck) and it consequently made an order to that effect.

[18] Against this background, I return to the issue raised in the referral which, as I have mentioned, relates to the jurisdiction of a provincial or local division of the

Supreme Court to inquire into the constitutionality of "acts" of the legislatures of South Africa and the TBVC states which were passed before the commencement of the Constitution.

[19] A decision on this issue turns ultimately on the proper interpretation of sections 101(2) and 101(3)(c) of the Constitution. However, in view of the jurisdictional scheme of the Constitution it is necessary to refer first to the provisions of section 98(2) and (3) which relate to the jurisdiction of the Constitutional Court.

[20] Section 98(2) states that the Constitutional Court—

> shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including—

the matters particularized in subparagraphs (2)(a) to (g). Thus, throughout the whole of the Republic, as defined in section 1, the jurisdiction of the Constitutional Court, as the court of final instance, in respect of constitutional issues is unqualified and all-inclusive.

[21] Section 98(2)(c) relates to the issue with which we are concerned in this case, namely, the power to test laws, and particularly Acts of Parliament, said to be inconsistent with the Constitution. In terms of this section, the Constitutional Court has jurisdiction over—

> any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution.

[22] Section 98(3) is also relevant to this issue. It states that-

> The Constitutional Court shall be the only court having jurisdiction over a matter referred to in subsection (2), save where otherwise provided in sections 101(3) and (6) and 103(1) and in an Act of Parliament.

In other words, section 98(3) read with section 98(2)(c) states, in effect, that the Constitutional Court shall be the "only court having jurisdiction" to inquire into the validity of any law, including an Act of Parliament "save where otherwise provided in sections 101(3) and (6) and 103(1) and in an Act of Parliament". The last two references refer to special situations not particularly

relevant for present proposes.

[23] I come now to sections 101(2) and 101(3)(c) which read as follows-

> (2)Subject to this Constitution, the Supreme Court shall have the jurisdiction, including the inherent jurisdiction, vested in the Supreme Court immediately before the commencement of this Constitution and any further jurisdiction conferred upon it by this Constitution or by any law.

and

> (3)Subject to this Constitution, a provincial or local division of the Supreme Court shall, within its area of jurisdiction, have jurisdiction in respect of the following additional matters, namely- :..
>
> > (c)any inquiry into the constitutionality of any law applicable within its jurisdiction, other than an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of the Constitution.

[24] Mr de Villier's argument was based mainly on the provisions of sections 98(2)(c), 98(3) and 101(3)(c). He

submitted that the question whether a provincial or local division of the Supreme Court had jurisdiction to inquire into the constitutionality of a law was not determined by the consideration whether such law was passed (or made) before or after the commencement of the Constitution, but solely by the question whether it was one which in the contemplation of the framers of the Constitution, was an "Act of Parliament". If it was such an Act, the Constitutional Court would have exclusive jurisdiction by reason of the provisions of section 98(3) read with section 98(2)(c). By the same token, a provincial or local division of the Supreme Court would not have authority to adjudicate on the matter in terms of the jurisdiction conferred upon it by section 101(3)(c). Mr de Villiers further contended that although the expression "Act of Parliament" was not defined in the Constitution, such indications as there were, left no doubt that in the contemplation of the framers of the Constitution, the expression related to Acts passed by Parliament, sitting in Cape Town, irrespective whether such Acts were passed before or after the commencement of the Constitution.

[25] Mr Trengove, on the other hand, submitted that in addition

to the jurisdiction conferred upon it by section 101(3)(c), a provincial or local division of the Supreme Court was empowered by section 101(2) to inquire into the constitutionality of all legislation, including Acts of Parliament, whether passed before or after the commencement of the Constitution. Mr Trengove's argument in support of this submission can be summed up as follows. Section 101(2) of the Constitution entrenches the "inherent jurisdiction" vested in the Supreme Court immediately before the commencement of the Constitution. This inherent jurisdiction of the Supreme Court has at all times prior to the commencement of the Constitution included the power of judicial review of Acts of Parliament. This power, so the argument continued, was rooted in our common law; it has moreover been asserted and applied by our courts in a number of well-known cases to which we were referred; it was furthermore confirmed and reinforced, in effect, by section 19(1)(a) of the Supreme Court Act, 54 of 1959; and finally, it was expressly acknowledged and preserved by section 34(2)(a) of the Republic of South Africa Constitution, Act 110 of 1983. Mr Trengove also contended that section 101(3)(c), read with section 101(2), was open to an interpretation

which did not vest the Constitutional Court with exclusive jurisdiction to review "Acts of Parliament", alternatively, that if section 101(3)(c) were to be construed as ousting the Supreme Court's jurisdiction to inquire into the validity of "Acts of Parliament", the ouster should be narrowly construed as applying only to Acts of Parliament passed after the commencement of the Constitution. This was the approach of Heath J who found support for this conclusion, *inter alia*, from the presumption against the ousting of the jurisdiction of the Supreme Court (at page 164B-C; 562F-G), from the principle that a constitution should be construed generously so as to give individuals "the full measure of the rights and freedoms referred to" (at page 162B,163I; 560E,562C) and consistently with the "spirit and purpose of sections 98 and 101"(at page 164D; 562H).

[26] I shall first deal with Mr Trengove's submission that, by reason of the entrenchment in section 101(2) of the inherent jurisdiction vested in the Supreme Court immediately prior to the commencement of the Constitution, a provincial or local division of the Supreme Court has jurisdiction to inquire into the constitutionality of all

legislation, including Acts of Parliament, whether passed before or after the commencement of the Constitution. I do not consider it necessary to decide whether the inherent jurisdiction vested in the Supreme Court immediately before the commencement of the Constitution included the power to inquire into the validity of Acts of Parliament. For present purposes, I shall assume that it did. The crucial question, nevertheless, is whether the inherent jurisdiction of the court as entrenched in section 101(2), included the power of review of Acts of Parliament. In order to determine this question, it is necessary to construe section 101(2) in the context of the constitutional scheme of division of powers and functions within the judiciary. In this respect there is, in my view, a fundamental flaw in Mr Trengove's line of reasoning - it does not take sufficient account of the fact that the provisions of section 101(2) must be regarded as being subordinate to those of section 98(2) and (3).

[27] In this regard, it is important to note, first, that the provisions of section 101(2) are governed by the words "subject to the Constitution". As to the meaning and

effect of the phrase "subject to," I respectfully agree with, and adopt, what Miller JA said in the following passage in *S v Marwane* 1982 (3) SA 717 (A), 747H to 748A, namely-

> The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject' is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that *that which is now being enacted is not to prevail in* circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, it not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one.

In the present instance, section 98(2) and (3) are plainly the dominant provisions and would prevail over section 101(2) in the event of conflict.

[28] As previously indicated, the exclusivity of jurisdiction conferred upon the Constitutional Court by section 98(3) with reference to the matters as set out in section 98(2), is subject to modification only as stated in the proviso.

There is no reference to section 101(2) in the proviso. It follows that the provisions of section 101(2) should not be construed as constituting a modification of the Constitutional Court's exclusive jurisdiction, in terms of section 98(3) read with section 98(2)(c), to inquire into the constitutionality of Acts of Parliament. However, if the expression "inherent jurisdiction" were construed - as counsel contended it should be - as inclusive of the power of review of Acts of Parliament, the provisions of section 101(2) would, to that extent, manifestly conflict or be inconsistent with the provisions of section 98(2) and(3)(c).

[29] The interpretation of section 101(2) advanced by Mr Trengove also gives rise to other inconsistencies or anomalies. For example, according to that interpretation, section 101(2) confers jurisdiction upon a provincial or local division of the Supreme Court to inquire into the constitutionality of any law, applicable within its area of jurisdiction, including an Act of Parliament, whereas in section 101(3)(c) the jurisdiction of such a provincial or local division to inquire into the constitutionality of laws, relates to "any laws applicable within its area of

jurisdiction, other than an Act of Parliament."

[30] In endeavouring to reconcile his interpretation of the extent of the inherent jurisdiction of the Supreme Court, entrenched in section 101(2), with the provisions of section 101(3)(c), Mr Trengove was constrained to resort to a somewhat artificial construction of the latter section. He contended that the language of the section did not exclude or revoke the Supreme Courts' inherent power of judicial review of Acts of Parliament - it merely entrenched the Supreme Court's jurisdiction to inquire into the constitutionality of any law applicable within its area of jurisdiction, and excluded Acts of Parliament from the general entrenchment. What this argument however overlooks, is that if the Supreme Court's inherent jurisdiction immediately prior to the commencement of the Constitution, *in fact included the power of judicial* review of Acts of Parliament, such power has, as I have already mentioned, been excluded or revoked by section 98(3) read with 98(2)(c), and has not been reinstated in section 101(3)(c) or in any other section of the Constitution.

[31] There is a further factor militating against the correctness of the interpretation of section 101(2) contended for by Mr Trengove. Section 101(4) confers the powers of the Constitutional Court in terms of section 98(5), (6), (7), (8) and (9) upon a provincial or local division of the Supreme Court "for the purposes of exercising its jurisdiction under subsection (3)." If the inherent jurisdiction of the Supreme Court as entrenched in section 101(2), had included the power of judicial review of Acts of Parliament, the Constitution would, no doubt, have provided for a similar conferral of powers upon a provincial or local division for the purposes of exercising its jurisdiction under section 101(2), but no such provision exists.

[32] In the result, I have come to the conclusion that whatever the scope of the Supreme Court's inherent jurisdiction immediately before the commencement of the Constitution might have been, its inherent jurisdiction as entrenched in section 101(2) does not include the power of review of the constitutionality of Acts of Parliament.

[33] I now come to the provisions of section 101(3)(c). The

question for consideration is whether this section confers jurisdiction upon a provincial or local division of the Supreme Court to inquire into the constitutionality of an Act of Parliament passed before the commencement of the Constitution. The answer to this question depends, as Pickard JP observed, on the proper interpretation of the expression "Act of Parliament" in the context of sections 101(3)(c) and 98(2)(c). It will be recalled that the learned judges in the court *a quo* were of the opinion that the expression applied only to Acts of Parliament passed after the commencement of the Constitution, and not to Acts passed before that date.

[34] Central to the reasoning of Pickard JP were two propositions. First, none of the legislatures of the Republic of South Africa or Transkei, Bophuthatswana, Venda and Ciskei "were recognised by the vast majority of the subjects of the new South Africa as the legitimate representatives of the people or as the legitimate legislatures for them." Consequently, in the context of the new democratic Constitution, the term "Parliament, when used in its ordinary sense, does not include... any of those legislatures." Secondly, since none of the

legislatures of the old Republic of South Africa or the TBVC states had authority to legislate for the whole of what is now the national territory, none of them can be said to have been a Parliament within the meaning of the 1993 Constitution.

[35] The 1993 Constitution is an Act passed by the old South African Parliament. It does not purport to bring about a merger between five "independent countries". On the contrary, it recognises only the sovereignty of South Africa, and proceeds on the basis that South Africa is claiming sovereignty over the TBVC states, repealing the legislation by which they were previously established, and referring to them in the text as areas "which form part of the national territory." It makes provision for constitutional continuity, treating the 1983 Constitution of the Republic of South Africa as the previous Constitution. Consistently with this, the name of the country remains the Republic of South Africa, the then South African President was empowered to bring the provisions of the Constitution into force prior to April 1994 (Section 251), the national revenue fund of the Republic of South Africa established under the 1983

Constitution is deemed to be the State Revenue Fund (Section 240), the elections for the new Parliament were to be conducted in terms of the South African Electoral Act 1993 (Section 249), under the supervision of the Independent Electoral Commission (Section 250), and local government elections are to be conducted in terms of the South African Local Government Transition Act 1993 (Section 245). In Section 234 one "Parliament" is contemplated, and the reference is clearly to the South African Parliament in Cape Town. In the context of the Constitution as a whole it is clear that "Act of Parliament" means an Act of the South African Parliament sitting in Cape Town. (See also *Japaco Investments (Pty) Ltd and Others v The Minister of Justice* 1995 (1) BCLR 113(C), 116D-F). This has been accepted by almost every division of the Supreme Court both before and since the decision of the Ciskei Provincial Division in this case. In my view, therefore, the two central propositions on which Pickard JP based his judgment must be rejected.

[36] The Constitution does not contain a definition of the expression "Act of Parliament". However, this expression has formed part of the definition of the word "law" in our

Interpretation Acts ever since 1910 (see section 3, s.v. "law" in the Interpretation Act, 5 of 1910). In the present Act, Interpretation Act, 33 of 1957, the word "law" is defined in section 2 as-

> "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law."

The word "Parliament" was initially defined in these Interpretation Acts as meaning "the Parliament of the Union of South Africa" but since 1961 it has meant "the Parliament of the Republic of South Africa." Thus, since the establishment of the Union of South Africa in 1910, the expression "Act of Parliament" has consistently been used in our statute law with reference to legislation passed by the South African Parliament - by the Parliament of the Union of South Africa during the period 1910 - 1961, and from then onwards, by the Parliament of the Republic of South Africa. The expression has never been used in our statute law with reference to any laws passed or made by the Parliaments or legislatures of any of the former TBVC States. The question whether, in the context of the Constitution, the expression "Act of Parliament"

refers to an Act passed either before or after the commencement of the Constitution, or to an Act regardless of when it was passed, must of course be determined with reference to the context in which it occurs.

[37] I return to the provisions of sections 98(2)(c) and 101(3)(c) to consider whether in the context of these sections the expression "Act of Parliament" includes acts passed before the commencement of the Constitution. In view of the effect of provisions of section 98(3), I shall first deal with the meaning of the words "Act of Parliament" in section 98(2)(c). Having regard to the all-inclusive nature of the jurisdiction conferred upon the Constitutional Court by section 98(2) and the ordinary meaning of the language of section 98(2)(c), I have no doubt that in this section the expression "Act of Parliament" refers to any such Act irrespective of whether it was passed before or after the commencement of the Constitution. This becomes very clear if the section is construed, as it should be, with due regard to the meaning assigned to the word "law" in the Interpretation Act. In the context of section 98(2)(c) the words "any law, including an Act of Parliament" and "such "law", clearly

mean "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law." (my emphasis). So construed, section 98(2)(c), in effect, confers jurisdiction upon the Constitutional Court over any inquiry into the constitutionality of "any law, proclamation, ordinance, Act of Parliament, or other enactment having the force of law", irrespective of whether "such law, proclamation, ordinance, Act of Parliament, or other enactment having the force of law" was passed or made before or after the commencement of the Constitution.

[38] It is now necessary to consider the meaning of the expression "Act of Parliament" in the context of section 101(3)(c). In this regard, it is important to bear in mind that the jurisdiction conferred upon a provincial or local division of the Supreme Court by this section is concurrent jurisdiction and that it, in effect, modifies the exclusivity of the jurisdiction conferred upon the Constitutional Court by section 98(3) with reference to the subject matter of section 98(3)(c). The essential difference between the scope of the jurisdiction conferred by sections 98(2)(c) and 101(3)(c) upon the respective

courts, is that section 98(2)(c) confers jurisdiction upon the Constitutional Court over "any inquiry into the constitutionality of any law, including an Act of Parliament" (my emphasis), whereas section 101(3)(c) confers jurisdiction upon a provincial or local division of the Supreme Court in respect of "any inquiry into the constitutionality of any law ... other than an Act of Parliament." (my emphasis) This comparison of the wording of the two clauses shows quite clearly that the jurisdiction conferred by section 101(3)(c) does not include the power to inquire into the constitutionality of Acts of Parliament, nor does it modify or affect the exclusivity of the Constitutional Court's jurisdiction to do so, in any manner. Thus, the question whether a provincial or local division of the Supreme Court has jurisdiction in terms of section 101(3)(c), to inquire into the constitutionality of any law depends entirely upon whether that law is an Act of Parliament, or not. If it is, a provincial or local division would have no jurisdiction in the matter for it would fall within the exclusive jurisdiction conferred upon the Constitutional Court by section 98(3) read with section 98(2)(c) in respect of any inquiry into the constitutionality of an

Act of Parliament. This in my view follows clearly from the structure and provisions of the Constitution dealing with the judicial authority and the jurisdiction of the Courts in respect of constitutional issues, and cannot be avoided, as Heath J sought to do, by a resort to presumptions and to a "generous" and "purposive" interpretation. In fact, in the present case, the adoption of a purposive interpretation does not support the conclusion reached by Heath J. In my view the clear purpose of the relevant provisions was to ensure that the Constitutional Court would be the only Court with jurisdiction to set aside an Act of Parliament. What other purpose could there have been for the provisions of section 98(3) and the deliberate distinction drawn in sections 98(2) and 102(3) between the jurisdiction of the Constitutional Court and the jurisdiction of the Supreme Court? In this respect, and without seeking to express any opinion in regard to the conflicting decisions on the jurisdiction of the Supreme Court to grant interim relief in disputes in which the validity of an Act of Parliament is in issue (a matter which has now been resolved by the provisions of section 16 of the Constitutional Court Complementary Act, 13 of 1995), I agree with the comments

of Didcott J in *Bux v The Officer Commanding the Pietermaritzburg Prison and Others* 1994 (4) BCLR 10 (N) 14J to 15F; 1994 (4) SA 562 (N), 566D-J.

[39] I do not consider it necessary to deal with Mr Trengove's alternative submission in respect of section 101(3)(c) because it does not take account of the effect of section 98(3) and is founded on a premise which I have already rejected as unsound, namely that section 101(2) entrenches the inherent jurisdiction of the Supreme Court to inquire into the constitutionality of an Act of Parliament.

[40] Finally, as to laws passed or made by the legislatures of the former TBVC States prior to the commencement of the Constitution, I have already indicated that, in my opinion, those laws do not fall within the definition of an Act of Parliament. It follows that a provincial or local division of the Supreme Court would have jurisdiction, under section 101(3)(c), to inquire into the constitutionality of any such law, applicable within its area of jurisdiction.

[41] In the result, I have come to the conclusion that the

issue referred to this Court by the Ciskei Provincial Division in terms of section 102(8) of the Constitution should be decided as follows–

1. A provincial or local division has no jurisdiction to inquire into the constitutionality of an Act of Parliament passed by the South African Parliament, irrespective of whether such Act was passed before or after the commencement of the Constitution.

2. As to a law passed or made by any of the legislatures of the former TBVC States, a provincial or local division of the Supreme Court has jurisdiction, in terms of section 101(3)(c), to inquire into the constitutionality of any such law applicable within its jurisdiction.

A Chaskalson

for J. TRENGOVE

ACTING JUDGE OF THE CONSTITUTIONAL COURT

[Chaskalson P, Mahomed DP, Ackerman, Didcott, Kriegler, Langa, Madala, Mokgoro, O'Regan, Sachs JJ concur in the judgment]

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