CASES / VONNISSE

VULTURES BEFORE THE CONSTITUTIONAL COURT: THE CHEQUE IS IN THE MAIL

Khohliso v S [2014] ZACC 33

1 Introduction

The legislative protection of wildlife in the Eastern Cape is not in what one would describe as a state of orderliness. Considering merely provincial or other regional legislation, one finds that there are at least three (four, if one includes the Problem Animal Control Ordinance 26 of 1957) such pieces of legislation operating simultaneously, or in parallel, depending upon where one finds oneself in the Eastern Cape, regulating the same subject matter. In the first place there is Decree 9 of 1992 which applies to what was once the independent homeland of Transkei before Transkei once again became part of the "new" South Africa, following the constitutional developments since 1993. Decree 9 was issued by presidential decree upon the recommendation of a Military Council, following a military coup which soon replaced the "democratic" government of the Transkei. Similarly there is the Nature Conservation Act 10 of 1987 (Ciskei) which applies to what was the independent homeland of Ciskei, which also became part of South Africa following the same constitutional developments since 1993. (The Ciskei too suffered a military coup soon after attaining independence.) As for the remainder of the Eastern Cape, the subject matter is regulated by the (Cape) Nature and Environmental Conservation Ordinance 19 of 1974, a creation of the Cape Provincial Council then in existence. The Provincial Councils were ultimately abolished by the Provincial Government Act 69 of 1986, and their law-making powers were transferred to the Executive.

The result of this farrago of legislation is that the status of each piece is unclear. Do they constitute original legislation or delegated legislation, or did they constitute legislative acts as opposed to executive acts? As if the matter is not complicated enough, Parliament has adopted (national) legislation which overlaps with the subject matter regulated by the aforementioned provincial or regional legislation, namely the National Environmental Management: Biodiversity Act 10 of 2004 in terms of which the relevant Minister adopted the Threatened or Protected Species Regulations (GNR150 / GG29657 / 20070223). A new draft set of such Regulations has been published for comment (GN255 and 256 / GG38600 / 20150331).

In 1994 the sovereignty of Parliament gave way to the rule of law and the supremacy of the Constitution of the Republic of South Africa, 1996 (the Constitution). The validity of legislation could now be challenged before the courts on the grounds that it was in conflict with the Constitution. In this regard section 167(5) of the Constitution provides that the Constitutional Court had to confirm an order of invalidity made by a High Court in respect of an Act of Parliament, a provincial Act or conduct of the President. In terms of section 172(2)(a), the declaration of invalidity had no force unless confirmed by the Constitutional Court.

On 20 February 2010 Ms Nokhanjo Khohliso ("the Appellant") ran afoul of the Transkei Decree 9 of 1992, having had in her possession two vulture feet in contravention of the Decree. The Appellant was a traditional healer and intended to use the feet as ingredients to a remedy designed to protect her clients against theft. For her troubles, the magistrate's court handed her a sentence of a fine of R4000.00, or twelve months imprisonment. The Appellant appealed to the Eastern Cape High Court, Mthatha, against her conviction, essentially challenging the constitutionality of the provisions of the Decree in terms whereof she was convicted. The key question that is examined in this note is whether a declaration of such unconstitutionality is subject to confirmation by the Constitutional Court in terms of section 167(5) and 172(2)(a) of the Constitution (see above). Reduced to its essence, the issue is whether legislation of the nature of Decree 9 is subject to the abovementioned two sections.

2 *Khohliso v S* (Case 86/2011 EC High Court, Mthatha): The unconstitutionality of Decree 9

The Respondents unsuccessfully attempted to persuade the Court that the matter could be disposed of without having to indulge the argument relating to the constitutionality of the relevant provisions. The Court proceeded to examine the facts of the case and the relevant provisions that pertained to the question of constitutionality. The Appellant did not dispute her possession of the vulture feet. Her case was that she was taught during her training as a traditional healer to mix certain animal and birds' parts as part of traditional medicines. She was never taught of any prohibitions with regard to possession of certain species of animals or birds, and accordingly did not know of any such prohibitions in law.

Section 13(c) of the Decree prohibited the possession of any carcass of a protected wild animal. Vultures were such a protected species. Section 84(13) of the decree created strict liability in that it stipulated that "it shall be no defence that the accused had no knowledge of some fact or did not act wilfully". The Appellant challenged the constitutionality of section 13(c) of the Decree on the grounds that it created inequality between persons of the former Transkei and those in the rest of the Eastern Cape, and on the basis that it was in conflict with her rights to equality and dignity, postulated in sections 9 and 10 of the Constitution. She further contended that section 84(13) of the decree was in conflict with the right to a fair trial.

Referring to the test set out in *Harksen v Lane NO* (1998 (1) SA 300 (CC)) the Court had no difficulty in finding that the differentiation between people

living in the former Transkei and those living elsewhere in the Eastern Cape bore no rational connection to a legitimate governmental purpose. The Court accordingly held that the conviction of the Appellant fell to be dismissed on that ground.

In addition, referring to *S v Zuma* (1995 (2) SA 642 (CC); 1995 4 BCLR 401 (SA)), and *R v Benjamin* (3 EDC 337), the Court held that the strict liability created by section 84(13) of the Decree unjustifiably infringed the right to be presumed innocent, contained in section 35(3)(h) of the Constitution. In the result the Appellant's appeal was upheld, the conviction and sentence set aside, and sections 13(c) and 84(13) of the Decree declared inconsistent with sections 9, 10 and 35 of the Constitution.

But that was not where the drama ended. The third and final order of the Court referred the Court's declaration of invalidity to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution, and in due course the matter did serve before the Constitutional Court.

Interestingly, council for the second Respondent, the MEC, Economic Development, Tourism and Environmental Affairs, stated that the Department was aware of the anomalies that exist as a result of the different pieces of legislation that are in existence in the Province, and was in the process of correcting such anomalies. The state of affairs requires the MEC every year to issue a hunting proclamation, containing three different sets of rules for the year for the three territories, the contents of which differ widely (see, for instance, Eastern Cape Provincial Gazette 3331 of 30 January 2015). As argued in conclusion, such correction is urgently required.

Before examining this third and last order by the Court, it is well to consider that the *Khohliso* case was not the first wherein the Constitutional Court had to inquire into a similar reference for confirmation of unconstitutional invalidity. Similar questions came before the Constitutional Court in *Wearne v Ndebele NO* (CCT 15/08) *and Mdodana v Premier of the Eastern Cape* (CCT 85.13). These cases accordingly provide insight as to the Constitutional Court's approach to confirming declarations of invalidity in respect of provincial ordinances and Acts, and require analysis in order to appreciate the judgment of that Court in *Khohliso*.

3 *Weare v Ndebele NO* (CCT 15/08): Does an "ordinance" amount to a "provincial act"?

The *Weare* matter concerned an application for confirmation of an order of constitutional invalidity made in respect of section 22(5) of the Kwazulu-Natal Regulation of Racing and Betting Ordinance (28 of 1957). This section allowed natural persons only to hold bookmaking licences in the Kwazulu-Natal province, even though juristic persons in other provinces were permitted to do so. The High Court declared this to amount to a differentiation, and decided that this was in contravention of section 9(1) and section 9(3) of the Constitution (which provides for equality before the law, and prohibits unfair discrimination, respectively) (for criticism of this decision, see De Vos "High Court Judges, Equality Law and the Constitutional Court"

18 November 2008 *Constitutionally Speaking* http://constitutionallyspeaking.co.za/high-court-judges-equality-law-and-the-onstitutional-court/).

The Constitutional Court considered whether invalidation of provincial ordinances required their confirmation in the same way that an Act of Parliament and a provincial Act required Constitutional Court confirmation of invalidity. In particular, the Court narrowed this question so as to address the issue whether the Ordinance qualified as a "provincial Act", in which event confirmation in terms of sections 167(5) and 172(2)(a) would be required.

In coming to their conclusion, the Court placed great emphasis on the *history* and *status* of the Ordinance in terms of the 1910, 1961 and 1983 Constitutions, and the fact that it had been passed by a deliberative legislative body, namely a "provincial council". This contributed to the Ordinance having the status of a statute (rather than merely a by-law or regulation, which would certainly not require Constitutional Court confirmation) (*Middelburg Municipality v Gertzen* 1914 AD 544 550, as quoted in *Weare* par 24). In support of hereof, it was also noted that provincial council ordinances, unlike delegated legislation, were not subject to review for substantive unreasonableness because of their status as original legislation (*Weare* par 25).

This position changed with effect from 1 July 1986, when the Provincial Government Act, 1986 (Act 69 of 1986) abolished provincial councils and transferred their authority to provincial administrators. The proclamations issued by these officials had the status of delegated legislation. The Ordinance in question, which was considered to be original legislation, was amended a number of times by proclamation between 1987 and 1992, making its status problematic. The dawn of the Constitutional era did little to alter this uncertainty, although it was significant that the Ordinance was amended by the legislature thrice between 1994 and 1998 (*Weare* par 28).

The Court concluded that the Ordinance should enjoy a status equivalent to a "provincial Act" for the purposes of the sections requiring Constitutional Court confirmation of invalidity. In support of this conclusion, the Court highlighted the point that the KwaZulu-Natal Gambling Act, 1996 (Act 10 of 1996) allowed the Ordinance to regulate forms of gambling not covered by this Act, meaning that the entire Ordinance was in fact operable in the province. That the modern provincial legislature had not amended or substituted the relevant part of the Ordinance, was taken to imply that the legislature accepted the law as it stood (*Weare* par 35 and 36):

> "the effect of the amendment and incorporation is that the Ordinance as a whole should be seen as an expression of the legislative will of a provincial legislature and treated accordingly. Following from the notion of respect and comity articulated in *SARFU*, its invalidation should be subject to confirmation by this Court".

In sum, the post-Constitution pronouncement by the provincial legislature in assimilating the Ordinance was crucial in the Court's conclusion that the Ordinance was a provincial Act (see *Mdodana* par 34). The Court went on to add, however, that ordinances in respect of which the legislature has *not* acted, and which have not been incorporated into a statute or amended, are not necessarily excluded from the ambit of sections 167(5) and 172(2)(a) of

the Constitution (*Weare* par 36) (for general discussion of this decision, see Du Plessis *et al Constitutional Litigation* (2013) 6.4.1).

4 *Mdodana v Premier of the Eastern Cape* (CCT 85/13): The importance of the *status* of an ordinance

The applicant in this case sought confirmation of an order of invalidity issued by the Eastern Cape High Court, Grahamstown, in respect of the Pounds Ordinance 18 of 1938. The matter arose in respect of various provisions contained in the Pounds Ordinance that had resulted in livestock belonging to the applicant being impounded. The High Court considered the pertinent provisions to be unconstitutional because of their impact on the applicant's rights to protection against arbitrary deprivation of property, just administrative action and access to courts (as enshrined in s 25, 33 and 34 of the Constitution) (see *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19).

In determining whether this decision required confirmation, the Constitutional Court again placed great emphasis on its status and background. In fact, it underscored the following indicators as being "significant" for purposes of determining the status of an ordinance (see, in general, Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 118):

(a) its original source;

(b) its history from the time of enactment until the enactment of the Constitution; and

(c) the history beyond the enactment of the Constitution.

In applying these indicators, the Court noted that the Pounds Ordinance was passed in November 1938 by the Provincial Council of the erstwhile Cape of Good Hope (exercising original legislative authority), and that its operation extended to the entire (old) Cape Province. During the 1970s and 1980s, however, as discussed above, the former Transkei and Ciskei attained "independence" from the Republic of South Africa until 1994, and legislation passed by authorities in these areas continued to be applicable in those parts of what is now the Eastern Cape (*Mdodana* par 25 and 26).

As indicated above, Provincial Councils were abolished in 1986 and their original legislative powers were transferred to provincial administrators, who enjoyed the (executive) power to amend ordinances. In June 1994, the administration of the Pounds Ordinance was assigned to competent authorities in the Eastern Cape, Northern Cape and Western Cape in terms of proclamations issued by the President (*Mdodana* par 28).

Considering all the factors, the Court held that the case was distinguishable from *Weare* for two reasons: firstly, because the legislature had not assimilated the Pounds Ordinance into a provincial Act, or expressed itself on this law; and secondly, because the Pounds Ordinance was not applied uniformly throughout the Eastern Cape Province (because

of the continuing operation of different legislation in the erstwhile Ciskei and Transkei) (*Mdodana* par 35 and 36):

> "It is my view that in circumstances as peculiar as in this case, where in one territory there is parallel legislation on the same subject, a conclusion that the Ordinance is a provincial Act would be inappropriate. In this case, contrary to the usual territorially-binding effect of a provincial Act, there are two sets of laws which regulate impoundment in the Eastern Cape Province. There is no indication (express or implied) of a specific exercise of power by the Eastern Cape Provincial Legislature that the High Court can be said to be trespassing on. The Ordinance we are confronted with in this case does not satisfy the "criteria" of a "provincial Act" as envisaged by the Constitution."

The Ordinance in question was applicable only in parts of the Eastern Cape Province. The Provincial Legislature had not demonstrated that it had "embraced the Ordinance and, in substance, its effect was not the same as that of a provincial Act (par 37). As a result, the Constitutional Court concluded that confirmation was unnecessary. Although this finding would, somewhat anomalously, permit the Ordinance to remain "alive" in other provinces (given that the High Court's declaration of constitutional invalidity was only effective in the Eastern Cape), the Constitutional Court dismissed the application for confirmation with costs. It did express the view, in respect of the broader implications of its decision, that "once the relevant authorities in the other two affected provinces become aware of the order, they will take it into account when they are called upon to implement the impugned provisions" (par 39).

5 *Khohliso v S* [2014] ZACC 33: The Constitutional Court decision

As alluded to above, the Constitutional Court was faced with an application to confirm an order of the Eastern Cape High Court, Mthatha, declaring section 84(13) of Decree 9, issued by the President of the then Republic of Transkei on 24 July 1991, unconstitutional. The grounds of unconstitutionality, specifically, were that that the section violated the right to a fair trial, particularly the presumption of innocence in section 35(3)(h) in the Constitution; further that section 13(c) of the Decree violated section 9 of the Constitution by discriminating between people in different areas within one province. To reiterate, section 167(5) of the Constitution provides that the Constitutional Court had to confirm the order of invalidity made by a High Court in respect of an Act of Parliament, a provincial Act or conduct of the President. In terms of section 172(2)(a) the declaration of invalidity had no force unless confirmed by the Constitutional Court.

The crucial question, which forms the basis of the analysis contained in this note, was whether it was necessary for the Constitutional Court to confirm the High Court's order of invalidity, since such confirmation is required only where an Act of Parliament, a provincial Act, or the conduct of the President is at stake. The question squarely before the Constitutional Court was whether Decree 9, which had been issued by the President of the Transkei after a military coup in 1987, constituted such Acts or conduct (the President was empowered to rule by Decree and his executive and legislative authority, had to be exercised on the advice of a Military Council).

The Constitutional Court held that Decree 9 did not constitute such Acts or conduct. Therefore confirmation of the High Court's declaration of constitutional invalidity by the Constitutional Court was not required, and the application was dismissed. The High Court's order took immediate effect. Accordingly the applicant's application was dismissed. In effect, the Constitutional Court decided that there was not sufficient evidence of any treatment by the Eastern Cape Legislature that justified a finding that the Eastern Cape Legislature has *endorsed* Decree 9, or recognized its *status* as that of a provincial Act. The origin and territorial application of the Decree, together with the fact that there are three pieces of parallel legislation on the same subject matter in operation in the Eastern Cape, further added to the conclusion that the Decree did not have the status of a provincial Act.

For reasons that follow, the authors submit that the Constitutional Court's decision is beyond reproach. The decision, which builds upon the previous pronouncements in *Weare* and *Mdodana*, brings further clarity to the application of sections 167(5) and 172(2)(a) of the Constitution, and provides an important reminder of the work required on the part of provincial legislatures to clean up the slew of pre-Constitutional legislation operating within their areas of jurisdiction.

6 The *Khohliso* Constitutional Court decision: Reasons for and analysis

Clearly Decree 9 was not a conduct of the President of the Republic of South Africa, though it might have been passed by the President of the former Republic of Transkei. The Constitution did not equate the position of the President of Transkei with that of the President of South Africa, nor did the Constitution equate the legislatures of the former TVBC (Transkei, Venda, Bophuthatswana and Ciskei) states with the South African Parliament. Whatever the nature of those legislatures might have been, the legislation they issued did not equate with an Act of Parliament. (*Zantsi v Council of State, Ciskei* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) par 35. When the interim Constitution came into force in 1994, followed by the Constitution of the Republic of South Africa, 1996, Transkei once again became part of South Africa. Any law in force when the new Constitution took effect remained in force if it was consistent with the Constitution and had not been repealed or amended.)

The purpose of sections 167(5) and 172(2)(a) of the Constitution was to promote comity between the branches of Government. (*Weare v Ndebele NO* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) (*Weare*) par 22; and *Mdodana v Premier, Eastern Cape* [2014] ZACC 7; 2014 (4) SA 99 (CC); 2014 (5) BCLR 533 (CC).) That entailed that the constitutionality of the actions of the highest legislatures and executive authority in the land, namely the National and Provincial Legislatures and the President, was a matter ultimately to be determined by the highest court in the land, the Constitutional Court (*Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) par 55–66;

and *President of the Republic of South Africa v South African Rugby Football Union* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) par 29).

Could Decree 9 be regarded as a provincial Act? The Court considered it necessary with a view to comity, and certainty to clarify what qualifies as a provincial Act. In *Weare* (*supra*) the Constitutional Court considered the incorporation by reference of a pre-1994 Ordinance into a post-1994 Kwazulu-Natal Act, and provision for its continued functioning as an expression of the legislative will of the Provincial Legislature. It therefore had to be treated accordingly (as a provincial Act). The Court was not persuaded by the appellant's argument that Decree 9 was original legislation (and not delegated) that should carry the same status as if it were passed by a body equivalent to a pre-1994 Provincial Council. Decree 9 was distinguishable from Provincial Ordinances in that they at least applied to provinces, whereas Decree 9 applied to an erstwhile independent homeland. There had to be sufficient post-1994 treatment by the Provincial Legislature to show that it endorsed the decree.

In *Mdodana* (*supra*) the Constitutional Court held that limited territorial application of an Ordinance which operated in parallel with other legislation on the same subject matter, suggested that it was something different to a provincial Act. In the case of the present legislation there are in fact three parallel pieces of legislation governing the same subject matter in the Eastern Cape, namely that governing the former Transkei, that governing the former Ciskei, and that governing the remainder of the Eastern Cape. In the present matter the Court held that the limited territorial application of legislation was not decisive in deciding whether legislation is a provincial Act or not. Even national legislation sometimes has a limited sphere of operation.

The prime consideration had to be how the post-1994 democratically elected legislatures treated legislation, that is to say, whether these legislatures enacted or endorsed the legislation in a way that amounted to taking legislative ownership of it. In one Eastern Cape Provincial Act the Act refers merely to a definition of a term contained in Decree 9. The Court did not hold such limited reference sufficient to conform to the doctrine of incorporation by reference.

Furthermore, the fact that Parliament's enactment of the Sea Fishery Amendment Act 74 of 1995 repealed Chapter 10 of Decree 9 neither served as evidence that Parliament considered the entire Decree and elected to repeal Chapter 10, nor did Parliament endorse the remainder. Neither did Parliament's treatment of the decree trigger the need for comity requiring the Constitutional Court's imprimatur on the declaration of invalidity. Nor, of course, did such treatment by Parliament of the Decree elevate its status to that of a provincial Act. The enactment of legislation by Parliament to create a uniform national regulatory scheme may impact other legislation such as provincial legislation, but that does not elevate or lower the status of the impacted legislation. The mere fact that Parliament left Decree 9 on the statute book when it could have amended or repealed it, could not lead to the inference that Parliament elected to endorse it.

Finally, the fact that the President in 1994 assigned executive powers in respect of various portions of Decree 9 to a competent authority in the Eastern Cape in terms of section 235(8) of the Constitution, did not affect the status of the legislation. The assignment of executive functions cannot affect the status of the legislation. Executive action taken in terms of Decree 9 is not relevant to the legislative status of the Decree. The Executive acts in terms of and must carry out existing legislation. It cannot make law.

7 Conclusion

The general question that is examined in this note is when it is necessary for the Constitutional Court to confirm the invalidation by other courts of legislation on the grounds of unconstitutionality. The applicable sections of the Constitution are sections 167(5) and 172(2)(a). These sections merely refer to Acts of Parliament, a provincial Act or conduct of the President. It is normally not difficult to establish what an Act of Parliament is, and acts of the President fall outside the scope of the note, although it is probably worthwhile to remind oneself that whatever else the case may be, the Constitution does not equate the presidents of the former TVBC states (Transkei Venda, Bophuthatswana and Ciskei) with that of the President of the Republic of South Africa, or for that matter, equate the legislation passed by the TVBC states with Acts of Parliament.

Provincial Acts referred to in the aforementioned sections of the Constitution, present difficulties of a different nature. The TVBC states were not “provinces” in the proper sense of the word, and the provinces of the pre-1993 South Africa did not issue Acts, but Ordinances. Moreover, though the Ordinances were issued by deliberative legislative bodies for some time (namely the Provincial Councils) these were ultimately abolished and placed under the power of an administrator, which was not a deliberative legislative body, but which formed part of the executive authority. It is true that the executive and administrative authorities can in fact make law, but it constitutes delegated legislation, generally referred to as *administrative* legislative action as distinguished from original legislation.

The question whether provincial ordinances could be considered “provincial Acts”, as referred to in the above sections of the Constitution, first came before the Constitutional Court in the *Weare* case. In determining the answer to that question, the Constitutional Court identified as important considerations the history and status of the Ordinance in the light of the 1910, 1961 and 1983 Constitutions, such Ordinances having been passed by deliberative legislative bodies as original and not delegated legislation. Furthermore in 1996 the KwaZulu-Natal provincial legislature adopted a (provincial) Act which allowed the Ordinance to regulate certain forms of gambling throughout the province. The Court held that such treatment by the provincial legislature of the Ordinance constituted an expression of the legislative will of the provincial legislature, and that it should consequently be treated like a provincial Act, invalidation whereof required the confirmation of the Constitutional Court. Whilst one is grateful for the clarity with which the Court spelled out the relevant considerations it applied, disappointingly the Court added (rather bluntly and without explanation) that the fact that

ordinances in respect of which the legislature has *not* acted, and which have *not* been incorporated into a statute or amended, are not necessarily excluded from the application of the relevant sections.

The next case wherein the Constitutional Court delved into the subject matter of this note, was the *Mdodana* case. The Court identified the following factors as significant for determining the status of an Ordinance: its original source, its history from the time of enactment until the enactment of the Constitution, and its history beyond the enactment of the Constitution. It is apparent that these factors coincided closely with those in the *Weare* case. However, the different nature of the facts of the case did not result in this particular Ordinance being treated as "a provincial Act". The Ordinance was adopted in 1938 by the Cape of Good Hope Provincial Council (also exercising original legislative authority). Its operation extended over the whole of the then Cape Province. But in the 1970s and 1980s the former Transkei and Ciskei attained independence from South Africa. After the Ciskei and Transkei joined South Africa again in 1994, the legislation adopted by the Transkei and Ciskei authorities continued (and continues) to apply to those territories, even though they now became part of the Eastern Cape Province. In this case the Eastern Cape Provincial legislature had not assimilated the Ordinance into a provincial Act, or expressed itself on the Ordinance. Because of the application of the Ordinance only to that part of the Eastern Cape that does not include the Ciskei or Transkei, and because of the continuing operation of different legislation in the Ciskei and Transkei, the Ordinance does not operate throughout the Eastern Cape Province as would usually be the case with a provincial Act. It would accordingly be inappropriate to consider it a "provincial Act". The constitutional invalidation of the Ordinance by the High Court stood; confirmation by the Constitutional Court was not required. Oddly, the Ordinance remains in place in the two other provinces that used to form part of the Cape of Good Hope, namely the Western Cape and the Northern Cape, since the invalidation was an order of the Eastern Cape High Court, which does not have jurisdiction over the Western Cape and the Northern Cape.

By the time that the *Khohliso* case reached the Constitutional Court, nothing had been done to improve the state of untoward disorder which arose from the fact that the province still had three different pieces of legislation regulating the same subject matter in three different parts of the province on matters that fall under the jurisdiction of the same provincial legislature. In this case it was not a provincial Ordinance that was at issue, but a "Decree" by the former President of the Transkei (really a military leader), whilst it was still in its state of temporary independence from South Africa. It was not an Act of a parliament or other democratically elected deliberative body, nor was it an Ordinance of a province. Should it be treated as an Act of Parliament, or possibly a provincial Act? Or perhaps an act of (a) President? Certainly, by no stretch of the imagination could it be construed as an Act of the Parliament of South Africa. Whether or not it was an act of (a) President, it was not the act of the President of South Africa. The Transkei simply was not a province, but an independent homeland. There was no treatment of the Decree by the post-1994 Eastern Cape provincial legislature that could be construed as an endorsement by the provincial legislature for purposes of treating it as a provincial Act. The

reference in one provincial Act to the definition of a term in the Decree was too minor to comply with the doctrine of incorporation by reference. The repeal of part of the Decree by an Act of Parliament also had no effect on the status of the Decree, and could even less likely somehow convert the Decree to a provincial Act. Such a suggestion would resemble a magician placing a Decree into an otherwise empty hat, and lo and behold, extracting from the hat a provincial Act. The assignation by the South African President of certain executive powers in respect of the Decree to particular authorities could similarly not convert the Decree to a provincial Act.

One wishes to add that, whilst the Constitutional Court as the highest court in the land owes comity to the democratically elected highest legislatures in the country, being Parliament and the provincial legislatures, there is no argument to be made that the Constitution imposes a duty of comity in respect of a military officer who achieved his status as President through the exercise of military power, howsoever benign or competent such a leader might have been.

The three cases discussed, shed light on the factors to be considered, or not to be considered, in determining when provincial or other regional legislation should be treated as provincial Acts. As usual, that means that such light is shed only upon circumstances where the *stare decisis* rule would apply. They therefore have not spoken the last words on the matter, and, regrettably, similar cases with slightly different facts may still end up before the courts to be decided *ad hoc.*

Such *ad hoc* solutions do not provide a satisfactory resolution of the problem. It is a lamentable situation that two decades into the new South Africa, the provincial legislatures have not rationalized the various “old South Africa” provincial legislation that still abounds the statute books, most especially in the Eastern Cape wherein the “old South Africa”, with the three different territories and their three different sets of laws, still perpetuate what is in essence the apartheid system which the Constitution sought to rid the country of.

The Constitutional Court in *Khohliso* in its end note (par 35) equally pronounces this very same lament, in language that has to be considered kind to the provincial Legislatures, when it could have (should have?) expressed its denunciation of the situation in stronger terms.

In the Court *a quo* both counsel for the State and for the MEC did not try to convince this Court that the differentiation in the legislation between those living in Transkei, Ciskei and the rest of the Eastern Cape bore any rational connection to a legitimate government purpose. In the Court *a quo* counsel for the MEC sought to avoid dealing with the constitutional issues, raised on the basis that the Department was aware of the anomalies that exist as a result of the different pieces of legislation in existence within the Province (this Decree being one of them, and noting that the Department was in the process of correcting such anomalies (par 17)). No detail of such attempts to correct the anomalies is revealed in the judgment, and the promise rings empty in the ear. Evidence of such attempts in regard to the protection of wildlife in the Eastern Cape has remained conspicuous by its absence. One

author has described the state of nature conservation in the provinces as confused, even chaotic (Kidd *Environmental Law* 2ed (2011) 101).

In the absence of evidence to the contrary, the MEC's undertaking cannot but remind one of the saying: "The cheque is in the mail". Two decades into the new South Africa, it is time that the Eastern Cape legislature puts some cash on the table.

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