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Ex parte Chairperson of the CA: In Re certification of the Constitution of RSA:

History

SA past was described as a deeply divided society characterized by strife, suffering, injustice, all which generated gross violations of human rights. From the outset the country maintained a colonial heritage of racial discrimination – in most of the country the franchise (right to vote) was reserved for white males.

At the same time the separation of powers principle didn’t flourish in SA – who followed the Westminster system and promoted parliamentary sovereignty and domination by the executive.

Race was the basic inescapable criterion for participation by a person in all aspects of political, economic and social life.

As the apartheid system gathered momentum during the 1950’s and came to be enforced there was resistance from the disenfranchised. Many of them demanded non-discriminatory and wholly represented government in a non-racial state whose beliefs entirely opposed apartheid.

The clash of these ideas resulted in strife and conflict, as it intensified the SA government became more repressive.

The in the course of a few years, the country’s political leaders managed to avoid a social revolution by negotiating a peaceful transition from the controlled minority regime to a wholly democratic constitutional dispensation.

After a long history of deep conflict between the minority which reserved for itself all control over political instruments of the state and the majority who sought to resist that domination – the majority of South Africans realized that the country had to be rescued from disaster by a negotiated commitment to a new constitutional order based on an open and democratic society.
DE LANGE v SMUTS AND OTHERS

FACTS:
The court looked at constitutional validity of the Insolvency Act, which states that a person required to appear before a meeting of creditors, if they fail to:

- Be sworn by the presiding officer
- Fail to produce any book or document which was required
- Refuse to answer a question lawfully asked

The presiding officer may commit that person to prison.

Lange said that this section violates his constitutional right not to be detained without trial.

Held:
Subsection is unconstitutional only to the extent that it authorizes a presiding officer who is not a magistrate to issue a warrant committing an examinee at a creditors’ meeting to prison = the right to freedom and security of the person.

The power to commit recalcitrant witnesses at insolvency hearings served an important public objective, namely, to ensure that insolvents and other persons who are in a position to give important information relating to insolvency do not evade supplying it.

BUT magistrates who commit uncooperative witnesses in aid of an insolvency inquiry do so in a judicial and not an administrative capacity. So committal by a magistrate presiding at creditors’ meeting is constitutionally permissible. Sachs looked at the constitutionality of the subsection within the context of separation of powers = only judicial officers should have the power to punish misconduct or penalize recalcitrance by means of imprisonment = the subsection contravenes the principle of separation of powers.
Executive council of Western Cape v Minister and another, executive council of Kwazulu Natal v President of RSA and others.

These cases raise NB questions relating to the authority to establish municipalities and their internal structures.

Constitutional challenges = 2 main groups

1. The provision of the structures act encroaches on the powers of the provinces – this challenge concerned the provinces power to establish municipalities’ i.t.o S155 of the constitution.

2. The contended the Structure Act encroaches on the constitutional powers of municipalities = related to municipal councils powers to elect executive committees and power to regulate their internal affairs.

Concurrency argument:

The constitution limits the residual power of Parliament. The question is whether on Chapter 7 of the constitution dealing with local governments, the provinces are correct in contending that there are certain constraints on parliament’s powers.

Chapter 7 = scheme for the allocation of powers between the National, Provincial and Local spheres of government.

S164: any matter concerning local government not dealt with in the constitution may be prescribed by the national legislature or by the provincial legislature within the framework of the national legislature. = Issues not dealt with = national authority has the powers.

If parliament indeed had full powers in respect of all matters referred to in Chapter 7, there would be no need for the reference in S164, to any matter not dealt with in the constitution.
S13 of the Structures Act: = unconstitutional

S13 provides = the minister by notice in the Government Gazette can determine guidelines to assist MEC’s for local governments to decide which type of municipality would be the best for that specific area.

The MEC for local government must take these guideline into account when establishing a municipality or changing the type of municipality.

The provinces said that parliament had NO powers to prescribe parliamentary guidelines, which they must take into account in the exercise of legislative powers to determine the types of municipalities that may be established in the provinces.

The constitution sets limits in which each sphere of government must exercise its constitutional powers – beyond these limited conduct becomes unconstitutional.

S155 confers on the provinces the power to determine the different types of municipalities, which may be established within a province. The power must include the legislative and executive power to establish the types in the provinces and to determine in which area the types are to be established.

The provision of S155 which establish municipalities in provinces – the provincial government have executive powers only, while in relation to the establishment of the type of municipalities, the provincial government have both legislative and executive powers.

S13 deals with a mater which S155 says vests in the provincial legislature – namely the determination of the different types of municipalities to be established in a province – this section is therefore inconsistent with the constitution = S155.

**Executive Council, W. Cape held:**

The legislative authority vested in parliament under S37 of the constitution is expressed in wide terms – to make laws for the Republic in accordance with this constitution.
There is nothing in the constitution, which prohibits parliament from delegating subordinate authority to other bodies.

Although the court was concerned with the interim constitution, it seems the same principles apply to the present constitution. The enquiry is whether the constitution authorizes the delegation of the power in question.

**Guideline:** legislative power may not be delegated by the legislature – this is depending on the context.

*Minister of Health and Others v TAC and Others 2002 (5) SA 721 (CC)*

The High Court held that the executive didn’t address the need to reduce the transmission from mother to child of HIV in pregnant woman. There was a violation of rights in the BOR in terms of S27 the right to health care and S28, which involves the rights of children.

It was argued that they didn’t make provision to make the drugs available and they didn’t make time for the national programme.

The executive argued that this would amount to the infringement of separation of powers, as the making of policy is a prerogative of the executive and not the judiciary.

The judiciary must apply the law impartially and respect the BOR and any action / policy, which is inconsistent with the constitution, must be declared invalid to the extent of the inconsistency.

There is also a requirement on the executive to respect and include socio economic rights

Where there is a breach of socio economic rights the court can give appropriate relief.
**Premier of the province of Western Cape v President of SA:**

The government of the Western Cape challenged the constitutionality of an amendment to the public service act. In terms of this amendment, provincial heads of department are given the same functions and responsibilities as national departments and no longer fall under the administrative control of the provincial Director General (DG).

The DG is responsible for the administration of the office of premier, intergovernmental relationships and co-operation between the departments of the provincial administration.

The Western Cape government objected that its part of the executive power of a province to structure its own administration and the national legislature, which wants to impose such structure on the provinces, infringes the provincial power.

**The court rejected this argument:**

It said that the sanctioning of national legislature is a feature of the constitution and a system of co-operative government that it prescribes. This legislation is required for the raising and division of revenue.

In the 1st certification judgment the constitutional court held that such requirements are inconsistent with the constitution.

**The courts’ interpretation of S40:**

The Western Cape government argued that the provision of the amended legislation encroached on the geographical and functional integrity of the provincial government contrary to S41.

The principle of co-operative government in S40 where the spheres of government are described as being distinctive, interdependent and interrelated.

This is consistent with the way powers have been divided between the spheres of government.
Distinctiveness: lies in the provision made for elected government at the national, provincial and local levels.

Interdependent and interrelatedness: flow from the founding provision that SA is a sovereign, democratic state and a constitutional structure which makes provision for framework provision to be set by the national sphere of government. These provisions vest concurrent legislative powers in respect of important matters in the national and provincial spheres of government and contemplate that the provincial executive will have responsibility for implementing national laws as well as provincial laws.

Courts interpretation of S41:

The constitution makes provisions to make sure that with common effort the spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. This co-operation requires that every reasonable effort be made to settle disputes before a court is approached to do so.

It’s desirable wherever possible to avoid conflicting legislative provisions, to determine the administration, which will implement laws that are made, and to ensure that adequate provision is made and to ensure provisions are made for it in the budget of different governments.

S41 (1)(g) requires that: all spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that doesn’t encroach on the geographical, functional or institutional integrity of government in another spheres. This reflects a requirement in the constitutional principles that the national government won’t exercise its powers so to encroach on the provinces.

In this case: What is relevant is that the constitutions power to structure public service, vests in the national sphere of government.
The purpose of S41 is to prevent 1 sphere of government from using its powers in such a way, which would undermine the other sphere and prevent them from functioning effectively.

The constitution provides that provinces shall have the exclusive functions shared with the national legislature. Constitution also requires the establishment of a single public service and gives the power to structure that public service to the national legislature.

This power of the national legislature is one, which has to be exercised carefully, in the context of S41, to ensure that in exercising its power the national legislature doesn’t encroach on the ability of provinces to carry out the functions entrusted to them by the constitution.

3 objections:

1. It assigns functions to the provincial Director General’s and heads of departments in a manner that’s unacceptable to it.

2. It constrains the premier’s executive powers to establish and abolish departments of government.

3. It empowers the minister to give directions concerning the transfer of certain functions to and from the provincial administration

The courts findings:

On if it’s constitutional for parliament to assign functions to the provincial DG: S41 (2) of the constitution enjoins parliament to enact legislation to facilitate intergovernmental relations.

The establishment of a post within the public services for the discharge of such functions doesn’t infringe any provincial powers. The functionary isn’t a representative of the national government but is appointed by the premier.

The province has the competence to appoint a functionary who is to occupy this post and that is all that the constitution requires.
It can’t be said that there aren’t valid reasons for having included such functions within the duties of the DG or that to do so would prevent the provincial government from carrying out its constitutional duties effectively.

The provisions of the amendment dealing with the powers and functions of the DG aren’t inconsistent with the executive power if the province. It’s also not been established that the provision infringes S41.

The power of the president at the request of the premier to establish or abolish any provincial department is constitutional:

S3A (a) – premier of a province may subject to S7 establish or abolish any department of the provincial administration concerned.

S7 (5) – president can at the request of the premier.

President is required to amend the schedule by proclamation to give effect to such a requirement if he’s satisfied its consistent with the provisions by way of a request directed to the president.

The premier has the power to establish and abolish provincial departments - this power is limited only by the extent that it must be exercised by way of a request directed to the president.

Proceeding require the president and the premier to see agreement about the legality of a proposed recon structuring of the public service within a provincial administration, is entirely consistent with the system of co-operative government prescribed by the constitution and it can’t be said to invade either the executive power vested in the premier or the functional integrity of the provincial government.

If the power of the minister to transfer certain functions to the provincial government to the national government is constitutional: S3 makes provisions for the allocation and
transfer of functions to and from departments of government, which by definition includes provincial departments.

The court found the S3 wasn’t reasonably capable of such an interpretation and was therefore unconstitutional.

**In re National Education Policy Bill 1995**

The Speaker of the National Assembly referred a dispute concerning the constitutionality of the National Education Policy Bill to the Constitutional Court for adjudication. The Court found that the Bill was not unconstitutional.

The Bill provides for the determination of national education policy by the Minister, requiring this to be done in terms if the constitution, taking into account the competence of the provincial legislatures and the relevant provisions of provincial legislation relating to education.

The bill requires the Minister to consult with the Council of Education Ministers and other bodies before formulating national education policy. The minister is also required to consult the Council before introducing legislation on education to Parliament.

The Bill required the provinces to amend their legislation to confirm to national education policy, and thereby empowered the Minister to impose national education policy on the provinces. The Court rejected this contention and held that the Bill neither imposed an obligation on the provinces to follow national education policy nor empowered the Minister to require the provinces to adopt national policy nor to amend their own legislation to conform with national policy.

The Court held that provinces must comply with national standards which have been formulated in accordance with the Constitution and lawfully made applicable to them.

The Bill prevented the national government from acting unilaterally, without allowing the provinces this opportunity.
Provincial legislatures have the power to make laws for their provinces in respect of any matter set out in Schedule 6 to the Constitution, which includes education. This power has to be exercised concurrently with the Parliament, which has the power to make laws for the whole of the Republic. If there is a conflict between a provincial law and an Act of Parliament, the Constitution provides for the resolution of that conflict by giving priority either to Acts of Parliament or to provincial laws, depending on the circumstances.

*August and another v Electoral Commission and others:*

**Question before the court:**
The voting rights of prisoners – Transvaal High Court held that the electoral commission had no obligation to ensure that awaiting trial and sentenced prisoners may register and vote in the general elections.

**What does the constitution say about whose entitled to vote?**
The 96 constitution provides that one of the values of a sovereign and democratic SA is founded on universal adult suffrage and a national common voters role. It guarantees that every adult citizen has the right to vote in elections and to do so in secret. If parliament wants to limit this right, it will have to do so in terms of the law of general application i.t.o S36.

**The difference from the interim constitution:**
In the 1st democratic elections 5 years ago parliament determined that, with specified exceptions, all prisoners could vote. The interim constitution provided for universal adult suffrage and didn’t expressly disqualify any prisoners – it did however say that disqualifications could be prescribed by law.

The 93 Electoral Act disqualified persons on 4 grounds;

1 & 2 The first 2 relating to mental incapacity
3. Drug dependency
4. To imprisonment: no one could vote if the person was detained after being convicted and sentenced without the option of a fine i.r.o. murder, robbery with aggravating circumstances, rape or an attempt to commit any such crime.
All other prisoners were therefore entitled to vote.

The 98 Electoral Act:
Any SA citizen in possession of an ID book can apply and register as a voter.

Disqualifications:

1. Has applied for registration fraudulently
2. Isn’t a SA citizen
3. Has been declared by the High Court to be of unsound mind or mentally disordered
4. Is detained under the Mental Health Act
5. Isn’t ordinarily resident in the voting district

Prisoners aren’t included.

The commission must allow a person to apply for a special vote if he/she can’t vote due to:

- Physical disability or pregnancy
- Absent from the republic on government service, etc

There is no mention of prisoners

Courts decision:
The powers and responsibility of the commission under the 98 Electoral Act must be interpreted and questions should be answered as to whether prisoners constitutional right to vote will be infringed if no appropriate arrangements are made to enable them to register and vote.

The 1st and 2nd respondents correctly conceded that prisoners retain the right to vote since parliament hasn’t passed any law limiting the right.
If the Electoral Act stated that prisoners wouldn’t be entitled to vote, this would have to be i.t.o the law of general application and be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom (S36).

**Minister of Home Affairs v NICRO and Others**

The CC upheld an order declaring provisions of the Electoral Act to be inconsistent with the Constitution and invalid = deprive prisoners serving a sentence of imprisonment without the option of a fine of the right to register and vote in the upcoming elections.

The right to vote is entrenched in the constitution and is NB for democracy. Any limitation of this right must be supported by clear and convincing reasons. Arrangements for registering voters have been made at all prisons in order to accommodate awaiting trial prisoners and those serving sentences because they have not paid the fines imposed on them.

**HELD:** that there was nothing to suggest that expanding these arrangements to include prisoners sentenced to imprisonment without the option of a fine would in fact place an undue burden on the resources of the Electoral Commission.

Minister argued that by allowing them to vote it would send a bad message to the public, i.e. that the government didn’t punish a convicted person adequately.

**COURT:** looked at the fact that a number of prisoners would lose the right to vote for minor transgressions and others may have the right to appeal. It was ordered that the Electoral Commission ensures that all prisoners, who are entitled to vote, following the declaration of invalidity of the various sections of the Electoral Act, are afforded a reasonable opportunity to register as voters for, and to vote in, the forthcoming general election in April 2004.
**CHASKALSON & KLAAREN**

Is parliament still bound to the constitutional principles established in the interim constitution?

The constitutional principles bound the constitutional assembly when it drew up the final constitution – the final constitution wouldn’t take effect until the constitutional court certified that it complied with all the constitutional principles.

It would be irregular to allow parliament now to amend the final constitution to introduce provisions which don’t comply with the constitutional principles and thus which couldn’t have formed part of the original text of the constitution.

**Basic structure doctrine:**

While the constitutional principles don’t limit parliament like they limited the power of the constitutional court to draft the final constitution – they still exercise an indirect effect on the power of parliament to amend the constitution, if the basic structure doctrine of constitutional amendment is adopted in SA law.

This doctrine originated in India – where the Supreme Court said that there were implied limits on the power of parliament to amend the constitution.

Although article 368 appears to give an unlimited power of amendment on the Indian parliament, the Indian Supreme court read into the article an implied limitation on the power of amendment. It was held that the amending power granted by article 368 didn’t extend to any amendment, which would change the basic structure of the constitution.

The basic structure doctrine has been confirmed by the Indian Supreme Court in later cases. This doctrine is applied with caution. It’s been invoked by the Supreme court to strike down only those constitutional amendments which effect the rule of law and the separation of powers between the
judiciary and the legislature. Outside of this article it has allowed parliament an almost unfettered power to amend.

In premier of Kwazulu Natal v President of RSA: the constitutional court left open the possibility that it might incorporate the basic structure doctrine into SA constitutional law, but held that the specific constitutional amendments which were being challenged couldn’t be described as amendments which violated the basic structure of the interim constitution.

If the basic structure doctrine is incorporated into SA law, it is likely that for the foreseeable future at least the constitutional principles are likely to play a role in shaping judicial conceptions of the basic structure of SA constitution.

S74 (1) = contemplates the amendment of S1, the provisions which set out the founding values of SA – if the founding values in S1 are amendable even if only by vote with the support of 75% of the NA and 6 of the 9 provinces in the NCOP – it’s difficult to argue that other provisions of the final constitution are unamendable because other amendments might implicate the basic structure of the constitution.

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Guideline: legislative power may not be delegated by the legislature – this is depending on the context.

PRESIDENT OF RSA AND OTHERS v SA RUGBY FOOTBALL UNION AND OTHERS

FACTS:
In this case the constitutional validity of the appointment of a commission of enquiry into the administration of rugby was in issue. It was found in the court a quo that the president had abdicated his responsibility to appoint a commission of enquiry i.t.o S84
(2) (f) and that the decision to appoint such a commission was taken by the minister of sport. The president merely rubber-stamped the minister’s decision. The appointment of the commission was found to be invalid.

The constitutional court agreed that the president had to exercise this power personally, as both the constitution and the Commissions Act confer this power to appoint a commission on the president alone. However, that’s not to say that it’s inappropriate for the president to act on the advice of the cabinet and advisors. What is important is that the president must make the final decision.

The constitutional court found that there had been no abdication of the president’s responsibility in the present case. Even though the initiative for the appointment of a commission of enquiry came from the minister. The president discussed the matter with legal advisors and the DG and made up his mind that there was good reason for the appointment of the commission.

In this case the constitutional court had to consider the question whether the president can be ordered to give evidence in a civil matter in relation to the performance of his official duties.

Reasons why it’s not desirable in the opinion of the court to compel the president to testify in open court:

The decision to require the president to give evidence is flawed – courts should be aware that the president isn’t in the same position as any other witness. The doctrine of separate of powers required the court to protect the status, dignity and efficiency of the office of the president and the president should be required to give evidence orally in open court, in civil matters relating to the performance of his duties only in exceptional circumstances.

It was a term of the judge’s order in the court a quo, that the president give oral evidence. There was no special order about the circumstances and the place at which the president was to testify. So the president was ordered to testify in open court = the question was if this was correct?
Appellants relying on the law of foreign jurisdiction submitted that the order requiring the president to testify was wrong in law. They submitted that the doctrine of separation of powers required the president not to be treated as any other witness.

They pointed to the NB conditional role that the president as head of state and head of the national executive and submitted that the doctrine of separation of powers required the court to protect the status of the president.

Circumstances when the president can be compelled to testify” looking at foreign jurisdiction fails to reveal a case in which the head of state has been compelled to testify before a court in relation to the performance of official duties. Even where the head of state may be called as a witness, special arrangements must be made for the way in which evidence is given. Courts are obliged to ensure the status, dignity and efficiency of the office of the president is protected and at the same time the administration of justice shouldn’t be impeded by the courts desire to safeguard the president.

Balance between the administration of justice and the protection of the dignity, status and efficiency of the office of president:

There are aspects of the public interest, which might conflict in cases where a decision must be made as to whether the president ought to be ordered to give evidence.

1. Public interest in ensuring the dignity and status of the president is protected – careful consideration must be given to a decision compelling the president to give evidence and the order shouldn’t be made unless the interests of justice demand this be done

2. There is an important need to ensure courts aren’t impeded in the administration of justice.

The judge said that he considered whether the president ought to be ordered to subject himself to cross-examination in the light of his constitutional status. The judge made an order that the president give evidence.
Even when exceptional circumstances require the president to give evidence – the dignity and status of the president and his busy schedule had to be taken into account.

In all cases where the president is called to testify, respect for the office, the need to preserve the dignity and status of the office and an understanding of his busy schedule must be carefully considered.

Why it’s NB whether the appointment of a commission is an administrative action i.t.o S33:

There were 2 distinct legal decisions under challenge:

1. The appointment of a commission of enquiry i.t.o. the constitution

2. Decision made by the powers of subpoena applicable to that commission

To determine if the act or decision is an administrative action, it’s necessary to look at the function being performed. After consideration of the nature of the president’s power to appoint a commission of enquiry = doesn’t constitute administrative action and the procedural fairness requirement for just administrative action demanded by S33 isn’t necessary for a decision to appoint a commission.

S33 – everyone has the right to administrative action that is lawful, reasonable and procedurally fair – anyone whose rights are affected by administrative action has the right to be given written reasons.

The proper test for determining if the conduct constitutes administrative action:
S33 - administrative and not executive is used to qualify action = the test for determining if conduct is administrative action, isn’t the question whether the action concerned is performed by a member of the executive. What matters isn’t so much the functionary as the function – the question is whether the task itself is administrative or not.
Why the court found that the appointment of the commission isn’t administrative action: when the president appointed the commission of enquiry into rugby he wasn’t implementing legislation, he was exercising a constitutional power vested in him alone. Neither the subject matter nor the exercise of that power was administrative in character. The appointment of the commission wasn’t an administrative action i.t.o S33.

Does this mean the president can exercise the power to appoint a commission in an unconstrained manner?
It doesn’t follow that because the president’s conduct in exercising the power given to him i.t.o S84 doesn’t constitute administrative action, there are no constraints on it. The constraints on the president when exercising his powers = he had to exercise the powers personally and it must be recorded in writing and signed. The exercise of the powers mustn’t infringe any provision in the Bill of Rights, it’s limited by the principle of legality and the president must act in good faith and mustn’t misuse his powers.

South African Association of Personal Injury Lawyers v Heath and Others

In this case the court looked at the validity of the provisions of a Special Investigating Unit headed by a judge, which was set up to investigate malpractices in state institutions and in connection with state assets and public money.

1. Looks at the validity of the appointment of a judge to head the Unit.

2. It deals with the validity of the President’s referral to the Unit for investigation of an allegation concerning a failure by attorneys acting for road accident victims claiming from the Road Accident Fund to pay over to such persons the full amount due in settlement of their claims after deduction of reasonable costs. The appellant had unsuccessfully challenged the provisions in the Transvaal High Court.

The validity of the appointment of a judge to head the Special Investigating Unit = held that the appointment of a judge to head the SIU violated the separation of powers required by the Constitution.
Courts must be independent of the legislature and the executive so that they can discharge their duty – this prevents the legislature and the executive from requiring judges to perform non-judicial functions that are incompatible with judicial office and which are not appropriate to the central mission of the judiciary, and prohibits judges from undertaking such functions.

The matters to be investigated are determined by the President and not by the unit itself, and involve questioning persons, searching premises, gathering evidence and instituting court actions for the recovery of losses alleged to have been suffered by the state. These are executive and not judicial functions, which under our constitutional scheme are ordinarily performed by the police.

The functions that a judge is required to perform under the Act are of a nature incompatible with the independence of the judiciary and judicial office. The provision of the Act that requires a judge or acting judge to be appointed as head of the Unit, and the appointment by the President of a judge to this position were accordingly held to be unconstitutional and invalid.

**Ex Parte President of RSA: in re constitutionality of the Liquor Bill**

Parliament passed a bill but it hadn’t received the assent of the president, who referred it to the constitutional court for a decision on its constitutionality.

The liquor bill was introduced – when sent to the president he declined to grant it. He referred it back to the NA for reconsideration. The NA looked at it and then returned it to the president with no amendments. The president referred it to constitutional court for a decision.

3 routes to judicial consideration of the constitutionality of legislation passed by parliament:

1. Is a challenge by an interested party in a competent court, under or more provisions in the constitution?
2. Application by at least 1/3 of members of the NA to the constitutional court for an order declaring all/part of an act of parliament unconstitutional.

3. Is that invoked in the present case – namely referral by the president before a bill can become a statute?

I.t.o S79 (1) – the president must either assent to and sign the bill passed by parliament or if he has reservations about its constitutionality refer it to the NA for reconsideration.

3 questions the court considered:

1. Is the court required to consider only the reservations the president has expressed or can it direct its attention more widely?

2. Should the court in determining the bills constitutional examine its every provision so to clarify in every respect it accords with the constitution?

3. Does the courts finding regarding the bills constitutionality restrict later constitutional adjudication regarding the provisions once enacts.

The court considers only the president’s reservations, whether it may ever be appropriate for the court on presidential referral to consider other provisions, which are manifestly unconstitutional, cut which aren't included in the president's reservations, need not be decided now.

*Robertson*

This is an appeal which concerns the validity of a provisional valuation roll of property in the area of jurisdiction of the City of Cape Town. The appellants in this Court are the City of Cape Town and the Minister of Provincial and Local Government.

In June 2002, Anita Marie Robertson and Guy Trevor Robertson, a couple living in Camps Bay, Cape town approached the cape High court for an order restraining the City
from charging property rates based on the provisional property valuations roll which the city opened for inspection and objection on 21 May 2002.

As part of the process aimed at transforming racially determined local government into one democratically determined, the Cape Metropolitan Area embarked on a process which eventually integrated sixty local authorities into a single municipality, now known as the City of Cape Town. Before then, local municipalities had each conducted their property valuations for rates based on different valuation rolls, some more than twenty years old. However, this produced discrepancies between rates values and the actual values of properties. Moreover, uniform property rates increases led to a perception in some quarters of an unfair and discriminatory distribution of the property rates burden. Shortly after its establishment in December 2000, the city compiled a metropolitan wide provision valuation roll of properties for the 2002/2003 municipal financial year in terms of the Property Valuation Ordinance (Cape) of 1993 (the ordinance). The property valuations reflected on the roll were used to calculate rates levied against the affected properties. This decision was opposed by some individual rate payers, such as the Robertson’s, and associations of ratepayers as it had for reaching financial implications for many property owners.

Before the High Court, the validity of the provisional valuation roll was challenged on three grounds. First, that the Ordinance is not a law in force and therefore the City could not impose rates because it was no a local authority as described by the Ordinance. And third, that there was no other law empowering the city to charge property rates based on a provisional valuation roll.

After the start of the High Court application, the City and the Minister sought and parliament passed an amendment to the law governing local governments. The relevant amendments are contained in section 21 of the Amendment Act. In response, the Robertson’s amend their application to include a challenge to its constitutional validity on the grounds that before their passage by parliament, the consultative procedures required by sections 154 (2) and 229 (5) of the Constitution had not been complied with.

The High Court, upheld the claim of the Robertson’s. It further declared section 21 of the Amendment Act invalid on the grounds that its terms should have been published for
public comment in draft form before it was tabled in parliament in accordance with section 154 (20 of the Constitution; and that there had been no formal request from parliament to the Financial and Fiscal Commission to consider the draft of section 21 of the Amendment Act in accordance with section 229 (5) of the constitution.

This Court unanimously holds that the appeal should succeed and that the orders of the High Court should be set aside.

Moseneke J writing for a unanimous Court finds that the Local government: Municipal Structures Act 117 of 1998 (Structures Act) taken together with Ordinance authorize the city to value property and to recover property rates within its area of jurisdiction. He holds that despite the powers of municipalities being subject to definition and regulation by a “competent authority”, this does not mean that the powers exercised by local government are “delegated” powers. Rather, local government exercises “original” powers entrenched in the Constitution.

The approach that a municipality has no power to act if not authorized by a statute is a relic of our pre-1994 past and is no longer permissible under our constitutional supremacy. In the past, parliament was sovereign and municipalities were creatures of statute, enjoying only delegated or subordinate legislative powers derived exclusively from ordinances or Acts of Parliament. The constitution has moved away from a hierarchical division of governmental power. A municipality under the Constitution is no longer a mere creature of statute. The Constitution has ushered in a new vision of government in which the sphere of local government is interdependent, inviolable and possesses the constitutional altitude with which to define and express its unique character subject to constraints permissible under our Constitution.

The Constitution itself, and in particular sections 229 (1) and (2) thereof authorise municipalities to impose property rates.

Moseneke J declined to consider the constitutionality of section 229 (1) and (2) thereof authorize municipalities to impose property rates.
Mosenek J declined to consider the constitutionality of section 21 of the Amendment Act as the decision would not have any practical value. Moreover, the facts are obscure and the issues are complex and far-reaching. They relate to the procedural validity of legislation. In any event, even if the challenge is decided in favour of the respondents, the decision would not alter the outcome of this case, vindicate the right of any party or resolve a matter of wider public importance.

The order of constitutional invalidity made by the High Court is not confirmed.