CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/14

In the matter between:

NOKHANYO KHOHLISO Applicant

and

THE STATE First Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, EASTERN CAPE Second Respondent

Neutral citation: *Khohliso v S and Another* [2014] ZACC 33

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J

Judgment: Van der Westhuizen J (unanimous)

Heard on: 21 August 2014

Decided on: 2 December 2014

Summary: Decree 9 (Environmental Conservation) of 1992 (Transkei) — constitutional validity of sections 13(c) and 84(13)

Sections 167(5) and 172(2)(a) of the Constitution — confirmation jurisdiction — whether Decree has status of provincial Act — not necessary for this Court to confirm invalidity of pre-constitutional legislation not endorsed by the Legislature and with parallel legislation on the same subject matter

ORDER

Application for confirmation of the order of the Eastern Cape Local Division of the High Court, Mthatha (Mjali J):

1. The application is dismissed.

2. There is no order as to costs.

JUDGMENT

VAN DER WESTHUIZEN J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J and Zondo J concurring):

Factual and legal background

[1] South Africa is an interesting country. Our people are diverse, culturally and otherwise; our history is brutal but fascinating; our wildlife is unique and precious. This Court sometimes hears cases which would rarely reach the highest courts of most other democracies. The facts and legal framework of this matter provide a kaleidoscopic illustration of how a mix of all the above can present a significant constitutional question.

[2] Ms Nokhanyo Khohliso, the applicant, is a traditional healer in the Transkei in the Eastern Cape Province. She was charged with and convicted in the

Tsolo Magistrates' Court of being in possession of two vulture's feet. She wanted to mix a substance made from the feet with other ingredients to produce a much needed remedy in our land, namely medicine that protects against theft. Ms Khohliso was sentenced to pay a fine of R4 000, or to twelve months imprisonment, suspended for five years.

[3] Possession of vulture's feet is a criminal offence under Decree 9,[1] issued on 24 July 1992 by the President of the Republic of Transkei. The President did so on the advice of the territory's Military Council.

[4] A decree issued by a military regime as part of the criminal law of a constitutional democracy? About this, one may well wonder in disbelief similar to asking: "A tiger in Africa?"[2] A quick look at history explains the apparent anomaly.

[5] One of the cornerstones of apartheid policy was the "grand design" of former Prime Minister HF Verwoerd and his advisors which turned rural areas where many black people resided into "homelands". These were destined to become fully "independent states". The ultimate goal was for all black people to lose their South African citizenship and become citizens of the new states, to which they had to return to live and exercise their political rights. From the homelands they would have to

[1] Decree 9 (Environmental Conservation) of 1992 of the Republic of Transkei (Decree 9).

[2] There are, of course, no indigenous tigers in Africa. The outrageous "A tiger in Africa?" scene appeared in the film *Monty Python's Meaning of Life* (1983), which – amongst other things – exposed the ignorance and pretentiousness of conventional Western notions of history, civilisation and ethics.

commute to their work on the farms and in the industries and homes of "white" South Africa.

[6] Some of those in power in these areas opted to embrace the system and accept the benefits that followed. In 1976 the Transkei obtained full "independence" and a President and Prime Minister were sworn in,[3] but South Africa was the only country in the world to recognise the new "Republic". Later the Ciskei – also located in the Eastern Cape – and other areas followed. But "democratic" rule in some of the new republics did not last long. In 1987 a military coup took place in the Transkei. The President was empowered to rule by Decree and his executive and legislative authority had to be exercised on the advice of the Military Council.[4] Similar events took place in the Ciskei.[5]

[7] When the interim Constitution came into force in 1994 and the final Constitution in 1997, the former homelands were accepted as part of one united democratic South Africa. In the interest of legal certainty – given the different applicable laws in the homelands and other parts of South Africa – the final Constitution provided that any law in force when the new Constitution took

[3] President Botha Sigcau was sworn in on 26 October 1976 and Paramount Chief Kaiser Matanzima became the Prime Minister.

[4] Decree 1 of 1988 dissolved Parliament and established a Military Council to "provide for the peace, order and good government of the Republic of Transkei until such time as civilian rule is restored". The Commander of the Transkei Defence Force, General Bantu Holomisa, was the Chairman of the Military Council. Paramount Chief Tutor Ndamase remained President.

[5] In March 1990 Brigadier Oupa Gqozo ousted President Lennox Sebe and proclaimed a military government.

effect remained in force as long as it was consistent with the Constitution and had not been repealed or amended.[6]

[8] Decree 9 deals with the conservation of indigenous fauna, flora and the environment in the Transkei. Ms Khohliso was convicted under sections 13(c) and 84(13) of the Decree.[7] Section 13(c) prohibits the possession of a carcass of a protected wild animal.[8] Vultures are protected wild animals.

[9] The military rulers must have felt strongly about the protection of vultures and other wildlife in their republic. Section 84(13) seems to create strict criminal liability, without the element of intent usually required in criminal law and may also exclude ignorance of the law as a defence.[9] Ms Khohliso and others in her position would thus be guilty of a crime, regardless of whether they intended to possess vulture's feet, thought that these were chicken's feet, or knew that it was unlawful to possess them.[10] This is how the Eastern Cape Local Division of the High Court, Mthatha interpreted the provision on appeal.

[6] Item 2 of Schedule 6 of the final Constitution.

[7] Read with sections 1- 4, 6-7, 12, 72, 76, 79- 82 and 85 and Schedule 1 of Decree 9.

[8] Section 1 defines a protected wild animal to include all birds not explicitly excepted in Schedules 1, 3 and 4 of the Decree. It also defines a carcass as any part thereof. Section 81 renders this contravention an offence.

[9] Section 84(13) provides: "It shall be no defence in any prosecution for an offence in terms of this Decree that the accused had no knowledge of some fact or other or did not act wilfully."

[10] On the fundamental importance of culpability in criminal law, see *S v Coetzee and Others* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 176. See also *S v De Blom* 1977 (3) SA 513 (A) on ignorance of the law as a defence.

[10] Thus the High Court overturned Ms Khohliso's conviction. It declared section 84(13) inconsistent with the Constitution since it violated the right to a fair trial, particularly the presumption of innocence in section 35(3)(h) of the Constitution.[11] Since the prohibition applicable in the Transkei is stricter than in other areas of the Eastern Cape,[12] the Court found that section 13(c) violated section 9 of the Constitution by discriminating between people in different areas within one province.[13] Ms Khohliso approaches this Court to confirm the declaration of invalidity.

[11] Section 167(5) of the Constitution provides that the Constitutional Court must 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.[14] According to section 172(2)(a), the declaration has no force unless confirmed by this Court.[15]

[11] Section 35(3)(h) provides: "Every accused person has a right to a fair trial, which includes the right . . . to be presumed innocent, to remain silent, and not to testify during the proceedings".

[12] While the Decree proscribes the possession of a "protected wild animal" carcass, which includes almost all birds, the rest of the Eastern Cape (excluding the Ciskei) is regulated by the Nature and Environmental Conservation Ordinance 19 of 1974 (Ordinance 19). Section 26 of Ordinance 19, read with section 42, only criminalises the possession of the carcass of an "endangered species", a far narrower category.

[13] The High Court did not state explicitly which subsections of section 9 it was applying in its equality analysis but appears to have concluded that the impugned provisions are inconsistent with section 9(1) and (3).

[14] Section 167(5) provides that the—

> "Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[15] Section 172(2)(a) provides that the—

> "Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[12] The crucial question is whether it is necessary for this Court to confirm the High Court's order of constitutional invalidity. In other words, is Decree 9 an Act of Parliament, a provincial Act or conduct of the President?

The status of Decree 9

[13] Decree 9 is certainly not conduct of the President, for purposes of section 167(5), even though it was passed by the President of the former Republic of Transkei. When the interim Constitution was enacted, it did not "purport to bring about a merger between five 'independent countries'".[16] Our Constitution does not accord the Presidents of the former homeland states of Transkei, Bophuthatswana, Venda and Ciskei (TBVC states) any legal status, let alone the same status as the President of the Republic of South Africa.[17]

[14] The central question is whether Decree 9 is a provincial Act. Ms Khohliso maintains that it is, but her counsel hinted that the Decree may enjoy a status equivalent to an Act of Parliament. The first respondent, the State, did not file submissions with this Court. The second respondent, the Member of the Executive Council for Economic Development, Tourism and Environmental Affairs, Eastern Cape (MEC), contends that Decree 9 is not a provincial Act.

[16] *Zantsi v Council of State, Ciskei and Others* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 35.

[17] Id.

[15] The purpose of sections 167(5) and 172(2)(a) of the Constitution is to promote comity between the branches of government. This entails respect for the roles of the President and the National and Provincial Legislatures, as elected law-makers.[18] In *Weare* it was said that this purpose "follows from a recognition of the status of the Legislatures and the President in our constitutional order".[19] If a Provincial or the National Legislature enacts a law, any provision in it can be effectively and finally invalidated only if it is inconsistent with the Constitution as determined by the highest

[18] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 55-6 this Court held that it—

> "has exclusive jurisdiction in respect of certain constitutional matters, and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts.
>
> . . .
>
> This is the context within which section 172(2)(a) . . . is concerned with the law making acts of the Legislatures at the two highest levels [national and provincial], and the conduct of the President, who as head of state and head of the Executive is the highest functionary within the state. . . . The apparent purpose of the section is to ensure that this Court, as the highest court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of state." (Footnotes omitted.)

See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at para 29:

> "Counsel for the applicants submitted that the effect of section 172(2) is to give this Court exclusive jurisdiction to make orders of invalidity that are binding upon Parliament, Provincial Legislatures and the President. The purpose of these provisions, so it was contended, is to preserve the comity between the Judicial branch of government on the one hand and the Legislative and Executive branches of government on the other, by ensuring that only the highest court in constitutional matters intrudes into the domains of the principal Legislative and Executive organs of state. In my view this submission correctly reflects the purpose of section 172(2). Our Constitution makes provision for the separation of powers and vests in the Judiciary the power of declaring statutes and conduct of the highest organs of state inconsistent with the Constitution and thus invalid. It entrusts to this Court the duty of supervising the exercise of this power and requires it to consider every case in which an order of invalidity has been made, to decide whether or not this has been correctly done. This Court has a duty to assume this supervisory role." (Footnote omitted.)

[19] *Weare and Another v Ndebele NO and Others* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) (*Weare*) at para 22.

Court in the land. In *Weare* and *Mdodana*[20] this Court used comity as a guiding principle.[21]

[16] Counsel for Ms Khohliso submitted that we should also give guidance on whether litigants are obliged to bring confirmation proceedings[22] when legislation similar to Decree 9 is found to be unconstitutional by a High Court. If a litigant cannot ascertain with any measure of certainty that a High Court's declaration of invalidity is of immediate force and effect, parties will have to bring confirmation proceedings to this Court each time an order of invalidity is made, even if only to be told that the Court does not have to confirm the High Court order and that it took immediate effect. Clarification of the applicable test for what qualifies as a provincial Act is thus necessary with a view to both comity and certainty.

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[20] *Mdodana v Premier, Eastern Cape and Others* [2014] ZACC 7; 2014 (4) SA 99 (CC); 2014 (5) BCLR 533 (CC).

[21] *Weare* above n 19 at para 23 and *Mdodana* id at paras 22-4.

[22] Under rule 16 of the Rules of this Court. Rule 16 reads:

> "(1) The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order.
>
> (2) A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.
>
> (3) The appellant shall in such notice of appeal set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against and the order it is contended ought to have been made.
>
> (4) A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.
>
> (5) If no notice or application as contemplated in subrules (2) and (4), respectively, has been lodged within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the Chief Justice."

[17] In *Weare* this Court was asked to determine whether the KwaZulu-Natal Regulation of Racing and Betting Ordinance[23] had the status of a provincial Act. The Ordinance was enacted by a pre-1994 Provincial Legislature, known as a Provincial Council. The treatment of the Ordinance by the KwaZulu-Natal Legislature in the years following 1994 included incorporating it by reference into the KwaZulu-Natal Gambling Act[24] and two amendments to the Ordinance to provide for its continued functioning.[25] The effect of this, the Court held, was that the Ordinance was an expression of the legislative will of the Provincial Legislature and should be treated accordingly.[26]

[18] In *Mdodana* this Court set out "significant indicators" of the status of old-order legislation, namely its—

(a) original source or origin;[27]

(b) territorial application;[28] and

(c) history or treatment both before and after the enactment of the Constitution.[29]

[23] 28 of 1957.

[24] 10 of 1996.

[25] *Weare* above n 19 at para 33.

[26] Id at para 36.

[27] *Mdodana* above n 20 at para 32.

[28] Id at para 36. While this criterion was not in the paragraph explicitly listing "more significant indicators", it is evident from the remainder of the judgment that the existence of parallel legislation was a crucial factor in determining the status of the legislation.

[29] Id at para 32.

Origin

[19] Decree 9 was issued by the President of the former Transkei, upon the recommendation of the Military Council. The Ordinances in *Mdodana* and *Weare* were enacted by pre-1994 Provincial Councils. Counsel for Ms Khohliso argued that, despite being a presidential decree, the Decree was original (and not delegated) legislation, with the same status as if it were passed by a body equivalent to a Provincial Council. This, she said, was because the President of the Transkei was vested with full legislative powers.

[20] The comparison to an Ordinance passed by a Provincial Council is not helpful. The status of legislation passed by Provincial Councils became uncertain from 1986 onwards when the Provincial Government Act[30] was passed, abolishing Provincial Councils and transferring their law-making powers to the Executive.[31] Thus, whether these bodies exercised executive or legislative power when creating subsequent legislation is not entirely clear.

[21] In addition, regardless of its origin, all law that was in force before the Constitution, remained in force until amended or repealed.[32] This covers any rule with the force of law,[33] including any Ordinance or Decree, regardless of whether it originated from a Provincial Council, Military Council or President. The Decree –

[30] 69 of 1986.

[31] *Mdodana* above n 20 at para 27 and *Weare* above n 19 at paras 26-8.

[32] Section 229 of the interim Constitution and item 2 of Schedule 6, read with section 241, of the final Constitution.

[33] *Zantsi* above n 16 at para 37.

like all legislation passed prior to 1994 – is undemocratic. It was born in constitutional sin. At the time, democracy was the privilege of the white minority. The recognition of pre-1994 legislation was based on the practical reality that law was in place regulating people's lives.

[22] While it cannot be said that the illegitimacy of the government of the Transkei renders its laws less valid or of a lower status than other legislation passed before 1994, Decree 9 is distinguishable from provincial Ordinances in that they were at least intended to apply to provinces. By contrast, Decree 9 was intended to apply to a country – albeit one whose independence was not internationally recognised.

[23] Comity does not dictate that this Court regard Decree 9 as a provincial Act. Unless there is sufficient post-1994 treatment by the Provincial Legislature to show it endorses the Decree, the Decree's origin will militate against a finding that it is a provincial Act.

Territorial application

[24] In *Mdodana* this Court held that in light of the limited territorial application of an Ordinance – which operated in parallel with other legislation on the same subject matter – it was not akin to a provincial Act.[34] In this case there are three parallel pieces of legislation operating in the Eastern Cape that govern the same or similar

[34] *Mdodana* above n 20 at para 36.

subject matter.[35] This is similar to the three pieces of legislation that governed the impounding of livestock in the Eastern Cape in *Mdodana*.[36]

[25] The question of territoriality does not entail simply asking whether the legislation in question applies only to a portion of a province. It is conceivable that a provincial or national Act may pertain only to a particular region or area. Statutes that establish a university or regulate an industry located in one area do so.[37] This does not, by itself, relegate those statutes to a status lower than a provincial Act. Similarly the National Legislature may enact legislation that applies only in one province, as long as the subject matter is within its sphere of legislative competence.[38] This does not render that Act provincial in status.

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[35] Decree 9 in the former Transkei, the Nature Conservation Act 10 of 1987 in the former Ciskei and Ordinance 19 in the rest of the Eastern Cape.

[36] The Cape Pounds Ordinance 18 of 1938, Ciskei Pounds Act 43 of 1984 and Proclamation 2431 of 1937 (Transkei).

[37] See, for example, provincial legislation relating to the establishment of nature reserves; the University of the North-West (Private) Act 17 of 1996; the University of Cape Town (Private) Act 8 of 1999; and the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990. See also provincial legislation which establishes specific corporations or institutions which operate in a particular area or industry, such as the North West Housing Infrastructure and Delivery Company Act 10 of 1997 and the KwaZulu-Natal Dube TradePort Corporation Act 2 of 2010.

[38] Section 44 of the Constitution sets out the legislative authority of Parliament. Section 44(1)(a) provides that the national legislative authority is vested in Parliament which has the power—

> "(i) to amend the Constitution;
>
> (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and
>
> (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government".

Schedule 4 sets out the functional areas of concurrent national and provincial legislative competence, which includes the environment. Schedule 5 sets out the functional areas of exclusive provincial legislative competence. Section 44(2) sets out the limited circumstances in which Parliament may intervene in provincial competences by passing legislation with regard to a matter falling within a functional area listed in Schedule 5. This occurs, for example, when it is necessary to maintain national security.

[26] However, the above can be distinguished from a case where, within a single province, different pieces of legislation regulate the same subject matter in different parts – a distinction apparently based only on territory and no other reason. Decree 9 is of that kind. It does not purport to regulate environmental conservation province-wide, but only in a portion of the province.

[27] This does not mean, however, that legislation that applies only in part of one province is never a provincial Act. In *Mdodana* there was no evidence that the Legislature considered the Ordinance after 1994.[39] No finding could be made as to whether the Ordinance had been endorsed.[40] Implicitly, if there had been a positive finding of endorsement, as in *Weare*, the territorial application would have been less relevant to determining the status of the legislation. Accordingly – given Decree 9's limited territorial application – one must conclude that it does not have the status of a provincial Act, unless its treatment by the Legislature after 1994 amounts to endorsement.

Treatment

[28] Although the origin and territorial application were discussed in *Weare* and *Mdodana*, "treatment of the Ordinance by the . . . Provincial Legislature in the years

[39] Above n 20 at para 35. The Court held that the Legislature had "never expressed itself on the [Cape Pounds] Ordinance".

[40] In addition, origin was also not determinative because there was no definitive finding on the status of Ordinances passed by the Council of Provinces prior to their confirmation into our new democratic order by section 229 of the interim Constitution.

following 1994"[41] appears to have been the most important consideration.[42] We have a legal system reborn. The prime consideration must be whether and how our post-1994 Legislatures treated the legislation. Guided by the principle of comity, this Court must ascertain whether these democratically elected bodies enacted or endorsed the legislation in a way that amounts to taking legislative ownership of it. If they did, their conduct must be respected by ensuring that the highest court confirms any declaration of invalidity. If they did not, the laws remain binding and enforceable legislation,[43] but a declaration of invalidity by the High Court need not be confirmed by this Court.

[29] Whether endorsement has occurred depends on how legislation has been treated by a Legislature. *Weare* set out the two primary indicators: first, whether the legislation has been incorporated by reference into new-order legislation;[44] second, whether the legislation has been amended in a way that indicates contemplation and approval of the remaining provisions.[45] Ms Khohliso has raised two additional factors, namely assignment by the President of the administration of legislation under the interim Constitution and executive action taken in terms of the legislation.

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[41] *Weare* above n 19 at para 33 and the judgment generally. There was negligible pre-1994 treatment since Decree 9 was promulgated in 1992, but I concentrate only on post-1994 treatment here.

[42] *Mdodana* above n 20 at paras 34 and 36-7 and the judgment generally. See also *Gold Circle (Pty) Ltd and Another v Premier, KwaZulu-Natal* 2005 (4) SA 402 (D) at 417A-B, where the Court concedes that the particular Ordinance's status could have changed based on its treatment by the Provincial Legislature.

[43] Item 2 of Schedule 6 of the final Constitution.

[44] *Weare* above n 19 at paras 35-6.

[45] Id.

[30] If no endorsement is established, because post-1994 Legislatures have not dealt with the legislation at all (as in *Mdodana*), or have treated it inadequately to evidence endorsement sufficiently, courts may have to place greater emphasis on the legislation's origin and territoriality to determine its status. If endorsement is established, it would not be necessary to depend on origin and territoriality, because the post-1994 Provincial Legislature, by endorsing the legislation in question, assumed or accepted it, as if it had promulgated it. The question in this case is whether treatment less than that in *Weare* could amount to giving the legislation the status of a provincial Act.

Reference

[31] The Eastern Cape Parks and Tourism Agency Act[46] – a provincial Act – refers to section 27 of Decree 9 when defining a "protected area".[47] Ms Khohliso argues that this amounts to incorporation by reference and therefore elevates the status of Decree 9 to that of a provincial Act. The reference in a provincial Act to some extent recognises the Decree as law applicable in the province. But is this enough to evidence endorsement of the Decree?

[46] 2 of 2010 (Parks Act).

[47] Section 1(a) of the Parks Act defines "protected area" as—

> "any nature reserve established under section 6 of [Ordinance 19], section 27 of [Decree 9] or section 23 of the [Ciskei Nature Conservation Act] which is, at the time of commencement of this Act, listed as a Provincial park in the register of provincial parks or managed by the Eastern Cape Parks Board in section 33 or section 8(1)(a) read with section 60(1)(d)(iii) of the Provincial Parks Board Act (Eastern Cape), 2003, irrespective of whether the MEC declared such a Provincial park or assigned the management thereof as required in terms of sections 33 or 41 of that Act or in terms of [Decree 9] or the Ciskei Nature Conservation Act".

[32] The doctrine of incorporation by reference finds application in many areas of law.[48] It refers to the situation where one document supplements its terms by embodying the terms of another.[49] There is a difference between incorporation by reference and mere reference though.[50] It is not enough to mention another document, simply to point the reader to it in order to find the meaning of a term.[51] More is needed. In the context of statutory incorporation, the intention to re-enact what is being referred to is required.[52] This Court has described this as "a clear intention that the provisions – all the provisions – of the Ordinance be operable in the province".[53]

[33] In *Weare* the Ordinance[54] was incorporated by reference into the KwaZulu-Natal Gambling Act,[55] which provided that the Act applied only to those forms of gambling not already regulated by the Ordinance. This was more than mere reference for clarification or definitional purposes. The reference was intended to create a coherent regulatory framework which included the continued application of the Ordinance. Decree 9 is mentioned once in the Parks Act – in the definitions section – and only to show that national parks (which were, as a matter of fact, declared as such in terms of Decree 9) were "protected areas" for the purposes of the

[48] See, in the context of contracts of sale, *Van Wyk v Rottcher's Saw Mills* (*Pty*) *Ltd* 1948 (1) SA 983 (A) at 990-1; in the context of contracts of suretyship, *Trust Bank of Africa Ltd v Cotton* 1976 (4) SA 325 (N) at 329E-H; in the context of wills, *Moses v Abinader* 1951 (4) SA 537 (A); and in the context of statutes, *Solicitor-General v Malgas* 1918 AD 489 (*Malgas*).

[49] *Industrial Development Corporation of SA (Pty) Ltd v Silver* [2002] ZASCA 112; 2003 (1) SA 365 (SCA) at para 6.

[50] *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK en Andere* 2002 (3) SA 653 (NC) at 670-1.

[51] *Moses* above n 48 at 542.

[52] *Malgas* above n 48 at 491.

[53] *Weare* above n 19 at para 35.

[54] Above n 23.

[55] Above n 24.

Parks Act. Moreover, the Parks Act does not refer to sections 13 and 84 of the Decree, which were relevant to Ms Khohliso's conviction.

[34] By contrast, Decree 9 is referred to for the sake of convenient substitution and not the continued application of the Decree. The reference does not amount to endorsement by the Legislature. So, it does not elevate the Decree to the status of a provincial Act.

Amendment

[35] This Court has held that the laws passed by the Legislatures of the TBVC states are not Acts of Parliament as contemplated in the interim Constitution.[56] Only the South African Parliament can pass an Act of Parliament. However, Ms Khohliso argues that Parliament's enactment of the Sea Fishery Amendment Act[57] – which repealed Chapter 10 of Decree 9 – serves as evidence that Parliament considered the entire Decree and elected to repeal Chapter 10. Parliament thereby endorsed the remainder. Ms Khohliso argued that this treatment of the Decree by the democratic Parliament triggered the need for comity, thus requiring this Court's imprimatur on the declaration of invalidity.

[36] It is not clear whether Ms Khohliso regards this "consideration" by Parliament as elevating the status of Decree 9 to that of an Act of Parliament or a provincial Act. The logic of the argument would indicate that, if the amendment amounted to

[56] *Zantsi* above n 16 at para 40.

[57] 74 of 1995.

endorsement as set out in *Weare,* this would be endorsement by Parliament and would therefore amount to an Act of Parliament. However in the papers and during oral argument Ms Khohliso's position appears to be that this elevated the Decree's status to that of a provincial Act only. No argument has been advanced as to how the intention or endorsement of Parliament could be transposed to a Provincial Legislature.

[37] This argument is, in any event, not persuasive. The enactment of the Sea Fishery Amendment Act created a uniform national regulatory scheme for sea fisheries.[58] The National Legislature often seeks to create uniform national schemes.[59] These national Acts then impact on the continued application of certain provisions of other legislation (national, provincial and possibly even municipal), but this neither elevates nor lowers the status of that legislation. Any law in the country that conflicted with the subject matter of the Sea Fishery Amendment Act would have been jettisoned in relevant part.[60]

[38] One must also distinguish between cases where a democratically elected Legislature specifically considered the legislation and amended it – as in *Weare* – and amendments that arise as a result of the enactment of a completely different regulatory

[58] Section 5 of this Act rendered the Sea Fishery Act 12 of 1988 applicable to the entire Republic. This would have conflicted with the two pieces of legislation which applied in the Transkei (Chapter 10 of Decree 9) and Ciskei (various provisions of the Ciskei Nature Conservation Act). Therefore these provisions had to be repealed. This Sea Fishery Amendment Act has now been replaced by the Marine Living Resources Act 18 of 1998.

[59] See above n 38 regarding national legislative competence.

[60] In this case Chapter 10 of Decree 9 and various provisions of the Ciskei Nature Conservation Act.

scheme. These enactments may well overlap in part with a portion of the legislation before the Court, as in this case.

[39] Partial amendment could mean either that the residual provisions were not considered, or that they were tacitly accepted by the Legislature.[61] *Weare* held that the latter would apply when the scheme of the legislation being amended or repealed is so interlinked and interdependent that it is impossible to dislocate the amended or repealed sections from the others.[62] This is not the case here. Chapter 10 regulated a discrete category, namely sea fisheries. This can be neatly separated from the remainder of Decree 9, which relates to inland fisheries and other wildlife, without needing to consider the other Chapters.

[40] Ms Khohliso also argues that Parliament contemplated amending the Decree and elected not to do so. Her counsel cited two examples. The first is the enactment of the Justice Laws Rationalisation Act,[63] which repealed many pieces of Transkei legislation, but not Decree 9.[64] Second, when the National Environmental Management: Integrated Coastal Management Bill was published for comment, the Minister of Environmental Affairs and Tourism suggested amendments to Decree 9, but these were not effected. Should consideration be given to failed or abandoned

[61] *Weare* above n 19 at para 35.

[62] Id.

[63] 18 of 1996.

[64] The Act extended the application of various South African Acts to the entire territory, thereby rationalising the regulatory framework for those areas of the law. This predominantly related to the justice system but also included insolvency, wills, drug trafficking, maintenance, domestic violence and matrimonial affairs. The Act did not purport to rationalise all law throughout the Republic and did not imply anything about the status of the areas of law which were not rationalised. The short title of the Act provides for the rationalisation and consolidation of only *certain* statutes.

amendments? I think not. There is no evidence before us as to why Decree 9 was not repealed or amended. It cannot be inferred that Parliament elected to endorse Decree 9 by leaving it on the statute book in its current form.

Assignment

[41] In 1994 the President assigned executive powers in respect of various portions of Decree 9 to a competent authority in the Eastern Cape Province, in terms of section 235(8) of the interim Constitution.[65] Ms Khohliso argues that the assignment is relevant to the status of the Decree because, in terms of section 235(6),[66] if a

[65] Proclamation 111 of 1994. Section 235(8) reads:

> "(a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the *Gazette* assign, within the framework of section 126, the administration of a law referred to in subsection 6(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.
>
> (b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may—
>
> (i) amend or adapt such law in order to regulate its application or interpretation;
>
> (ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and
>
> (iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution."

[66] Section 235(6) of the interim Constitution read, in part:

> "The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows—
>
> . . .
>
> (b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3) shall—

provision is not assigned then it remains under national authority. Regardless of whether she is correct,[67] it is not clear if or how partial assignment would change the Decree's status or whether it would only change the status of the assigned provisions and not the others.

[42] Assignment of executive functions does not seem relevant to the status of legislation. The functional area of Decree 9 is the environment and conservation, which falls in Schedule 4 of the Constitution and thus in an area of provincial legislative competence. The assignment was not necessary to ground the Eastern Cape's legislative competence.[68] The fact that only parts of the Decree were assigned would not deprive the Provincial Legislature of its ability to amend or repeal it.

> (i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1)(a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent authority within the jurisdiction of the government of such province; or
>
> (ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1)(c), subject to subsections (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this subparagraph shall not apply to policing matters, which shall be dealt with as contemplated in paragraph (a)."

[67] In my view the submission is not correct. Decree 9 falls under section 235(6)(b)(ii) of the interim Constitution, since it relates to the environment which is listed in Schedule 6 of the interim Constitution and was administered by a functionary outside of the Republic as contemplated in section 235(1)(c). Accordingly, it does not necessarily appear to have been automatically assigned to the national government and not the provincial government. Therefore it seems that the national government may not have retained the executive powers for the remainder of the Decree.

[68] Compare *Western Cape Provincial Government and Others In re: DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC), where the legislative competence was not a category listed in Schedule 4.

[43] Since Schedule 4 lists areas of concurrent national and provincial competence, the issue of partial assignment might have been relevant if it resulted in only the National Legislature being able to amend the parts of Decree 9 which were not assigned. It could be argued that this elevates Decree 9 above even the status of a provincial Act. However, the partial assignment did not appear to bring about this state of affairs. The President's assignment of only parts of Decree 9 to the Eastern Cape provincial authorities does not mean that the residual provisions were reserved and came under exclusive national legislative competence. The Eastern Cape Legislature did not need to have any part of Decree 9 assigned to it to ground its legislative competence.[69]

[44] Assignment, in this case, is not relevant to the question of whether the Provincial Legislature has endorsed Decree 9.

Executive action

[45] Ms Khohliso cites several examples of executive action taken in terms of, or with reference to, Decree 9 as evidence that the Decree has been treated as a

[69] Ms Khohliso also contends that because the Court in *Mdodana* above n 20 stated that legislative history is the most significant factor, there must be other relevant factors in determining the status of Decree 9. Ms Khohliso argues that a relevant factor ought to be the subject matter of the legislation, namely the sphere of government responsible (environmental legislation falls under Schedule 4 which lists areas of concurrent national and provincial competence) and the constitutional importance of any rights implicated by the legislation (environmental rights are constitutionally significant). In this way, she distinguishes Decree 9 from the Pounds Ordinance 18 of 1938, at issue in *Mdodana*. Ms Khohliso does not advance a clear argument as to why the importance of the Decree's subject matter would determine its status as a provincial Act. That legislative competence is concurrent also does not appear to be relevant to any law or policy argument and seems to miss the aim of the exercise – to determine whether the Provincial Legislature has endorsed the legislation. The legislation's subject matter was not canvassed in *Mdodana* or *Weare*. And it still does not address the main issue of comity because it does not speak to whether the provincial or national government has endorsed the legislation.

provincial Act.[70] This cannot be relevant to the legislative status of the Decree. The Executive has to act in terms of existing legislation; this follows from the accepted democratic principle of the separation of powers. The Executive cannot make law and Decree 9 remains existing law because of the preservation of pre-1994 legislation, subject to consistency with the Constitution.[71] Executive reference to, or conduct in terms of, Decree 9 is not enough to elevate its status to that of a provincial Act. The enquiry is whether Parliament or the Provincial Legislature has pronounced on or endorsed the legislation.

[46] The conclusion has to be that the Decree does not, because of its treatment, have the status of a provincial Act. The Eastern Cape Legislature has not treated it in a way that amounts to endorsing it or recognising its status as that of a provincial Act, as in, for example, *Weare*. It is also clearly not an Act of Parliament.

Summary and conclusion

[47] Decree 9 is valid and applicable law in the Transkei. This does not make it a provincial Act or an Act of Parliament.

[48] The post-1994 treatment of the Decree by Parliament and the Provincial Legislature is not sufficient to evidence endorsement or enactment. The Legislature

[70] The MEC purportedly acted in terms of section 93 of Decree 9 when establishing the Bizana Nature Reserve; the area of the former Transkei is treated differently and separately in provincial notices for hunting seasons and the publications of hunting seasons which refer to the area of the former Transkei were promulgated in terms of Decree 9, whereas the publications for the Eastern Cape and the former Ciskei were promulgated under different Acts and Ordinances; and the Wild Coast Tourism Development Policy refers to Decree 9 to explain the prohibition of vehicles on Wild Coast beaches.

[71] Above at [7].

did not take legislative ownership of it. The origin and territorial application of the Decree, together with parallel legislation on the same subject matter, also suggest that the Decree is not a provincial Act.

[49] It is clear from *Weare*, *Mdodana* and this decision that – unless expressly embraced by post-democratic legislation – provincial laws emanating from the TBVC states will rarely have the status of a "provincial Act". A High Court's declaration that it is invalid will therefore not require this Court's confirmation.

[50] This does not mean, of course, that this Court cannot hear a matter concerning the constitutionality of legislation which is not an Act of Parliament, a provincial Act or conduct of the President. It can do so on appeal, for example; but not by way of confirmation proceedings.

[51] Since Decree 9 is not a provincial Act, an Act of Parliament, or conduct of the President, this Court does not have to confirm the declaration of constitutional invalidity by the High Court. That declaration had immediate effect.

Costs

[52] As her appeal succeeded in the High Court, Ms Khohliso did not come to this Court to enforce her rights. She sought legal certainty – which will also be of benefit in future cases. Her cause was thus rights-related. In this dispute between a

private party and the state the principles of *Biowatch* apply.[72] There should be no costs order.

End note

[53] It is rather odd that – 20 years into our constitutional democracy – we are left with a statute book cluttered by laws surviving from a bygone undemocratic era remembered for the oppression of people; the suppression of freedom; discrimination; division; attempts to break up our country; and military dictatorships. When these laws determine criminal liability, the situation looks even worse. It is not clear from the facts of the matter why this is the case. It is clear, though, that people like Ms Khohliso and the rest of us – and indeed our much-valued vultures and other wildlife – deserve to be guided and protected by democratically elected Legislatures through clearer laws on a cleaner statute book.

Order

The following order is made:

1. The application is dismissed.
2. There is no order as to costs.

[72] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22.

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