

# **Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996**

**Case CCT 37/96**

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## **Explanatory Note**

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

In its earlier decision in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) the Court ruled that a new constitutional text adopted by the Constitutional Assembly in May 1996 could not be certified. The judgment explained the nature, purpose and scope of certification. In essence it is to establish whether a constitutional text complies with a list of Constitutional Principles (the CPs) set out in Schedule 4 of the interim Constitution. The Court identified the features of the new text that did not in its view comply with the CPs and gave its reasons for that view. The Constitutional Assembly then had to reconsider the text, taking the Court's reasons for non-certification into account.

The Constitutional Assembly reconvened and on 11 October 1996 adopted an amended constitutional text (the AT). It contains many changes from the previous text, some dealing with the Court's reasons for non-certification and others tightening up the text. The AT was then sent to the Constitutional Court for essentially the same certification exercise as before. Political parties, the general public and the Constitutional Assembly were again invited to make written representations to the Court. Objectors were free to raise issues not raised before, or to submit that the Court had erred in some or other finding in the previous judgment. Objections to certification were received from the Democratic Party, the Inkatha Freedom Party, the government of Kwa Zulu-Natal and eighteen private individuals or interest groups. Oral argument on behalf of the two political parties, the government of KZN and the Constitutional Assembly was heard on 18 to 20 November 1996.

The Court held that most of the grounds for non-certification of the earlier constitutional text had clearly been eliminated in the AT. The judgment focuses on remaining areas of contention, namely:

The Bill of Rights

Amendments to the Constitution

Local Government

Transitional Provisions

Traditional Monarch

Intervention Permitted by AT 100

Public Protector, Auditor-General and the Public Service Commission

Compliance with CP XVIII.2

The judgment discusses each of these topics in turn and concludes with consideration of whether the powers and functions of the provinces under the AT are substantially less than or

substantially inferior to those provided for in the interim constitution, a requirement contained in CP XVIII.2.

Four objections are discussed in relation to the Bill of Rights. First, the Court rejected a contention that the right to choose a trade, occupation or profession is a universally accepted fundamental right that cannot be afforded to citizens only. Second, the Court rejected a submission that the AT fails to recognise and protect collective rights of self-determination sufficiently. The institutional structures of the AT, the protection of associational rights and the procedural provisions for their enforcement are adequate. Third, the exclusion of certain rights from those made non-derogable under a state of emergency did not, according to the Court, constitute grounds for non-certification. Fourth, the Court rejected the contention that AT 203 in effect provides for a declaration of martial law.

As regards amendments to the Constitution the Court concluded that the provisions of the AT dealing with special procedures and special majorities for amendments to the Constitution and for entrenchment of the Bill of Rights are adequate.

As regards Local Government the Court dismissed objections to new features of the AT, holding that the AT had remedied the shortcomings expressed in the Court's earlier finding that the NT failed to provide a framework for the structures of local government in accordance with CP XXIV.

The Court further dismissed objections to two provisions of AT Sch 6 in relation to transitional provisions.

On the issue of the traditional monarch, the Court rejected an objection that the AT failed to afford protection to provisions in a provincial constitution relating to the institution, role, authority and status of the traditional monarch.

In the chapter dealing with the intervention permitted by AT 100 the Court held that there was no substance in the contention that the provisions of AT 100(1)(b) violate the principle of separation of powers and held that the provision for intervention by the national government in provincial government complies with CP XX1.2

The Court thereafter noted the enhancement of the independence of the Public Protector and Auditor-General wrought by the AT and confirmed the adequacy of these amendments. The analysis focuses on the AT provisions dealing with the Public Service Commission, which strengthen the protection of the Commission to an extent compatible with the demands of CP XXIX.

A substantial portion of the judgment is devoted to an assessment of the extent to which the AT complies with the requirements of CP XVIII.2. The conclusion is that although the powers and functions of the provinces under the AT are still less than or inferior to those accorded by the interim Constitution, the disparity is not substantial.

The order of the Court reads as follows:

'We certify that all provisions of the amended constitutional text, the Constitution of the Republic of South Africa, 1996, passed by the Constitutional Assembly on 11 October 1996,

comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa, 1993'.

Judgment was delivered by the full Court.