CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 85/13

In the matter between:

BENSION MPHITIKEZI MDODANA	Applicant
and	
PREMIER OF THE EASTERN CAPE	First Respondent
PREMIER OF THE WESTERN CAPE	Second Respondent
PREMIER OF THE NORTHERN CAPE	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR TRADITIONAL LEADERS AND LOCAL GOVERNMENT AFFAIRS, EASTERN CAPE	Fourth Respondent
LUKHANJI MUNICIPALITY	Fifth Respondent
KEVIN LIEBRUM	Sixth Respondent
ROY CALLAGHAN	Seventh Respondent

Neutral citation:	*Mdodana v Premier of the Eastern Cape and Others* [2014] ZACC 7
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J and Zondo J
Heard on:	13 November 2013
Decided on:	25 March 2014

Summary: Constitutional law – Provincial Legislation – Jurisdiction to confirm order of constitutional invalidity

Separation of powers – Status of ordinance – High Court declaring unconstitutional and invalid sections of the Pounds Ordinance 18 of 1938

Whether Ordinance a Provincial Act – Parallel legislation on the subject in the same Province – No pronouncement by Provincial Legislature on its preference – Parallel legislation to remain in place notwithstanding confirmation

Ordinance not a Provincial Act and no jurisdiction to confirm declaration of invalidity

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ORDER

On application for confirmation of the order of the Eastern Cape High Court, Grahamstown (Smith J):

1. The application is dismissed.
2. There is no order as to costs.
3. The Registrar of this Court shall immediately deliver a copy of this judgment and the judgment of the High Court to the second and third respondents.

JUDGMENT

DAMBUZA AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J and Zondo J concurring):

Introduction

[1] Mr Bension Mphitikezi Mdodana (applicant) seeks confirmation of an order by the Eastern Cape High Court, Grahamstown (High Court) declaring unconstitutional and invalid certain provisions of the Pounds Ordinance[1] (Ordinance).

[2] In the High Court, the applicant brought a two-part application, first, for the release of his goats which had been impounded in terms of the Ordinance; and, second, for an order declaring unconstitutional and therefore invalid the provisions of the Ordinance in terms of which the livestock was impounded.

[3] The High Court (Smith J) found the impugned provisions unconstitutional and declared them invalid.[2] That Court suspended the order of invalidity for 12 months to afford the Legislature an opportunity to enact remedial legislation. Its order provides for judicial supervision of impoundment of livestock and their sale in the interim.

The parties

[4] The applicant is a subsistence farmer from Mgcwangele Location in Lady Frere, Eastern Cape. The first to third respondents are the Premiers of the Eastern Cape, Western Cape and Northern Cape. They are cited as political heads of the three

[1] Pounds Ordinance 18 of 1938 passed by the Provincial Council of the Province of the Cape of Good Hope, promulgated on 25 November 1938.

[2] *Mdodana v Premier of the Eastern Cape and Others* [2013] ZAECGHC 66 (High Court judgment).

Provinces to which administration of the Ordinance was assigned in 1994.[3] The fourth respondent is the Member of the Executive Council for Traditional and Local Government Affairs in the Eastern Cape (MEC). The fifth respondent is Lukhanji Municipality, which operates the pound in which the applicant's goats were impounded. The sixth respondent is Mr Kevin Liebrum, the poundkeeper. The seventh respondent is Mr Roy Callaghan, the owner of a farm adjoining the applicant's homestead. It was at Mr Callaghan's instance that the applicant's goats were impounded.

Factual background

[5] The applicant lives with his wife, his three children and his two grandchildren. They are all unemployed and their combined household monthly income, consisting of the applicant's disability grant and child support grants, is R2 660. At the time of institution of the proceedings in the High Court the applicant owned 91 goats (valued at approximately R70 000), 160 sheep, 9 cattle and about 30 chickens. His family depends on sale of their livestock to supplement their income for expenses such as school fees, school uniforms, transportation, medical bills and paraffin.

[6] During May 2010 the applicant's goats went missing. Because the applicant is blind, it was his close relative and herdsman, Mr Gqebeni, who informed him that the goats were missing. After searching for several days, Mr Gqebeni was informed by a

[3] This assignment was made in terms of section 235(8) of the interim Constitution under Proclamations 108, 111 and 115, *Government Gazette* 15813 promulgated on 17 June 1994.

fellow villager that a herd of goats had been removed from Mr Callaghan's property and impounded in the Lukhanji Municipal Pound in Queenstown.

[7] At the pound, the applicant was advised that he had to pay a penalty fee of R41 157, 20 to have the goats released. This amount comprised of damages payable to the complainant and administration costs. The applicant was unable to pay and he contacted the Legal Resources Centre for assistance. This led to the proceedings in the High Court.

[8] Before the matter was heard in the High Court, an agreement was reached between the applicant and the Lukhanji Municipality, in terms of which the applicant's livestock was released from the pound and he was exempted from paying the penalty fee to the Municipality. The first part of the application in the High Court thus came to an end. What remained for consideration was the application to have certain sections of the Ordinance declared unconstitutional.

[9] The sections of the Ordinance declared unconstitutional by the High Court are sections 12, 23, 34 to 36, and 63 to 70.[4] They provide for impoundment of livestock,[5]

[4] At paragraph 19 of the High Court judgment these sections are summarised as follows:

> "(a) section 14 . . . enjoins the poundmaster to inform the owner of impounded animals only where he or she knows the name of the owner;
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> (b) section 23 . . . allows impoundment of animals . . . without judicial supervision;
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> (c) sections 63 to 70 . . . allow for the deprivation of property through sales in execution without judicial supervision or sanction; and
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> (d) sections 12, 34, 35, 36, and 39 . . . provide for, *inter alia*, 'two landowners' to decide on damages or the destruction of diseased animals, thus unfairly discriminating against the landless."

destruction of impounded livestock in certain circumstances,[6] assessment of moneys payable by a livestock owner in trespass and other fees,[7] and sales of impounded livestock.[8]

The proceedings in the High Court

[10] The applicant contended that his rights to protection against arbitrary deprivation of property, just administrative action and access to courts, as enshrined in sections 25, 33 and 34 of the Constitution, had been violated through the enforcement of the impugned sections of the Ordinance. The complaint was that, to the extent that the Ordinance imbues a landowner with the authority to determine when trespass has occurred and to instigate impoundment, section 23 of the Ordinance permits arbitrary deprivation of property. The applicant contended further that the impugned sections of the Ordinance sanction disposal of livestock without provision for representations by the owner, unconstitutional disqualification of certain groups of people from participating in the trespass penalty assessment process, and exclusion of judicial supervision over sales in execution.

[11] The application was opposed by the Municipality and Mr Callaghan. The Municipality explained that a substantial area within its jurisdiction is utilised for commercial livestock farming and therefore it is essential that there be a mechanism

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[5] Section 23.

[6] Section 12.

[7] Sections 34 to 36.

[8] Sections 63 to 70.

for dealing with stray livestock which causes a nuisance and poses a threat to the livelihood of commercial livestock farmers and to public-road users.

[12] The Municipality contended that the impoundment scheme provided for in the Ordinance should be retained. It blamed livestock owners for the difficulties experienced in notifying them of impoundment of their livestock, as livestock owners neglect to register their identification marks and to mark their livestock as required by law. The argument was that, because the animals are often unmarked, the poundmaster is unable to identify the owner to notify her of the impoundment as provided for in section 14. A further complaint by the Municipality was that animal owners make little effort to exercise adequate control over their livestock, with the result that the Municipality often incurs considerable costs in rounding up, transporting and caring for stray animals. It was contended that the Ordinance provides the Municipality with the necessary means of recovering the costs incurred.

[13] The Municipality, however, acknowledged the irregularities in the Ordinance. According to the Municipality, its functionaries, in their implementation of the provisions thereof, usually ameliorate the effect of such irregularities. It did not explain, however, which of the provisions of the Ordinance it admits to being unsustainable. And, despite this admission, the Municipality insisted that, viewed in the context of other relevant legislation such as the Animal Identification Act,[9] the impugned provisions of the Ordinance are not necessarily unconstitutional.

[9] 6 of 2002.

[14] The High Court followed the approach adopted by this Court when dealing with comparable legislation. In *Zondi*[10] this Court considered the constitutional validity of provisions of the KwaZulu-Natal Pounds Ordinance[11] which also provided for immediate seizure and impoundment of trespassing animals without a court order. In that case this Court found that although impoundment per se is justifiable because of the danger that stray animals pose to commercial farming and public road users, when considered jointly with other sections of the impoundment regulatory scheme, it impermissibly allowed animals to be sold in execution without judicial supervision or approval.[12] The High Court then concluded that the impounding scheme as set out in sections 23 and 63 to 70 of the Ordinance, being similar in content and effect to the provisions impugned in *Zondi*, is in conflict with section 34 of the Constitution.

[15] The High Court found that there is no justifiable cause for limitation of the right of access to courts brought about by the impoundment scheme. It reasoned, as this Court did in *Zondi*,[13] that once stray animals are impounded, any danger that might have existed ceases. There is no reason why further processes, including the levying of fees, destruction of diseased animals and sales in execution cannot be subjected to judicial supervision.

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[10] *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) (*Zondi*).

[11] 32 of 1947.

[12] *Zondi* above n 10 at paras 66-8 and 79-86.

[13] Id at para 83.

[16] The judgment of the High Court reveals that all the parties were in agreement that sections 12, 34, 35, 36 and 39 of the Ordinance could not be allowed to stand. They discriminate unfairly against landless stock owners in violation of their right to equality as guaranteed in section 9 of the Constitution. The sections provide for destruction of animals and for the determination of penalties payable for animal trespass without the involvement of landless stock owners. It is against this background that the High Court order was granted.

Before this Court

[17] The application comes before us in terms of rule 16 of the Rules of this Court. None of the respondents opposes the application. The first to seventh respondents elected to abide by the decision of this Court. This Court then solicited assistance from the Grahamstown Bar and Mr Paterson SC together with Ms Beard filed written submissions and appeared before this Court as friends of the Court (amici curiae). We are grateful to both of them for their assistance.

[18] The applicant persists that the impoundment scheme violates sections 25 and 34 of the Constitution.[14] At the hearing we raised with both Mr Ngcukaitobi (who appeared on behalf of the applicant) and the amici the issue whether this Court has

[14] Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum."

jurisdiction to confirm the order of the High Court. They were in agreement that confirmation is necessary. This submission, however, requires further consideration.

[19] As to the rest of the order of the High Court, the amici submitted that sections 12 and 23 of the Ordinance are not constitutionally invalid.

[20] Therefore the issues before us are—

(a) whether this Court has jurisdiction to confirm the order of the High Court;

(b) whether the impugned sections of the Ordinance (or some of them) violate the provisions of the Constitution; and

(c) the appropriate remedy.

Does this Court have jurisdiction to confirm the order of the High Court?

[21] The power of this Court to confirm orders of constitutional invalidity is founded in sections 167(5) and 172(2)(a) of the Constitution. Section 167(5) provides:

> "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, the High Court, or a court of similar status, before that order has any force."

Section 172(2)(a) provides:

> "The Supreme Court of Appeal, the High Court of South Africa 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."

[22] The Constitution therefore sets out categories of cases in which orders of constitutional invalidity will be effective only on confirmation by this Court. This is necessary to preserve the principle of separation of powers.[15] Only the highest court in the country is empowered to determine finally the conduct of the principal repositories of legislative and executive powers: that is, the National Parliament and the Provincial legislatures, on the one hand, and the State President, on the other hand. This rationale for subjecting orders of constitutional invalidity to consideration by this Court was expressed in *SARFU* as follows:

> "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

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

> correctly done. This Court has a duty to assume this supervisory role."[16] (Footnote omitted.)

[23] Where an order of constitutional invalidity relates to legislation other than national or provincial Acts, there is no need for what *SARFU* called this Court's "supervisory role". Under section 172(2) of the Constitution, the High Court and the Supreme Court of Appeal are empowered to make effective orders of constitutional invalidity in respect of any laws (other than those mentioned in sections 167(5) and 172(2)(a)). Woolman suggests that—

> "[section 172(2)(a) of the Constitution] covers all statutory provisions enacted by Parliament. It does not extend to subordinate legislation (eg regulations and bylaws), to conduct other than conduct of the President, or to the common law. In regard to these other forms of law and conduct, confirmation of a declaration of invalidity is not required and the High Court's finding is final – provided the parties do not appeal the case to the Constitutional Court."[17] (Footnotes omitted.)

[24] The issue whether this Court has jurisdiction to confirm the declaration of invalidity arises because there is uncertainty regarding the status of the Ordinance: whether it is a provincial Act, the declaration of invalidity of which is susceptible to confirmation by this Court.

[25] For a proper perspective of the current status of the Ordinance, its background needs to be set out in some detail. The Ordinance was passed in November 1938 by the Provincial Council of the erstwhile Cape of Good Hope. Its operation extended to

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[16] *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) (*SARFU*) at para 29.

[17] Woolman et al (eds) *Constitutional Law of South Africa* 2 ed Vol 1 (Juta & Co Ltd, Cape Town 2008) 4–53.

the whole of the province, which then included the current Eastern Cape, Northern Cape and Western Cape Provinces. It was aimed at consolidating and amending the laws relating to trespassing and impoundment of livestock which were applicable in the area. Between 1940 and 1971 the Ordinance was amended on several occasions.[18]

[26] From October 1976 the former Transkei (within which the applicant's home town, Lady Frere, is located) attained "independence" from the Republic of South Africa, a status that endured until 1994. So did the erstwhile Ciskei during the period from 1981 to 1994.[19] During this period of "independence" the Legislature of the erstwhile Republic of Ciskei repealed the Ordinance and replaced it with the Ciskei Pounds Act.[20] That legislation continues to be applicable in that part of the Eastern Cape. There is evidence of similar legislation having been enacted in the erstwhile Transkei.[21]

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[18] Amended by the Pounds (Amendment) Ordinance 30 of 1940; the Pounds (Amendment) Ordinance 14 of 1941; the Pounds (Amendment) Ordinance 8 of 1950; the Decimal Coinage Ordinance 18 of 1960; the Pounds (Amendment) Ordinance 23 of 1962; the Pounds (Amendment) Ordinance 21 of 1970; and the Pounds (Amendment) Ordinance 7 of 1971.

[19] In fact, in 1963 the Transkei became a "self-governing territory".

[20] 43 of 1984.

[21] The status and applicability of the Ordinance in the former Transkei is unclear. The isolation of the so-called "Transkeian Territories" began in the late 1800s. The Glen Grey Act of 1894, for example, saw the establishment of district councils under the leadership of chiefs. Transkeian Territories were often regulated through a separate set of laws, quite different from laws applicable in the Union (later the Republic). The same is true of pounds. Until 1994, the Cape Pounds Ordinance 18 of 1938 did not apply to the former Transkeian Territories. On 23 April 1937 the Privy Council had enacted Proclamation 2431 of 1937. The Proclamation consolidated and amended pounds regulations in respect of the Transkeian Territories. In terms of section 1, the Proclamation was to be administered by the Transkei Divisional Council, which was created in terms of Ordinance 30 of 1937 and by village management boards, established in terms Ordinance 10 of 1921. Further, the Proclamation was amended on several occasions after 1938. It was amended by Proclamation 262 of 1946 and Proclamation 163 of 1953. In 1963, the Transkei became a "self-governing territory" and the Transkei Constitutive Act was passed. Section 2 of the Constitutive Act described the areas that became the Transkeian Territories. In terms of section 37 of the Constitutive Act, several issues were within the jurisdiction of the Transkeian legislative body. In terms of Schedule 2 (Part B, Item 19) of the Constitutive Act, the legislative authorities in the Transkei had jurisdiction in respect of "Markets and pounds in the Transkei".

[27] Meanwhile, in the rest of the country, in 1986, provincial councils were abolished and their original legislative powers were transferred to provincial administrators in the executive arm of the provincial government. Provincial administrators were empowered, inter alia, to amend ordinances that had been enacted by provincial councils. Thus the status of ordinances, including the one before us, became uncertain. It is not clear whether the status of the Ordinance changed with the abolition of the provincial councils and transfer of their original legislative authority to provincial administrators, or whether the change of status would take effect only if the provincial administrator exercised his or her legislative authority by pronouncing on the Ordinance.

[28] In June 1994 the administration of the Ordinance was assigned to competent authorities in the Eastern Cape, Northern Cape and Western Cape in terms of proclamations issued by the President.[22] In the Eastern Cape (excluding the former Ciskei) the Ordinance continues to apply in its 1971 form, as provided for in terms of section 235(8) of the interim Constitution.[23]

[29] What then is the status of the Ordinance in the Eastern Cape? In *Zondi*, because the Provincial Government had appealed against the High Court order of invalidity, this Court left open the question of whether an ordinance similar to the one before us is a provincial Act for the purposes of confirmation by this Court under sections 167(5) and 172(2)(a) of the Constitution. The issue of confirmation of the

[22] See Proclamations above n 3.

[23] Id.

invalidity was decided on the merits of the appeal. Unlike *Zondi*, this case comes before us purely as an application for confirmation of the order; the question of the status of the Ordinance is the primary issue.

[30] In *Weare* this Court, whilst considering the same question, observed that there is no definition in the Constitution for "provincial Act".[24] However, some indication is given in the definitions section,[25] which provides that in the Constitution, unless the context indicates otherwise—

> "'provincial legislation'" includes—
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> (a) subordinate legislation made in terms of a provincial Act; and
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> (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government."

The same observation had been made in *Gold Circle*,[26] where Southwood AJ reasoned that the distinction made by the legislature between "legislation that was in force when the Constitution took effect" and "provincial Act" demonstrates that the former was not meant to be included in the latter phrase.

[31] But in *Weare* this Court did not find the consideration referred to in *Gold Circle* to be conclusive on whether a declaration of constitutional invalidity needs to be confirmed. Instead this Court considered relevant the internal qualifier in the

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[24] Above n 15 at para 22.

[25] Section 239 of the Constitution.

[26] *Gold Circle (Pty) Ltd and Another v Premier, KwaZulu-Natal* 2005 (4) SA 402 (D) (*Gold Circle*).

definitions section to the effect that "unless the context indicates otherwise".[27] Van der Westhuizen J said*:*

> "On the reasoning of *Gold Circle*, section 239 implies that 'provincial Act' and 'provincial Ordinance' are different terms for the purposes of the Constitution and this means that a provincial ordinance does not fall within the meaning of 'provincial Act' as used in sections 167(5) and 172(2)(a). However, another consideration is also relevant. Section 239 provides that the definitions it contains apply 'unless the context indicates otherwise'. As was said earlier, the application of this Court's confirmation power under sections 167(5) and 172(2)(a) is based notionally on the status of the law or authority reviewed. It must therefore be asked whether, considering 'provincial Act' in this context, the present Ordinance should be seen to have status such that it should be treated as a provincial Act for the purposes of these sections."[28]

[32] Therefore the more significant indicators of the status of an ordinance, such as the one before us, are: (a) its original source; (b) its history from the time of enactment until the enactment of the Constitution; and (c) the history beyond the enactment of the Constitution.

[33] The origins and part of the history of the Ordinance under consideration in this case are similar to the ordinances considered in *Weare* and *Zondi.* As shown in [25] and [27] above, the relevant ordinances were enacted by provincial councils, exercising original legislative authority. This Court has held that nothing in either the interim or the final Constitution indicates that the intention was that the status of

[27] *Weare* above n 15 at para 32.

[28] Id.

ordinances as original legislation should change. If anything, both indicate the contrary. In *Weare*, this Court expressed itself in the following terms:

> "Indeed, the effect of the interim and 1996 Constitutions is, if anything, the opposite. As this Court has held, the purpose of the continuation provisions is to preserve the existing legal order: considerations of practicality made it unavoidable to hold the pre-constitutional law in place until such time as the necessary changes could be made, notwithstanding that this legislation was the product of democratically illegitimate authorities."[29]

[34] In *Weare*, the post-Constitution pronouncement by the provincial legislature in assimilating the Ordinance was crucial in the conclusion that the Ordinance was a provincial Act. The Court further said:

> "[T]he effect of the amendment and incorporation is that the ordinance as a whole should be seen as an expression of the legislative will of a provincial legislature and treated accordingly. Following from the notion of respect and comity articulated in *SARFU*, its invalidation should be subject to confirmation by this court."[30] (Footnote omitted.)

Notwithstanding this, the Court also said:

> "I do not agree with the finding in *Gold Circle* that the invalidation of a provision which has not itself been amended or substituted by a provincial legislature does not fall to be confirmed. . . This does not necessarily mean that ordinances in respect of

[29] *Weare* above n 15 at para 28. See also *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 106 (separate concurring judgment of Chaskalson CJ); *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 2; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 44; *Ynuico Ltd v Minister of Trade and Industry and Others* [1996] ZACC 12; 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 7; and *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 32.

[30] Above n 15 at para 36.

> which the legislature has not acted – which have not been incorporated into a statute or amended – do not fall within the ambit of sections 167(5) and 172(2)(a).”[31]

[35] There are two distinguishing aspects between the case of the applicant, on the one hand, and that of *Weare*, on the other. The first is the express pronouncements by the provincial legislature on the Ordinance in *Weare*, in the form of assimilation into a provincial Act, whereas the Eastern Cape Provincial Legislature has never expressed itself on the Ordinance before us. Further, as I have stated, the Ordinance before us does not apply uniformly throughout the Eastern Cape Province. Different legislation regulates impoundment in the erstwhile Ciskei.

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

[37] Can this Court nevertheless assume confirmation jurisdiction for the other reasons advanced by the applicant and the amici? The applicant submitted that even

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[31] Id.

if, on a technical interpretation, it is found that the Ordinance does not constitute a provincial Act, that should not be a reason for this Court to refrain from confirming the High Court order because the question whether or not to confirm any declaration of invalidity is one of substance, not form. A further submission was that the post-Constitution passivity by the Eastern Cape Legislature in not rectifying the constitutional defects should be viewed as an embrace of the Ordinance in its original form. But, in the context of the Ordinance being applicable only in parts of the Eastern Cape Province, I do not think that it can be said that the Provincial Legislature has embraced the Ordinance, nor can it be concluded that, in substance, its effect is the same as that of a provincial Act. By the same token, it could be argued that the Provincial Legislature accepted the Ciskei Pounds Act.

[38] Further, while I accept that the anomaly arising from the fact that the High Court's declaration of constitutional invalidity is effective in one province when the Ordinance remains "alive" in the other two provinces is undesirable, I do not think that is a proper basis for this Court to assume jurisdiction not sanctioned by the Constitution. The relief sought will not cure the "irregularity" that prevails in the Eastern Cape Province as a result of the two legislative regimes over impoundment.

[39] The amici expressed a concern that if we decline to confirm the declaration of invalidity, the hardship confronting rural stockowners will endure. I do not agree. The declaration of invalidity by the High Court remains intact and effective in the Eastern Cape Province. I think that once the relevant authorities in the other two

affected provinces become aware of the order, they will take it into account when they are called upon to implement the impugned provisions.

[40] For obvious reasons I echo the High Court's lamentation of the non-participation by the Premiers of the Northern and Western Cape in these proceedings, despite the fact that they were cited as respondents. In an effort to ameliorate the irregularity resulting from continued implementation of the invalid sections of the Ordinance in the Northern and Western Cape Provinces, I shall order that a copy of this judgment and the judgment of the High Court be served on the second and third respondents.

[41] Lastly, the National Animal Pounds Bill[32] is set to establish national norms and standards in order to maintain consistency relating to pounds and the impounding of animals in the country. Although it is unclear when the Bill is likely to be finalised, it does signal efforts by the National Legislature to regulate impoundment countrywide.

[42] On the view I take of the issue of jurisdiction, this Court cannot enquire into the propriety of the order of constitutional invalidity.

[43] In the event, the following order is made:

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

[32] *Government Gazette* 36385, published on 18 April 2013.

3. The Registrar of this Court shall immediately deliver a copy of this judgment and the judgment of the High Court to the second and third respondents.

For the Applicant:	Advocate T Ngcukaitobi instructed by the Legal Resources Centre.
Appointed by the Court:	Advocate T Paterson SC and Advocate M Beard.