CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/98

THE PREMIER OF THE PROVINCE OF THE WESTERN CAPE Applicant

versus

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION Second Respondent

Heard on : 23 February 1999

Decided on : 29 March 1999

JUDGMENT

CHASKALSON P:

Introduction

[1] This case arises out of a dispute between the government of the Western Cape province and the national government relating to the constitutional validity of certain amendments to the Public Service Act, 1994[1] (the 1994 Act) introduced by the Public Service Laws Amendment Act, 1998[2] (the 1998 Amendment). The 1998 Amendment is part of a legislative scheme aimed

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1 Act 103 of 1994.

2 Act 86 of 1998.

at the structural transformation of the public service. The new scheme to which the government of the Western Cape objects is set out in the 1994 Act as amended by the Public Service Laws Amendment Act, 1997[3] (the 1997 Amendment), the 1998 Amendment, and the Public Service Commission Act 1997.[4] These acts have all been assented to by the President but have not yet been brought into force.

[2] The Western Cape government instituted proceedings in this Court during December 1998. It sought an order declaring certain provisions of the 1998 Amendment to be inconsistent with the Constitution.[5] It also claimed urgent interim relief, stating that the President intended to fix 1 January 1999 as the date on which the new legislative scheme would come into force. If it were obliged to comply with the disputed provisions of the Amendment Acts on that date, notwithstanding the challenge to their constitutionality, wasted expense and other adverse consequences would ensue should the challenge prove to be successful. As the dispute is one which concerns "the constitutional status, powers or functions" of organs of state at the national

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3 Act 47 of 1997.

4 Act 46 of 1997.

5 Constitution of the Republic of South Africa, 1996.

and provincial sphere only this Court has jurisdiction to decide the matter.[6]

[3] The claim for interim relief and the immediate urgency fell away when an undertaking was given that the implementation date of the new legislative scheme would be deferred pending the outcome of this litigation. The parties were agreed, however, that the dispute was one which called for speedy resolution, and an early date for the hearing of the matter was accordingly allocated.

[4] The objection raised by the government of the Western Cape to the new legislative scheme (the new scheme) is that it both infringes the executive power vested in the provinces by the Constitution and detracts from the legitimate autonomy of the provinces recognised in the Constitution.

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[6] Section 167(4)(a) of the Constitution provides:
"Only the Constitutional Court may -
a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state."

[5] Prior to the enactment of the new scheme, the public service was divided into departments of the national government and provincial administrations. Provincial administrations, but not provincial departments, were listed as "departments" in the unamended 1994 Act.[7] Provincial administrations were, in turn, subdivided into departments. Administrative responsibility for, and control over, a provincial administration, including all its departments, vested in the head of the provincial administration, the provincial Director-General (DG).[8] The essential changes to the existing scheme to which objection is raised in these proceedings, derive from the 1998 Amendment. The changes can be summarised as follows:

(a) provincial departments are included in the definition of "department". A "department" is now defined to mean "a national department, a provincial administration or a provincial department";[9]

(b) provincial heads of departments are accorded the same broad functions and responsibilities as heads of national departments and no longer fall under the administrative control of the provincial DG;[10]

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7 Section 1(1) of the 1994 Act.

8 Section 7(3)(b) of the 1994 Act.

9 Sections 1(a) and (f) and 4(a) of the 1998 Amendment Act. (New sections 1 and 7(2) of the 1994 Act).

10 Sections 4(a)-(d) of the 1998 Amendment Act. (New section 7(2) - (4) of the 1994 Act).

(c) amongst other powers and duties, a provincial DG becomes the Secretary to the Executive Council of the province concerned and is responsible for the administration of the Office of the Premier, intergovernmental relationships, and intragovernmental cooperation between the various departments of the provincial administration, including coordination of their actions and legislation;[11]

[11] Section 4(c) of the 1998 Amendment Act. (New section 7(3)(c) read with schedule 1 of the 1994 Act).

(d) a provincial head of department is now directly accountable to the "executing authority" concerned, who is the member of the Executive Council (the MEC) responsible for such portfolio;[12]

(e) a premier may request the President to establish or abolish any provincial department. The President shall give effect to such request if he is satisfied that such steps are consistent with the provisions of the Constitution and the Act;[13]

(f) the Minister of Public Service and Administration (the Minister) may, after consulting with the relevant executing authority, make determinations regarding the allocation or abolition of any function of any department or the transfer of any function from a department to another body.[14]

[6] The main contention of the Western Cape government is that it is part of the executive power of a province to structure its own administration, and that national legislation which seeks

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12 Section 1(b) read with section 4(b) of the 1998 Amendment Act. (New section 1(f) read with section 7(3)(a) of the 1994 Act).

13 Section 4(d)(ii) of the 1998 Amendment Act. (New section 7(5) of the 1994 Act).

to impose such a structure on the provinces infringes this provincial power.

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[14] Section 2(b) of the 1998 Amendment Act. (New section 3(b) of the 1994 Act).

[7] Much of the evidence placed before this Court was addressed to the question whether the provisions of the new scheme dealing with the structure and functioning of the public service in the provinces, and specifically in the Western Cape, is likely to be better or worse than the existing scheme according to which control of provincial administrations is centralized and vested in the DGs of the provinces. In the circumstances of the present case, that, however, is not a question that has to be addressed in dealing with this issue. The question is not which scheme is better suited to the conditions in the Western Cape in the circumstances of the present case; it is whether Parliament has the competence to prescribe how provincial administrations in the public service are to be structured. A further contention that the new scheme falls foul of the cooperative government provisions of section 41 of the Constitution is dealt with later in this judgment.[15]

The executive power of the provinces

[8] The executive authority of provinces is set out in section 125 of the Constitution which provides:

> "(1) The executive authority of a province is vested in the Premier of that province.
> (2) The Premier exercises the executive authority, together with the other members of the Executive Council, by -

[15] Paras 49-62.

(a) implementing provincial legislation in the province;

(b) implementing all national legislation within the functional areas listed in schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;

(c) administering in the province, national legislation outside the functional areas listed in schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;

(d) developing and implementing provincial policy;

(e) co-ordinating the functions of the provincial administration and its departments;

(f) preparing and initiating provincial legislation; and

(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

(3) A province has executive authority in terms of subsection 2(b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred in subsection (2).

(4) ....

(5) ....

(6) The provincial executive must act in accordance with -

(a) the Constitution; and

(b) the provincial constitution, if a constitution has been passed for the province."

[9] Section 125 does not specifically include as an executive power of a province, the power to establish and structure a public service administration for the province. The Western Cape government contended, however, that such a power is implicit in the executive power of a province.

Section 197 of the Constitution

[10] The only provision of the Constitution dealing with the structuring of the public service is section 197 which provides:

> "(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.
>
> (2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.
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> (3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.
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> (4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service."

[11] Section 197(1) requires national legislation to address the structure of the public service (the framework within which it will be organized), and the functioning of the public service (how duties will be carried out). A law making provision for the public service to be organized in departments and prescribing the line and reporting functions of heads of departments and other officers and employees would ordinarily be within the purview of such a power.

[12] A power cannot be implied if it contradicts an express provision of the Constitution. To meet this difficulty the government of the Western Cape contended that section 197(1) should be construed narrowly as dealing only with the regulation or structuring of the public service corps, and not with the structuring of the provincial administration within which

such corps is to function. According to this contention:

(a) the national legislation sanctioned by section 197(1) is confined to public service matters such as (i) the setting up and regulating of the personnel corps which comprises the public service, (ii) the identifying of provincial administrations which are to be further structured and organised by the provincial executives, and (iii) establishing norms and standards in accordance with which provincial governments must recruit, appoint, transfer and dismiss members of the public service in their administrations;

(b) the 1998 Amendment requires that the public service in the provinces be organised in departments and prescribes the responsibilities attached to the posts of DGs and heads of departments, and deals with the structuring of public administration, not the structuring of the public service.

[13] On the construction of section 197(1) contended for by the Western Cape government, the first of the three competences said to be contemplated by the section is covered by section 197(2), which provides that national legislation must regulate the terms and conditions of employment in the public service. The third competence is covered by section 197(4) which states that recruitment *etc*. must be within a framework of uniform norms and standards applying to the public service as a whole. That leaves

only the second of the suggested competences, namely the power to identify provincial administrations which are to be further structured and organised by provincial executives. In effect, what the contention implies is that section 197(1) should be construed as having no application to the provincial administrations within which the public service corps is to function.

The certification proceedings

[14] It was contended, however, by the Western Cape government that its construction of section 197(1) was correct in the light of the two judgments of this Court dealing with the certification of the new constitutional text. I will refer to these as the First Certification Judgment[16] and the Second Certification Judgment.[17]

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16 *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); 1996 (10) BCLR 1253 (CC).

17 *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

[15] The certification proceedings were held to determine whether or not the new constitutional text adopted by the Constitutional Assembly in 1996 to replace the interim Constitution[18] was consistent with the 34 Constitutional Principles[19] (CPs) by which the Constitutional Assembly was bound. In the first certification proceedings this Court held that certain provisions of the new constitutional text did not comply with all the CPs and accordingly declined to certify the text. The text was referred back to the Constitutional Assembly which considered the defects in the text identified by this Court in its judgment, and amended the text in order to deal with them. In the Second Certification Judgment this Court had to consider whether the amended text complied with the CPs. It concluded that the defects had been remedied and it accordingly certified that the amended constitutional text complied with the CPs.

[16] One of the issues raised in the first certification proceedings was whether the provisions of chapter 10 of the new constitutional text dealing with the public service and the Public Service Commission complied with the CPs.[20] This Court held that it was unable to certify that these provisions met such requirements, and this was one of the grounds upon which certification was declined. In the Second Certification Judgment, it held that amendments made by the Constitutional Assembly to the provisions of chapter 10 were

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18 Act 200 of 1993.

19 Set out in schedule 4 to the interim Constitution.

20 Chapter 10 is dealt with in paras 273 - 278 of the judgment.

sufficient to remedy such defects.[21]

[17] In the First Certification Judgment, this Court referred to the problem which could arise if the constitutional text has more than one permissible meaning, and if on one construction the text concerned does not comply with the CPs, but on another it does. It held that:

[21] Paras 183 - 198 of the judgment.

> "... a future court should approach the meaning of the relevant provisions of the NT [New Constitutional Text] on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances."[22]

[18] Counsel for the Western Cape government contended that the construction which they place on the Constitution in the present case, in so far as it deals with the executive powers of the provinces and their legitimate autonomy, is the only construction consistent with the findings made by this Court in the certification judgments, and that this Court is accordingly bound to adopt such a construction in dealing with the present dispute.

[19] Because of the contentions which have been advanced by the Western Cape government it will be necessary in this judgment to give consideration to the certification proceedings, and to compare the provisions of the interim Constitution and the legislative scheme according to which the public service was structured and regulated under its provisions (the existing scheme), with the provisions of the 1996 Constitution and the legislative scheme contemplated by the 1997 and 1998 amendments.

The interim Constitution and the existing scheme

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[22] At para 43.

[20] The existing scheme was established by the 1994 Act which was proclaimed by the President in terms of section 237(3) of the interim Constitution.[23] It came into force on 3 June 1994 and made provision for the complicated and difficult task of establishing a single public service for the Republic to replace various administrations which had been established under apartheid. Prior to the 1997 and 1998 Amendments it had been amended on a number of occasions by presidential proclamations and by national legislation.[24]

[21] The rationalisation contemplated by the interim Constitution was carried out in terms of the 1994 Act. This Act dealt with the way in which the "administrations" within the public service were to be structured at the national and provincial sphere. Provincial administrations were to be treated as single departments, functions were assigned to the DGs of the provinces, and provision was made for the manner in which decisions were to be taken concerning the establishment, abolition and control of sub-departments and the like, and the employment of personnel.

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23 See Proclamation 103 of 1994 published in *Government Gazette* 15791 of 3 June 1994.

24 See Proclamation 105 of 1994, Proclamation 134 of 1994, Proclamation R171 of 1994, Proclamation R175 of 1994, Intelligence Services Act 38 of 1994, Public Service Amendment Act 13 of 1996, Public Service Second Amendment Act 67 of 1996, Proclamation 82 of 1998.

[22] The design of the scheme took account of the provisions of the interim Constitution dealing with the public service and Public Service Commissions. Under that Constitution there was to be one public service[25] and a Public Service Commission at national sphere,[26] but provinces that wished to do so, could establish Provincial Service Commissions.[27] Provincial Service Commissions had powers similar to those vested in the Public Service Commission, but had to exercise them "subject to norms and standards applying nationally".[28] The public service had to be structured "to provide effective public administration."[29] Provision was also made in the interim Constitution for the principles according to which the public service was to be conducted[30] and the criteria to be taken into account in the making of appointments.[31]

[23] The Public Service Commissions, national and provincial, had an important role in matters relating to the structure and functioning of the public service. They could make recommendations concerning such matters and these recommendations had to be carried out unless rejected by the President or the Premier.[32] As previously indicated, however,

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25 Section 212.

26 Section 209.

27 The Western Cape government established such a commission.

28 Section 213.

29 Section 212(1).

30 Section 212(2).

31 Section 212(4).

32 Section 210(3) and section 213(2) of the interim Constitution.

recommendations of a Provincial Service Commission were subject to norms and standards applying nationally.

The new constitutional text

[24] The 1996 Constitution certified by this Court changed these provisions. It requires that there be a single Public Service Commission for the Republic,[33] consisting of fourteen commissioners, five of whom have to be recommended by the National Assembly. The remaining nine are to be appointed on the basis that one commissioner for each province will be nominated by the Premier of that province.[34] The powers of the Public Service Commission are different to the powers of the commissions which existed under the interim Constitution. The new Public Service Commission has less control over the public service than its predecessors. It is empowered to conduct investigations, make reports and generally to promote those values and principles of the public service identified in the Constitution.[35] It has to report to the National Assembly and also to provincial legislatures in respect of its activities in a province.[36] It is entitled to investigate complaints and to monitor the performance of the public service,[37] but it is only empowered to give directions aimed at:

> "... ensuring that personnel procedures relating to recruitment, transfers, promotions and

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33 Section 196(1).

34 Section 196(7).

35 Section 196(4) (a) and (b).

36 Section 196(6).

37 Section 196(4)(f).

> dismissals comply with the values and principles set out in section 195 [of the Constitution]."[38]

The Constitution does not say how such directions are to be implemented, but as that issue does not arise in the present proceedings, there is no need to deal with it.

[25] Weight is given to the functioning of the Public Service Commission by section 196(3) of the Constitution which provides:

> "Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission."

The new scheme

38 Section 196(4)(d).

[26] The changes to the existing scheme introduced in 1997 and amended in 1998 have already been referred to.[39] The provincial administrations are divided into departments, as is the case with the national administration, and are required to function in much the same way as national departments do. The provincial administration headed by the DG in the Premier's office remains a department for the purposes of the Act. Provision is, however, made for each provincial department to have a head of department. Many responsibilities which previously vested in the DG of the province have been transferred to the heads of the provincial departments, and new responsibilities have been allocated to the DG. This is reflected in chapter III of the Act, as amended, which deals with the organisation and staffing of the public service. The principal objection of the government of the Western Cape is that the provisions of section 7 of this chapter constitute an impermissible interference with an executive power of the provinces to establish provincial administrations. The terms of section 7 are dealt with in more detail later in this judgment.[40]

[27] The constitutionality of the 1994 Act was not challenged by the Western Cape government; on the contrary, the effective relief that it seeks is to leave in place the provisions of this Act dealing with provincial DGs and heads of departments. National legislation, so it was contended, was permissible under the interim Constitution in order to effect the rationalisation. The position under the 1996 Constitution is, however, different. The rationalisation having been effected under the mechanisms provided by the interim Constitution, the provinces were now

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39 See para 5 above.

40 See paras 63-83 below.

free to take decisions as to how, if at all, the structures put in place by the 1994 Act should be changed. That, so it was argued, is part of the executive power of the provinces and within the ambit of their legitimate autonomy.

The certification of the new constitutional text

[28] In developing this argument counsel referred to paragraph 276 of the First Certification Judgment dealing with chapter 10 of the new constitutional text where it was said:

> "Under the IC [interim Constitution] provincial service commissions are bound by norms and standards set by the national PSC [Public Service Commission]. The setting of such norms and standards by an independent body does not detract from the legitimate autonomy of the provinces. What is important to such autonomy, however, is the ability of the provinces to employ their own public servants. We do not read the NT [New Constitutional Text] as denying the provinces this power. Although there is no specific provision dealing with this, it is a power implicit in the executive authority of the provinces which is vested in the Premiers by NT 125(1), and in the other provisions of NT 125 which presuppose that the provinces will have an administrative infrastructure necessary for the implementation and administration of laws. The IC does not specifically empower the provinces *to set up their own administrations and to employ their own servants*, but this has been done by all the provinces, and it has never been doubted that the power to do this is inherent in their executive authority to implement laws. NT sch 6 annexure D s 6 accepts that existing provincial administrations will remain in place and that the process of rationalisation will be continued with a view to establishing an effective administration for each province. The fact that NT 197 makes provision for 'a public service for the Republic' and not for separate public services for the various levels of government does not detract from this. IC 212 also makes provision for 'a public service for the Republic'. What is important is who makes the appointments to the public service in respect of provincial administrations." (Italics added).

[29] Counsel relied in particular on the passage in this paragraph concerning the inherent power of the provinces to "set up their own administrations and to employ their own servants". They contended that this identified two aspects of provincial power: one to establish a provincial administration, the other to employ personnel. Section 197 of the new Constitution makes provision for national legislation to regulate the employment of personnel in the public service, but it does not deal with how the administrations within each province should be established. And that, so the argument went, is an exclusive power of the provincial government.

[30] In the First Certification Judgment this Court did not deal directly with the structuring of the public service in the provincial administrations. What was of concern then was the failure of the new constitutional text to identify the powers of the new Public Service Commission, and the question whether provincial governments would have the power to appoint or dismiss employees in the provincial administrations of the public service. The Court held that the new constitutional text did not address these issues adequately, and this was one of the reasons why it declined to certify the text.

[31] This question was referred to for the first time in paragraphs 170 - 177 of the First Certification Judgment, where the issue under consideration was whether the provisions relating to the new Public Service Commission complied with CP XXIX, which required the independence and impartiality of the Commission to be safeguarded in the Constitution. The judgment pointed to the differences between the provisions of the interim Constitution and the provisions of the new constitutional text insofar as the Public Service Commission was concerned and indicated that it was impossible for it to certify whether its independence and

impartiality had been adequately protected, without knowing what the functions and powers of the commission would be. In paragraph 177 it concluded this part of its judgment as follows:

> "It is sufficient for present purposes to say that we also cannot certify that CP XVIII.2 and CP XX have been complied with without knowing what the powers and functions of the PSC will be and what control the provinces will have over appointments to and staffing of provincial administrations."

[32] The judgment dealt again with this issue when considering the question whether the requirements of CP XX calling for "legitimate provincial autonomy" had been complied with. It held that:

> "The CPs do not contemplate the creation of sovereign and independent provinces; on the contrary, they contemplate the creation of one sovereign state in which the provinces will have only those powers and functions allocated to them by the NT. They also contemplate that the CA [Constitutional Assembly] will define the constitutional framework within the limits set and that the national level of government will have powers which transcend provincial boundaries and competences. Legitimate provincial autonomy does not mean that the provinces can ignore that framework or demand to be insulated from the exercise of such power."[41]

[33] Applying this to the way in which the single Public Service Commission was dealt with in the new text, the judgment said:

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41 Para 259 of the First Certification Judgment.

> "If the PSC has advisory, investigatory and reporting powers which apply equally to the national and provincial governments, and the provinces remain free to take decisions in regard to the appointment of their own employees within the framework of uniform norms and standards, the changes will neither infringe upon their autonomy nor reduce their powers. But if the provinces are deprived of the ability to take such decisions themselves, that would have a material bearing on these matters."[42]

[34] The issue was reverted to when consideration was given to the provisions of CP XVIII.2, which required that:

> "The powers and functions of the provinces defined in the Constitution, ... shall not be substantially less than or substantially inferior to those provided for in [the interim] Constitution."

One of the objections which had to be considered was whether provincial powers had been substantially diminished, because the new constitutional text failed to repeat the provision of the interim Constitution, that allowed provinces to establish their own provincial service commissions. In dealing with this objection this Court said:

> "We have previously indicated that we cannot evaluate changes made in the NT in regard to the PSC without knowing what the powers and functions of the "single Public Service Commission" will be. If such powers interfere with the provinces' powers to appoint provincial public servants, subject to national norms and standards, there will have been a reduction of provincial powers in this regard."[43]

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42 Para 278 of the First Certification Judgment.

43 Para 390, First Certification Judgment.

[35] When the Court came to weigh the effect of the changes made by the new constitutional text it dealt with the public service commission as follows:

> "We cannot assess whether the powers and functions of the provinces in this area have been diminished because NT ch 10 does not define the powers of the PSC."[44]

It accordingly held:

> "NT ch 10 therefore has to be ignored at this stage for the purposes of weighing the baskets because it itself is not in compliance with the CPs."[45]

[36] I have already mentioned that in the First Certification Judgment this Court did not deal directly with section 197(1) which provides that the public service be structured and function in accordance with national legislation. Nor did the Court express any opinion on the meaning to be given to such provision. In dealing with the question of framework in a different context, however, it pointed out in paragraph 294 of the judgment that the CPs empowered the Constitutional Assembly to determine the framework within which the various spheres of government would function, and said:

> "Provincial governments, like other levels of government, have to conduct their affairs

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44 Para 453, First Certification Judgment.

45 Para 454, First Certification Judgment.

> within the prescribed framework. As long as the framework does not constrain the exercise of provincial powers in ways which would prevent the provinces from effectively exercising the powers vested in them by the NT, the framework is not relevant to provincial autonomy."

[37] In the context of the judgment as a whole the passage from paragraph 276 relied on by counsel for the Western Cape government must be understood as meaning no more than this. The executive power of the provinces under the interim Constitution included a power to set up a provincial administration within the public service by employing the personnel who would work in that section of the public service. All this was to be done within a framework prescribed by national norms and standards.

The interpretation of section 197(1) of the Constitution

[38] In the Second Certification Judgment, this Court was required to consider whether the changes made to chapter 10 of the new constitutional text were sufficient to meet the concerns raised by it in the First Certification Judgment, and whether the amended text complied with the CPs.

[39] The implications of these changes are considered in paragraphs 192 and 193 of the Second Certification Judgment, saying:

> "[192] Under the IC provincial governments are entitled to appoint their own employees, but their powers are constrained in two respects:
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> (a) The provincial service commissions can issue mandatory directives in regard to the establishment and organisation of departments,

> appointments, transfers, promotions, discharge and other career incidents of provincial employees; and
>
> (b) The directions of the provincial service commissions have to conform with national norms and standards.
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> [193] Under the AT [Amended Constitutional Text] provincial governments will be able to deal with the matters referred to in subparagraph (a) in the previous paragraph without reference to the PSC but will have to do so in accordance with uniform norms and standards as required by AT 197(4). An objector contended that there is a diminution in the powers of provincial governments because AT 197(1) and (2) make it clear that the powers of a provincial government under AT 197(4) are subject to frameworks determined by national legislation. In our view, however, this requirement does not introduce any diminution of the powers of provinces. Under the IC these powers are exercised by the provincial service commissions 'subject to norms and standards applying nationally.' There has been a shift of power from the provincial service commissions to the provincial government and from the national PSC to the national government, but under both the IC and the AT, appointments, transfers, promotions and discharge of employees are to be made by provincial institutions subject to national norms and standards. We, therefore, cannot accept that the provisions of the AT in this regard diminish the powers of the provinces."

[40] It is contended by counsel for the Western Cape government that paragraph 193 should be read as applying only to appointments, transfers, promotions and discharge of employees, and not to the framework of the administration. I do not agree. Paragraph 192 of the judgment points out that provincial governments were entitled under the interim Constitution to appoint their own employees, but their power to do so was constrained in two respects. First, because the Provincial Service Commission could issue mandatory directives in regard to the establishment and organisation of departments, appointments, transfers, promotions, discharge and other incidents of provincial employees and secondly because the directions of the

Provincial Service Commissions had to conform with national norms and standards.

[41] These constraints applied both to the establishment and organisation of departments, and to appointments and other incidents of employment. Both had to comply with national norms and standards, and both are covered by paragraph 193 of the judgment. It was in this context that the statement was made in that paragraph that the framework requirements of sections 197(1) and (2) of the amended constitutional text did not result in a diminution of provincial powers.

[42] The executive power of the provinces includes the power to implement provincial legislation, and in certain cases national legislation as well.[46] This has to be done in accordance with the Constitution[47] and in the case of the Western Cape, in accordance with its provincial constitution as well.[48] The Western Cape Constitution vests in the executive the same powers concerning the implementation of legislation as the national Constitution does. It also requires the executive to exercise its powers "in accordance with the national Constitution".[49] Chapter 6 of the Western Cape Constitution deals with provincial administration and vests in the provincial government only the responsibility for recruitment, promotion, transfer and dismissal of members of the public service in the administration of the Western Cape. Nowhere in the

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46 Section 125(2)(a), (b) and (c).

47 Section 125(6)(a).

48 Section 125(6)(b).

49 Section 35(3).

Western Cape constitution is the executive given the power to make laws for the structure and functioning of the section of the public service in the Western Cape province. If there had been such a provision the constitution may not have been certified. But the fact remains that according to its own constitution the Western Cape government has to implement legislation in accordance with the provisions of the national Constitution, which provides that the public service is to be structured in accordance with national legislation. The fact that the structure is determined in this way does not prevent the province from functioning as such or from discharging its powers and duties under the Constitution.

[43] The sanctioning of national framework legislation is a feature of the Constitution and the system of cooperative government it prescribes. Such legislation is required for the raising and division of revenue,[50] the preparation of budgets at all spheres of government,[51] treasury control,[52] procurements by organs of state,[53]conditions according to which governments at all spheres may guarantee loans,[54] the remuneration of public

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50 Section 214(1) requires national legislation to set a framework for the equitable division of revenue raised nationally.

51 Section 215 requires national legislation to prescribe the form in which national, provincial and municipal budgets must be prepared, when they are to be tabled and how they are to be presented.

52 Section 216 requires national legislation to prescribe accounting practices, uniform expenditure classifications, and uniform treasury norms and standards to be applied by the national and provincial spheres of government.

53 Section 217 requires national legislation to prescribe a framework applicable at national and provincial spheres of government, for a fair procurement system.

54 Section 218.

officials at all spheres of government[55] and various other matters[56]. In the First Certification Judgment this Court held that such requirements were not inconsistent with the CPs.[57]

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55 Section 219.

56 See the discussion of the legislative framework in paragraph 293 of the First Certification Judgment where details of such matters are set out.

57 See paras 259-260 and paras 293-4.

[44] In my view the contentions advanced by counsel for the Western Cape government concerning the proper interpretation of section 197(1) of the Constitution must be rejected. The distinction they seek to draw between the public service and public administration is not supported by the certification judgments: when section 197(1) says "within public administration there is a public service" it is not drawing a distinction between provincial and national competences. Chapter 10 applies to all aspects of public administration prescribing the basic values and principles that have to be adhered to, making it clear that they apply to "administration in every sphere of government".[58] The public service is one of the administrations referred to, but the administrations of public enterprises and other organs of state by which "public goods" are provided, are also subject to the general requirements of the chapter. Special requirements are laid down for the public service as a distinct administration, and it is in this context that the public service is referred to as being "within public administration".

[45] Section 197(1) deals with the way in which the public service, as a particular administrative entity within public administration, must be structured and function. This is consistent with the interim Constitution and the 1994 Act. If a distinction were to be made between the structuring of public administration as a provincial power, and the structuring of the public service as a national power, one would have expected this to be set out explicitly in the Constitution. This was not done in the new constitutional text,

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[58] Section 195(2)(a).

submitted to this Court for certification in the first certification proceedings, and when the provisions of section 197 were reconsidered by the Constitutional Assembly, the only change made to the section to accommodate the concerns expressed in the First Certification Judgment, was to vest in the provinces the power to "employ, promote, transfer and dismiss" personnel in the provincial administrations of the public service. The competence to make laws for the structure and functioning of the public service as a whole, vested in the national sphere of government was retained in the amended text. Section 197(1) must be given effect to and should not be deprived of its content by finding as an implied power, a provincial legislative competence inconsistent with the express provisions of the Constitution.

[46] The Constitution requires that one public service be established to implement national and provincial laws. It is presumably for this reason and in order to avoid any dispute thereon that the competence concerning the structure and functioning of the public service is dealt with specifically in the Constitution, and was not left to be dealt with under the general legislative power conferred on parliament by section 44(1)(a). If the Constitution had provided that the structure and control of all aspects of the public service would reside solely at national sphere, personnel would be employed by and answerable to national functionaries, and as was pointed out in the First Certification Judgment, that would have detracted materially from the legitimate autonomy of the provinces. On the other hand, if each province and the national government had the

power to structure and control their respective segments of the public service, there would in substance be several public services and the concept of one public service would be a fiction. The compromise struck by the Constitution is that the framework for the public service must be set by national legislation, but employment, transfers etc. are the responsibility of the various administrations of which the public service is composed. That compromise was certified by this Court as being consistent with the CPs.

[47] Moreover, in regard to the linguistic construction of section 197(1), counsel for the Western Cape government could not refer us to any authority in support of the narrow and very particular construction which they sought to place on the words "public service" and I am unaware of any. "Public administration" and "public service" are not terms of art which have such clearly distinct meanings. On the contrary, they are expressions which are often used interchangeably to connote the organisation as well as the public officials through which an executive implements that which it is empowered to implement.

[48] The main attack on the constitutionality of the new scheme must accordingly fail. What remains to be considered is whether the detailed provisions of the new scheme infringe the executive powers of the provinces in any other respect, or whether they "encroach on the geographical, functional or institutional integrity" of provincial governments contrary to the requirements of section 41(1)(g)[59] of the Constitution.

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[59] Section 44(1)(g) provides:

Cooperative government

[49] For the purposes of this part of the judgment it is necessary to consider the provisions of chapter 3 of the Constitution which deal with cooperative government.

"All spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere."

[50] The principle of cooperative government is established in section 40 where all spheres of government are described as being "distinctive, inter-dependent and inter-related". This is consistent with the way powers have been allocated between different spheres of government. Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is "one sovereign, democratic state",[60] and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.[61] These provisions vest concurrent legislative competences in respect of important matters in the national and provincial spheres of government,[62] and contemplate that provincial executives will have

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60 Section 1.

61 See para 43 above.

62 National and provincial legislatures have concurrent powers in respect of the 33 functional areas referred to in schedule 4. These includes matters as important to day-to-day living as education at all but tertiary level, the environment, health services, housing, industrial promotion, public transport, trade, urban and rural development and welfare services. The manner in which conflicts between national and provincial laws are to be resolved is not relevant to this judgment. It is dealt with in sections 146 to 150 of the Constitution.

responsibility for implementing certain national laws as well as provincial laws.[63]

[51] Local governments have legislative and executive authority in respect of certain matters[64] but national and provincial legislatures both have competences in respect of the structuring of local government,[65] and for overseeing its functioning.[66] It is not necessary for the purposes of this judgment to give details of the legislative and executive competences of local authorities, or of the oversight powers of national and provincial governments.

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63 Section 125(2)(a), (b) and (c).

64 Section 156.

65 National legislative competences are referred to in section 155(1), (2), (3) and (4). Provincial legislatures have competence in respect of the matters referred to in section 155(5) and (6).

66 Section 155(7).

[52] The national legislature is more powerful than other legislatures, having a legislative competence in respect of any matter[67] including the functional areas referred to in schedule 4,[68] though its competence in respect of functional areas listed in schedule 5 is limited to making laws that are necessary for one of the purposes referred to in Section 44(2).[69]

[53] The national government is also given overall responsibility for ensuring that other spheres of government carry out their obligations under the Constitution. In addition to its powers in respect of local government,[70] it may also intervene in the provincial sphere in circumstances where a provincial government "cannot or does not fulfil an executive obligation

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67 Section 44(1)(a)(ii).

68 Id.

69 In terms of section 44(2) the purposes are:

> "to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

70 Above para 51.

in terms of legislation or the Constitution".[71] It is empowered in such circumstances to take "any appropriate steps to ensure fulfilment" of such obligations.[72]

71 Section 100.

72 Id.

[54] The provisions of chapter 3 of the Constitution are designed to ensure that in fields of common endeavour the different spheres of government cooperate with each other to secure the implementation of legislation in which they all have a common interest.[73] The cooperation called for goes so far as to require that every reasonable effort be made to settle disputes before a court is approached to do so.[74]

[55] Cooperation is of particular importance in the field of concurrent law-making and implementation of laws. It is desirable where possible to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made, and to ensure that adequate provision is made therefor in the budgets of the different governments.[75]

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73 This is also reflected in section 154(1) of the Constitution which requires the national and provincial governments to support and strengthen the capacity of municipalities, and section 125(3) which requires the national government to assist provinces to develop their administrative capacity.

74 Section 41(3) and (4).

75 *In re: The National Education Policy Bill No. 83 of 1995*, 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 CC.

[56] Principles of cooperative government and intergovernmental relations are dealt with in section 41 of the Constitution. In addition to provisions setting common goals for all spheres of government requiring cooperation between them in mutual trust and good faith, including avoiding legal proceedings against one another,[76] section 41(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 does not encroach on the geographical, functional or institutional integrity of government in another sphere."

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[76] Section 41(1)(h)(iv). Section 41 goes on to provide:

> "(2) An Act of Parliament must –
>
> (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
>
> (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
>
> (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

Matters such as the present, which are essentially administrative and political in nature, lend themselves to good faith negotiations, using if necessary, the machinery contemplated by section 41. The courts would then serve as a last resort in the event of the machinery failing. Parliament, however, has not as yet passed the necessary legislation, and in the present case it was not suggested that the Western Cape government had not attempted to resolve the dispute before resorting to litigation.

This provision reflects a requirement of CP XXII that:

> "The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces."

[57] Section 41(1)(g) is concerned with the way power is exercised, not with whether or not a power exists. That is determined by the provisions of the Constitution. In the present case what is relevant is that the constitutional power to structure the public service vests in the national sphere of government.

[58] Although the circumstances in which section 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively.[77] The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.[78]

[59] I have previously referred to the finding made by this Court in the First Certification Judgment that the CPs contemplated that the national government would have powers that transcend provincial boundaries and competences and that "legitimate provincial autonomy does not mean that the provinces can ignore [the constitutional] framework or demand to be insulated

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77 See CP XXII referred to in para 56 above.

78 See paras 32 and 36 above.

from the exercise of such power".[79] Nor does it mean that provinces have the right to veto national legislation with which they disagree, or to prevent the national sphere of government from exercising its powers in a manner to which they object.

[60] The Constitution provides that provinces shall have exclusive functions as well as functions shared concurrently with the national legislature. The 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 given to the national legislature is one which needs to be exercised carefully in the context of the demands of section 41(1)(g) to ensure that in exercising its power, the national legislature does not encroach on the ability of the provinces to carry out the functions entrusted to them by the Constitution.

[61] The Western Cape government contends that the public service in that province functions effectively under the existing scheme and that there is no need for it to be reorganised in the manner contemplated by the amendments to which it objects. It contends further that the reorganisation will hamper rather than assist it in the execution of its executive functions, and that in all the circumstances the reorganisation of the provincial administration of the public service in the Western Cape, contrary to its wishes encroaches upon its functional or institutional integrity.

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[79] See para 32 above.

[62] Three principal objections are taken by the Western Cape government to the details of the new scheme. First, that it assigns functions to the provincial DGs and heads of departments in a manner that is unacceptable to it; secondly, that it constrains the Premier's executive power to establish or abolish departments of government; and thirdly, that it empowers the Minister to give directions concerning the transfer of certain functions to and from the provincial administration and its departments.

The functions of the provincial Director-General

[63] The 1998 Amendment[80] amends section 7 of the 1994 Act to prescribe new duties for a DG who is to be the head of the Premier's office. Sections 7(3)(a) to (d) contain the following provisions:

> "(3) (a) Each department shall have a head of department who as an officer shall be the incumbent of the post on a fixed establishment bearing the designation mentioned in the second column of Schedule 1 or 2 opposite the name of the relevant department, or the officer who is acting in that post.
>
> b) Subject to the provisions of paragraphs (c) and (d), a head of department shall be responsible for the efficient management and administration of his or her department, including the effective utilisation and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and care of State property, and he or she shall perform the functions that may be prescribed.

80 Section 4(c).

c) In addition to any power or duty entrusted or assigned by or under the Act or any other law to the head of a provincial administration, the said head shall -

(i) be the Secretary to the Executive Council of the province concerned;

(ii) subject to the provisions of sections 85(2)(c) and 125(2)(e) of the Constitution, be responsible for intergovernmental relations between the relevant provincial administration and other provincial administrations as well as national departments and for the intra-governmental co-operation between the relevant provincial administration and its various provincial departments, including co-ordination of their actions and legislation; and

(iii) subject to the provisions of paragraph (d), be responsible for the giving of strategic direction on any matter referred to in section 3(2)(a).

(d) The head of a provincial administration shall in respect of a provincial department exercise no power or perform no duty which is entrusted or assigned by or under this Act or any other law to the head of the provincial department."

Sections 85(2)(c) and 125(2)(e) of the Constitution referred to in section 7(3)(c)(ii) deal with the executive power of the President to coordinate the functions of state departments and administrations, and the power of a Premier to coordinate the functions of the provincial administration and its departments. Section 3(2)(a) of the Act referred to in section 7(3)(c)(iii) deals with policy concerning the functions and organisational arrangements of the public service and employment practices.

[64] As head of the Premier's office, the DG is responsible for the efficient management and administration of that office, and for the functions assigned to such office by the Premier, in terms of section 3A of the Act.[81] In addition, the amended section 7(3) requires the provinces to appoint DGs as Secretaries to the Executive Councils and prescribes other duties for them, including the responsibility for intergovernmental relations, intragovernmental cooperation, including the coordination of the legislation and actions of the separate provincial departments, and the giving of strategic directions concerning policy matters.[82] What has to be decided is whether national legislation can determine that the DG should perform these functions.

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81 The provisions of Section 3A are referred to in para 76 below.

82 Section 7(3)(c).

[65] There are good reasons why there should be a functionary in the public service of each provincial administration charged with the responsibility of coordinating intergovernmental relations. Provinces are required to implement national legislation and in areas of concurrent competences ongoing cooperation is clearly a necessity.[83] Such functions are consistent with the principles of good governance and cooperative government. Section 41(2) of the Constitution specifically enjoins Parliament to enact legislation that facilitates intergovernmental relations. The subsection provides that:

> "An Act of Parliament must -
>
> (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
>
> (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes."

[66] The establishment of a post within the public service for the discharge of such functions does not infringe any provincial power or encroach upon provincial autonomy. The functionary is not a representative of the national government. He or she is appointed by the Premier, is required to act under the Premier's directions and instructions, and is answerable to the Premier and the Executive Council of the province. The same applies to the position of Secretary to the Executive Council. These are necessary functions which have to be assigned to a particular post in the public service.

[67] The crisp issue raised by the objection to section 7(3)(c) is whether provinces can be

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83 *In re: The National Education Policy Bill No. 83 of 1995*, above n 75.

compelled by national legislation to have these essential functions carried out by the DG and not have the freedom to appoint another functionary or functionaries to attend to such duties.

[68] If it is correct that the structuring and functioning of the public service involves the creation of particular posts for the performance of particular functions, and the determination of functions to be carried out by each post, the fact that particular functions are assigned to the post of DG would not be inconsistent with the legislative competence vested in Parliament by section 197(1).

[69] It may be argued that at the highest sphere of the provincial administration in the public service, and in view of the sensitivity attaching to functions of Secretary to the Executive Council and intergovernmental relations, the provincial government should be free to assign such functions to whomever it chooses, including to persons other than the DG. Such a contention is not without substance, but in the light of the provisions of section 197(1) of the Constitution, there seems to me to be no basis on which it can be held that the determinations made by the 1998 Amendment fall outside the scope of the legislative power conferred upon the national Parliament. Nor can it be said that this encroaches on the functional or institutional integrity of the provinces.

[70] The national executive does not determine the structure of the public service. Under the Constitution that is a matter to be determined by national legislation. The executive at national as well as the provincial sphere must comply with that legislation, and no member of any executive in any sphere of government can ignore it.

[71] It cannot be said that the provincial government will not be able to carry out its functions effectively under the new scheme. There has been a shift of certain powers from the DG to heads of departments, but apart from this, the structure of a provincial administration remains substantially the same as it is under the existing scheme. The administration was and will be divided into departments. What will change is that the heads of departments, including the DG of the Premier's office, will now have responsibility for the efficient management and administration, and certain supervisory and training functions in their departments, whereas under the existing scheme the DG has this responsibility and heads of departments act under delegations from the DG.

[72] In the First Certification Judgment what this Court required as protection for the limited "autonomy" of provinces within the larger framework prescribed by the Constitution, was that they should have the ability to employ the personnel in the provincial administrations of the public service. The determination of posts and functions to be performed by the personnel in such posts, provides the framework within which the appointments are to be made. According to the Constitution, as certified, that framework must be determined by national legislation. One of the posts in the framework is that of DG in the Premier's office who, in addition to the administration of that office, is now required to assume responsibility as secretary to the Executive Council, the coordinator of intergovernmental and intragovernmental relations and other functions. These functions are of considerable importance and are not inconsistent with the post of the most senior person in the administration. The province has the competence to appoint the functionary who is to occupy this post, and that is all that the Constitution requires. It

cannot be said that there are not 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.

[73] The same applies to the requirement that the DG should not exercise powers or perform duties entrusted or assigned by the legislative framework to heads of provincial departments. That is a perfectly reasonable provision in the light of the structure which has now been determined, and ensures that the heads of departments take responsibility themselves for the functions assigned to them. The provision does not prevent the MECs as executing officers from giving instructions to the heads of departments, nor does it prevent the Premier from seeking advice from the DG in regard to any department within the provincial administration, or from requiring important issues arising from such reports to be referred to the Executive Council for its consideration.

[74] It follows that the provisions of the 1998 Amendment dealing with the powers and functions of the DG are not inconsistent with the executive power of the province. It has also not been established that such provisions infringe section 41(1)(g) of the Constitution.

Establishment and abolition of departments

[75] Section 7(2) of the 1994 Act as amended[84] provides that the public service shall be administered in national departments, provincial administrations, provincial departments and

[84] Section 4 of the 1998 Amendment introduced provincial departments into the structure.

organisational components, as set out in schedules 1, 2 and 3. Provincial departments are dealt with in schedule 2.

[76] The establishment and abolition of provincial departments is dealt with in Section 3A(a)[85] which provides:

> "The Premier of a province may -
>
> (a) subject to the provisions of section 7(5), establish or abolish any department of the provincial administration concerned."

[77] This must be read with section 7(5)(a)(ii)[86] which provides:

> "The President may - at the request of the Premier of a province for the establishment or abolition of any department of the provincial administration concerned, or their designation of any such department or the head thereof, amend schedule 2 by proclamation in the gazette."

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85 Section 3A was introduced by section 3 of the 1998 Amendment.

86 Introduced by section 4(d) of the 1998 Amendment.

The President is required to amend the schedule by Proclamation[87] to give effect to such a request if he or she "is satisfied that it is consistent with the provisions of the Constitution or this Act".[88]

[78] Whether or not a request is consistent with the Constitution or an Act of Parliament is a question which ultimately only a court can decide. Section 7(5)(b) should not be construed as vesting such power in the President. It should be construed, rather, as recognising that the President cannot be obliged to amend the schedule if it would be unconstitutional or otherwise unlawful for him to do so. It must be assumed that the Premier and the President will both act in good faith. The former will not ask for an amendment which would be unlawful; the latter would not refuse to act on a lawful request. Disputes as to the legality of a request are therefore likely to occur only in cases of doubt.

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87 It was not contended that this power is inconsistent with the Constitution on any of the grounds referred to in the judgment of this Court in *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289.

88 Section 7(5)(b) of the Act as amended.

[79] If the President declines a request in circumstances when as a matter of law the request is in accordance with the provisions of the Constitution and the Act, there is no basis on which the President could be "satisfied" that this is not so. If the President is wrongly advised on such an issue, a decision to withhold consent would be subject to judicial review. Counsel on both sides of this litigation correctly accepted that this was so.

[80] In substance, the premier has the power to establish or abolish provincial departments. This power is limited only to the extent that it must be exercised by way of a request directed to the President. The Premier has no right to demand that the request be implemented with retrospective effect, though the President may do so if he or she considers this necessary.[89] This means that the implementation of a request may be delayed pending the President's decision. Where there is a dispute as to legality, that dispute may have to be resolved by the courts before the decision is implemented.

[81] The constitutionality of these provisions were challenged on the grounds that the constraints upon the power of the premier detracted from his or her executive authority and constituted an invasion of the "functional or institutional integrity" of provincial governments.

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89 Section 7(5)(a).

[82] The argument as to the executive power of the Premier is no different to the argument concerning the interpretation of section 197 of the Constitution. The structuring and functioning of the public service into departments is not part of the executive power of the provinces. It is a power vested by section 197(1) of the Constitution in the national sphere of government. If the Premier had no say in the establishment or abolition of departments it may well be that this would infringe section 41(1)(g). But this is not the case. The effective power rests with the Premier and the constraints upon that power are of a very limited nature. The reorganisation of departments is not ordinarily an issue which calls for immediate decision, nor, as this case exemplifies, is it necessarily appropriate to undertake such reorganisation until disputes as to its legality have been resolved.

[83] A procedure requiring the President and the Premier to seek agreement concerning the legality of a proposed restructuring of the public service within a provincial administration, is entirely consistent with the system of cooperative government prescribed by the Constitution, and cannot be said to invade either the executive power vested in the Premier by the Constitution, or the "functional or institutional" integrity of provincial governments.

Transfer of functions between departments and between different spheres of government

[84] Sections 3(3)(b) and 3A make provision for the allocation and transfer of functions to and from departments of government, which by definition include provincial departments.[90]

[90] Section 1. A new definition of department was introduced by Section 1(a) of the 1998 Amendment.

Section 3(b)[91] provides:

> "The Minister may -
>
> (b) after consultation with the relevant executing authority or executing authorities, as the case may be, make determinations regarding the allocation of any function to, or the abolition of any function of, any department or the transfer of any function from one department to another or from a department to any other body or from any other body to a department: provided that the provisions of this paragraph shall not be construed so as to empower the Minister-
>
> (i) to allocate any function to, or abolish any function of, any provincial administration or provincial department except in consultation with the Premier of the province concerned; or
>
> (ii) to transfer any function from one provincial administration or provincial department to another or from a provincial administration or provincial department to any body established by or under any provincial law or from any such body to a provincial administration or provincial department."

It was contended that this provision infringes the executive powers of the provinces.

[91] Section 3(b) was introduced by section 2(b) of the 1998 Amendment.

[85] For reasons which are not entirely clear, transfers of functions to and from provincial administrations and departments on the one hand, and national departments and other bodies not established by or under provincial law on the other, are dealt with differently to transfers between provincial departments and between them and other provincial bodies. In respect of the latter, the Premier has the authority to allocate functions to a department or abolish any function of a department and to determine whether or not such transfers should be effected.[92] But in regard to the former, the Minister has such power, and is entitled to exercise it after consultation with the appropriate provincial MEC.[93] The result is that the Minister must have regard to the views of the MEC concerned, but is not bound by them, and can direct that such transfers take place against the wishes of the provincial government.[94]

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92 Section 3A(b).

93 Section 3(b).

94 Section 233(3) of the interim Constitution provided:

> "Where in this Constitution any functionary is required to take a decision in consultation with another functionary, such decision shall require the concurrence of such other functionary: Provided that if such other functionary is a body of persons it shall express

its concurrence in accordance with its own decision-making procedures."

Section 233(4) of the interim Constitution provided:

> "Where in this Constitution any functionary is required to take a decision after consulting with another functionary, such decision shall be taken in good faith after consulting and giving serious consideration to the views of such other functionary."

Although there are no comparable provisions in the 1996 Constitution, it was correctly accepted by counsel in the present case that the distinction between "in consultation with" and "after consultation with" is that the former calls for concurrence, whilst the latter does not.

[86] Sections 125(2)(b) and (c) of the Constitution[95] which deal with the implementation by the provinces of national laws, contemplate that determinations as to whether or not such a law will be implemented by provincial governments will be made in terms of Acts of Parliament, and not by an executive direction from a Minister. Moreover, section 3(3)(b) permits the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body. The vesting of such a power in the Minister, without qualification, would clearly infringe the executive authority of the province to administer its own laws.

[87] Counsel for the Minister correctly did not dispute that this was so.[96] He argued that section 3(3)(b) should be construed purposively so as to avoid such a conclusion. Counsel

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95 "The Premier exercises the executive authority, together with the other members of the Executive Council, by –

(a) ....
(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;"

96 This is so whether the legislation was based on section 197(1) or the plenary powers contained in section 44. In view of counsel's concession, this aspect was not canvassed during argument.

contended, that this could be done by construing section 3(3)(b)(i) as applying to transfers as well as allocations. If subsection (i) had stood alone, the reference in that subsection to the allocation of a function might possibly have been construed as including an allocation made by way of a transfer. But subsection (i) does not stand alone. It must be read with subsection (ii) which deals specifically with transfers. The distinction between allocations and transfers is also made in section 3A.

[88] The problem lies with the provisions of subsection (ii) and that problem cannot be solved by giving a wide meaning to subsection (i). The flaw in subsection (ii) is that in dealing with transfers it specifically limits the proviso to intraprovincial transfers and makes no mention of transfers between provincial spheres and national spheres of government. To that extent, it is inconsistent with the Constitution. No reading of subsection (i) can solve that problem. I will deal later with the appropriate order to be made to address this defect in the statute.

Does the new scheme contravene section 41 of the Constitution?

[89] With the exception of section 3(3)(b) which infringes the executive power and autonomy of the provinces to the extent referred to in paragraph 86 above, none of the other provisions to which objection is taken can be said on their own to infringe section 41. What remains to be considered is whether, apart from section 3(3)(b), the new scheme as a whole can be said to infringe the functional and institutional integrity of the provinces.

[90] The new scheme was adopted after comprehensive investigations undertaken to determine the most appropriate structure for the public service in South Africa. The Western

Cape government had the opportunity of making its views known on the relevant issues and of making representations concerning draft legislation. Indeed, the 1998 Amendment reflects changes to the original proposals to accommodate some of the objections raised by the Western Cape government.

[91] The Western Cape government has not been deprived of any power vested in it under the Constitution or the Western Cape Constitution. The Premier of the province has the power to appoint the members of the executive council, to determine what departments should be established within the provincial government, to allocate functions to departments and transfer functions from one department to another. Functionaries in the provincial administration of the public service are appointed by the provincial government, are answerable to it, and can be promoted, transferred or discharged by it. The right of the Premier and Executive Council to coordinate the functions of the provincial administration and its departments has been preserved.

[92] Political direction and executive responsibility for the functions of provincial governments remain firmly in the hands of the Premier and Executive Council. The Executive Council is appointed by the Premier in terms of section 42 of the Western Cape Constitution, and in terms of section 132 of the Constitution in the case of the other provinces which have not adopted their own Constitutions. The national sphere of government has no say in such appointments. Functions are assigned to the Executive Council by the Premier as required by sections 42 and 43 of the Western Cape Constitution and sections 132 and 133 of the Constitution. Members of the Executive Council appoint the functionaries to the posts

established in the public service, and are also entitled to give instructions necessary to ensure that provincial governmental policy is implemented, and that the department is administered efficiently.

[93] The new scheme is rational and it cannot be said that it has been enacted arbitrarily or for a purpose not sanctioned by section 197, or that it is inconsistent with the structure of government contemplated by the Constitution. It requires the public service to be organised in a particular way, making provision for proper reporting between the public service and the executive sphere of government, and ensuring that the heads of departments, including the DG as head of the Premier's office, have clear responsibilities both in relation to the administration of their own offices and in reporting to the executive sphere of government.

[94] In the circumstances, and subject to what has been said concerning section 3(3)(b), the provisions of the 1998 Amendment to which objection is taken, seen alone or cumulatively, do not detract from the executive power of the provinces, nor do they infringe their functional or institutional integrity.

The order

[95] What remains is to determine the order to be made in the light of the finding that section 3(3)(b) is inconsistent with the Constitution. The inconsistency lies in the fact that proviso (ii), dealing with the transfer of functions, is framed too narrowly and permits the Minister without the consent of the Premier to direct that transfers be made from provincial administrations or provincial departments to national departments or bodies not established by or under provincial law, and that transfers be made to provincial administrations or departments from such bodies.

[96] Section 3(3)(b) contains other provisions dealing with transfers between administrations in the national sphere of government. If it were declared to be inconsistent with the Constitution only to the extent that it applies to directions given without the consent of the Premier, its other provisions would remain in force and serve an important function. The result of an order in such terms would leave a workable structure in place and enable transfers between provincial and national spheres of government to take place in accordance with the provisions of the Constitution.

[97] The parties were in agreement that this was a case in which it would be appropriate to make an order for costs, and that the costs should follow the result. In the correspondence dealing with the objections to the proposed legislation the major cause of concern was identified as the provisions which would place provincial departments on the same footing as national departments, and the consequent "unbundling" of the provincial administration. Prior to the 1998 Amendment there were also objections to the power vested by the draft legislation in the President to establish and abolish provincial departments on the advice of the Minister, without provision being made for consultation with the Premier. A further objection related to the power of the Minister to determine the functions of the provincial departments to the exclusion of the provincial DGs and MECs and to transfer functions between provincial departments and between different spheres of government. After the 1998 Amendment the focus of the dispute was in respect of the changes affecting the DGs and heads of departments, and the involvement of the President in the scheduling of departments.

[98] The basis for the objection to the envisaged amendments was dealt with in the founding affidavit as follows:

> "I have been advised that in the following respects the latest envisaged amendments to the Act are unconstitutional and cannot bind a provincial executive to the implementation thereof:
>
> 98.1 The inclusion in national legislation of provisions concerning the establishment, abolition and scheduling of provincial departments.
>
> 98.2 The involvement of the President in the establishment, abolition and scheduling of provincial departments.
>
> 98.3 The description, qualification and restriction of the duties of the Directors-General of the Provincial Administrations in relation to the activities of the Administrations and their constituent departments. The Director-General is stripped of all powers relating to personnel administration and organisation matters in respect of provincial departments and re-deployed as head of the Office of the Premier. Although the Director-General will still be formally designated as head of the Provincial Administration, and is given certain tasks to perform concerning the administration as a whole, these are of a secretarial, liaison, co-ordinating and advisory nature, devoid of decision-making powers. He will be the accounting officer in respect of the Office of the Premier, but will relinquish accountability for the Administration as a whole. This will result in a serious impairment of the exercise of executive authority.
>
> 98.4 All attempts at regulating powers inherent in the executive authority of the Provincial Cabinet."

CHASKALSON P

[99] The Western Cape government has failed on its main arguments but has succeeded in its contention that the proviso to section 3(3)(b) is not wide enough to protect its legitimate interests. This was not highlighted as an issue in the correspondence and negotiations that took place concerning the 1998 Amendment. If this had been the only issue between the parties, and it had been raised pertinently prior to the commencement of the proceedings, it might well have been resolved without litigation. Neither party can be said to have been entirely successful, and in the circumstances it seems to me that it would be appropriate to make no order as to costs.

[100] The following order is made:

1. Section 3(3)(b) of the Public Service Act, 1994, as amended by section 2(b) of the Public Service Laws Amendment Act, 1998, is declared to be inconsistent with the Constitution and invalid to the extent that it empowers the Minister, without the consent of the Premier concerned, to make determinations regarding the transfer of functions of a provincial administration or a provincial department to a national department or any body not established by or under a provincial law, or the transfer of functions to a provincial administration or a provincial department from a national department or any such body.

2. Save as set out in paragraph 1 of this order, the applicant's claims are dismissed.

3. No order is made as to costs.

CHASKALSON P

Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Chaskalson P.

For the Applicant:	JC Heunis SC and AM Breytenbach instructed by Marais Muller Inc.
For the Respondents:	KS Tip SC and NJ Motata instructed by The State Attorney (Johannesburg).