

In the matter between:

**MINISTER OF HEALTH AND OTHERS**

**APPELLANTS**

and

**TREATMENT ACTION CAMPAIGN AND OTHERS**

**RESPONDENTS**

In re:

**MEC FOR HEALTH, KWAZULU-NATAL**

**APPELLANT**

and

**THE GOVERNMENT OF KWAZULU-NATAL  
REPRESENTED BY THE PREMIER**

**RESPONDENT**

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**APPELLANT'S FURTHER SUBMISSIONS**

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- 1 After the submissions were filed on behalf of the Appellant on 23<sup>rd</sup> April 2002, we received further directions from the Chief Justice asking that submissions be made in the light of Chapter 3 of the Constitution. As those submissions had not been made in the Appellant's earlier submissions they are now made herein. The submissions should be considered as an addition to the Appellant's earlier submissions.

2 Chapter 3 and in particular s 41 of the Constitution lays down the principles of co-operative government and intergovernmental relations. Section 41 makes co-operation between various spheres of government obligatory.

3 We are of the view that the provisions of s 41 do apply to the dispute between the MEC and the Premier. Section 41(1) specifically states that “**...all organs of state within each sphere must**” comply with subsections (a) - (h)((vi) inclusive. It is our submission that the Premier acted in breach of sections 41(1)(f), (h)(i), (h)(ii), (h)(iii), (h)(iv) and (h)(vi) of the Constitution.<sup>1</sup>

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<sup>1</sup> Section 41 provides:

“(1) **All spheres of government and all organs of state within each sphere must-**

- (a) **preserve the peace, national unity and the indivisibility of the Republic;**
- (b) **secure the well-being of the people of the Republic;**
- (c) **provide effective, transparent, accountable and coherent government for the Republic as a whole;**
- (d) **be loyal to the Constitution, the Republic and its people;**
- (e) **respect the constitutional status, institutions, powers and functions of government in the other spheres;**
- (f) **not assume any power or function except those conferred on them in terms of the Constitution;**
- (g) **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; and**
- (h) **co-operate with one another in mutual trust and good faith by \_**
  - (i) **fostering friendly relations;**
  - (ii) **assisting and supporting one another;**
  - (iii) **informing one another of, and consulting one another on, matters of common interest;**
  - (iv) **co-ordinating their actions and legislation with one another;**
  - (v) **adhering to agreed procedures; and**
  - (6) **avoiding legal proceedings against one another.**

(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**

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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.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved. ”

- 1 The MEC was taken by surprise by the conduct of the Premier.<sup>2</sup> Since it all occurred within a short space of time the MEC would not have been able to invoke subsection 41(3) of the Constitution, had it been applicable. Botha J. ruled on the 1<sup>st</sup> March 2002 that the MEC was substituted by the Premier.
  
- 2 It is clear from the conduct of the Premier that he had intended to intervene in this matter before the 1<sup>st</sup> March 2002.<sup>3</sup> He did so without any regard for the provisions of Chapter 3 of the Constitution. He made no attempt, let alone a meaningful attempt, to comply with the provisions of s 41 of the Constitution.

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<sup>2</sup> Affidavit of Zwelini Mkhize, p 22 of Application, para 12, pp 46 - 47 of the Record, paras 5 - 6

<sup>3</sup> The letter sent by Larson Bruorton and Falconer Inc, which is to be found on p 48 of the Record, was sent on 27<sup>th</sup> February 2002, see Zwelini Mkhize's Affidavit, p 47, para 6

3 Chapter 3 “**is foundational to our constitutional endeavour**”.<sup>4</sup>

4 Having regard to the above facts and the facts referred to in the Appellant’s initial submissions, it is clear that the Premier acted unconstitutionally by instructing attorneys to act on his behalf or on behalf of the Government of KwaZulu-Natal to intervene in this matter.

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5.1 Furthermore, Botha J had no jurisdiction to decide the dispute between the Premier and the MEC.

5.2 Section 167(4)(a) of the Constitution provides that this Honourable Court has exclusive jurisdiction to determine, *inter alia*, a dispute concerning the constitutional status, powers or functions between organs of state within the provincial sphere. As this dispute revolves precisely around the powers and functions of the MEC *vis-a-vis* the Premier or the government of KwaZulu-Natal, it fell squarely within the terms of s 167(4)(a).<sup>5</sup>

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<sup>4</sup> *National Gambling Board v Premier KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) at para 32

<sup>5</sup> See: *National Gambling Board* at para 24

5.3 Section 239 defines “an organ of state as:

- “(a) any department of State or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) ...”

5.4 It is submitted that the Premier and the MEC are functionaries “exercising a power or performing a function in the of the Constitution or a provincial constitution” as envisaged in s 239(b)(i) of the Constitution.<sup>6</sup>

6 For the aforesaid reasons the substitution of the Premier for the MEC by the Court *a quo* should be set aside.

MTK Moerane S.C.  
P Coppin  
B Vally  
Counsel for the Respondents  
29<sup>th</sup> April 2002  
Chambers

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<sup>6</sup> Compare *National Gambling Board* at paras 19 and 20