CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/99

THE EXECUTIVE COUNCIL OF THE PROVINCE OF THE WESTERN CAPE — Applicant

versus

THE MINISTER FOR PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA — First Respondent

THE MUNICIPAL DEMARCATION BOARD — Second Respondent

and

Case CCT 18/99

THE EXECUTIVE COUNCIL OF KWAZULU-NATAL — Applicant

versus

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Respondent

THE MINISTER FOR PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

THE MUNICIPAL DEMARCATION BOARD — Third Respondent

Heard on : 24 - 25 August 1999

Decided on : 15 October 1999

JUDGMENT

NGCOBO J:

INTRODUCTION

[1] These two cases raise important questions relating to the authority to establish municipalities and their internal structures. They arise out of a dispute between the governments of the Western Cape and KwaZulu-Natal, on the one hand, and the national government on the other. The dispute concerns the constitutionality of certain provisions of the Local Government: Municipal Structures Act, No 117 of 1998 ("the Structures Act"). The Structures Act became law on 11 December 1998, but only came into operation on 1 February 1999. It is the second of the three statutes envisaged to transform local government, and establishes municipalities throughout the country.[1] The first local government elections in respect of these new municipalities are scheduled for no later than 1 November 2000. There is accordingly some urgency in the matter.

[2] The Western Cape government instituted proceedings in this Court on 26 April 1999, on an urgent basis. In its notice of motion it challenged the constitutional validity of sections 5(1) and (2), 6(2), 13(2), 40 to 80, 82 and 91(1). It also originally sought urgent interim relief, alleging, amongst other things, that if it were obliged to comply with the disputed provisions of the Structures Act, notwithstanding the challenge to their

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[1] The other two pieces of legislation are the Local Government: Municipal Demarcation Act, 27 of 1998 ("the Demarcation Act"), and the Local Government: Municipal Systems Bill, which was published in the *Government Gazette* 20357, GN 1776, 06 August 1999, for comment.

constitutionality, enormous expense and adverse consequences would ensue should the challenge prove to be successful.

[3] The Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa, the first respondent,[2] gave notice that he would oppose the application, whilst the Municipal Demarcation Board, the second respondent, informed the Registrar that it would abide by the decision of the Court. Directions were given by the President of the Court fixing times for the lodging of affidavits, and the application for interim relief was set down for hearing. The claim for interim relief was subsequently withdrawn by the Western Cape government with the consent of the first respondent, and the matter was dealt with in the ordinary way as an opposed application.

[4] The Western Cape government subsequently filed a notice of intention to amend, in terms of which it extended the challenge to include sections 4 to 13, 16(1)(a) and 93(2). No objection was raised to this notice. At the commencement of the hearing, Mr Heunis, who, together with Mr Schippers, appeared on behalf of the Western Cape government, sought to extend the challenge further to include sections 18(4), 29(1), 30(5) and 36 to 39. Mr Trengove, who, together with Mr Chaskalson, appeared on behalf of the national government, did not object to this amendment either. In these circumstances,

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[2] The Structures Act defines the Minister as "the national Minister responsible for local government". At present this is the Minister for Provincial and Local Government, who will be referred to hereinafter as "the Minister".

the amendments must be allowed.

[5] The KwaZulu-Natal government instituted its proceedings by way of notice of motion during May 1999. It sought an order declaring sections 4, 5, 7 to 11, 13, 20, 24(1), 32, 33 and 93(2) of the Structures Act to be inconsistent with the Constitution and also that its application be consolidated with or heard simultaneously with the Western Cape application. The President of the Republic of South Africa, the Minister for Provincial Affairs and Constitutional Development and the Demarcation Board were cited as the first, second and third respondents respectively.

[6] As the disputes involved in these cases raise similar issues concerning the constitutionality of the provisions of the Structures Act, the President of the Court issued directions that the cases be heard together. It will be convenient also to consider them together in this judgment.

[7] In this judgment, the applicants will be referred to as the Western Cape or KwaZulu-Natal, as the case may be, or jointly as the provinces. The respondents will be referred to as the national government (since the Demarcation Board did not oppose the application).

[8] Since these cases were argued, the Cape of Good Hope High Court has handed

down a judgment in which it deals with some of the issues which were argued before this Court.[3] I have considered that judgment. As will appear from this judgment, I do not agree with some of the conclusions reached by that Court.

JURISDICTION

[9] In approaching this Court directly, the provinces asserted jurisdiction in terms of section 167(4)(a) of the Constitution, alleging that each matter "concerns a dispute between organs of state in the national and provincial sphere of government relating to the constitutional status, powers or functions of organs of state in the national and provincial sphere". In the alternative, KwaZulu-Natal asserted jurisdiction in terms of section 167(6)(a) read with Rule 17 of this Court which amongst other things allows a party to approach this Court directly when the interests of justice so require. The national government neither challenged nor conceded jurisdiction on the bases asserted.

[10] Jurisdiction in terms of section 167(4)(a) raises a number of questions including: first, what characterises the dispute envisaged in the section? Is it the identity of the parties to the dispute, or the subject matter of the dispute; second, is the dispute envisaged

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3 *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development and Another*, Cape of Good Hope High Court, Case No 1128/99, 22 September 1999, as yet unreported ("the CHC judgment").

in the section the same dispute as contemplated in section 41(3) of the Constitution;[4] third, if the present dispute falls within the purview of section 41(3), was there compliance with that section? The present dispute concerns the constitutionality of certain provisions of the Structures Act. The constitutionality of these provisions could have been raised by any interested person in the High Court. Indeed, the Cape Metropolitan Council challenged some of these provisions in the Cape of Good Hope High Court. Does the fact that the challenge to the validity of the Structures Act was brought in the present cases by the provincial governments and not a municipal government mean that only this Court has jurisdiction to decide them? In addition, in the papers of the Western Cape application, the national government has disputed the assertion that there was compliance with section 41(3). These questions were not argued, understandably so, because the right of the parties to come directly to this Court was not put in issue. It was accepted by all the parties that these cases raised important constitutional issues which called for decision by this Court, and that even if section 167(4)(a) is not applicable, the cases should be dealt with by way of direct access in terms of Rule 17. For the reasons set out below, I am satisfied that this is so, and that these applications should be decided by this Court.

[11] The issues raised here are of considerable national importance. The dispute relates

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[4] Section 41(3) reads as follows:
"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."

to the authority to establish municipalities and their internal structures in all provinces. In terms of the Structures Act, the local government elections must be held no later than 1 November 2000. Prior to that date a considerable amount of preparatory work must be undertaken, including the demarcation of boundaries and the establishment of municipalities. The issues raised in these cases are real and not abstract. They need to be resolved as a matter of urgency. The issues here relate to constitutional interpretation and involve no dispute of fact. In these circumstances any delay in resolving the present dispute is likely to prejudice the public interest and disrupt the local government elections. The interests of justice, therefore, require that leave to come directly to this Court be granted.

THE CONTROLLING PROVISIONS OF THE CONSTITUTION

[12] Chapter 7 of the Constitution deals with local government. It makes provision for the establishment of municipalities "for the whole of the territory of the Republic".[5] The objects of local government are, amongst other things, "to provide democratic and accountable government for local communities";[6] "to ensure the provision of services to communities in a sustainable manner";[7] and "to promote social and economic

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5 Section 151(1).

6 Section 152(1)(a).

7 Section 152(1)(b).

development".[8] The executive and legislative authority of municipalities to govern local government affairs of their communities are subject to national and provincial legislation.[9] However, "[t]he national or a provincial government may not compromise or impede" the ability or right of the municipalities to exercise their powers or perform their functions.[10] The national and provincial governments are moreover required to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions".[11]

[13] Section 155 deals with the establishment of municipalities.[12] It makes provision for three different categories of municipality, namely, category A, self-standing municipalities, category B, municipalities that form part of a comprehensive co-ordinating structure, and category C, municipalities that perform co-ordinating functions.[13] In addition, it also makes provision for national legislation to define different types of municipality that may be established within each such category.[14] It sets out a scheme for the allocation of powers and functions between the national government, provincial

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8 Section 152(1)(c).

9 Sections 151(2) and 151(3).

10 Section 151(4).

11 Section 154(1).

12 Section 155 is quoted in full below at para 35.

13 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) at para 77. See also section 155(1).

14 Section 155(2).

government and the Demarcation Board in relation to the establishment of municipalities. In terms of this scheme: (a) national legislation must establish criteria for determining which category of municipality should be established in a particular area,[15] must define the types of municipality that may be established within each such category,[16] must establish criteria and procedures for the determination of municipal boundaries by an independent authority (which is the Demarcation Board),[17] and must make provision for the division of powers and functions between municipalities with shared powers;[18] (b) the Demarcation Board must determine the municipal boundaries in accordance with the criteria and procedures established by such national legislation;[19] and (c) provincial legislation must determine which types of municipality should be established in its province.[20] In addition, provincial governments "must establish municipalities" in their provinces "in a manner consistent with the legislation enacted in terms of subsections (2) and (3)" of section 155.[21]

[14] In terms of section 156, municipalities have executive authority in respect of

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15 Section 155(3)(a).

16 Section 155(2).

17 Section 155(3)(b).

18 Section 155(3)(c).

19 Section 155(3)(b).

20 Section 155(5).

21 Section 155(6).

matters listed in part B of Schedule 4 and part B of Schedule 5 and "any other matter assigned to [them] by national or provincial legislation".[22] They are empowered to make "by-laws for the effective administration of the matters" which they have the right to administer. However, subject to section 151(4), a by-law which is in conflict with national or provincial legislation is invalid.[23]

[15] The remaining provisions deal with the composition and election of municipal councils,[24] membership of municipal councils,[25] their term of office,[26] and internal procedures.[27] Municipal councils may elect an executive committee or other committee, but this power is subject to national legislation.[28] National legislation may provide criteria for determining the size of a municipality, whether municipal councils may elect an executive committee or any other committee, and the size of an executive committee or any other committee of a municipal council.[29] Municipal councils have the power to make by-laws which prescribe rules and orders for their internal arrangements, business and proceedings, and the establishment, composition, procedures, powers and functions

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22 Sections 156(1).

23 Sections 156(2) and (3).

24 Section 157.

25 Section 158.

26 Section 159.

27 Section 160.

28 Section 160(1)(c).

29 Section 160(5).

of their committees.[30] Finally, in terms of section 164 national or provincial legislation may deal with any matter relating to local government not dealt with in the Constitution.[31]

THE LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT

[16] The Structures Act represents the final phase in the long and extremely complex process of transforming racially determined local government into democratically determined local government. The process had its genesis in the Local Government Transition Act, 209 of 1993 ("the Transition Act"). This statute envisaged three phases for the transition.[32] It commenced with the pre-interim phase, which ran from 2 February 1994 until the first democratic local government elections;[33] the interim phase, which commenced with the first democratic local government elections, and which will run until "the implementation of final arrangements to be enacted by a competent legislative authority"; and the final phase, which will commence with the implementation of the

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30 Section 160(6).

31 Section 164 is quoted in full below at para 27.

32 *African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal, and Others* 1998 (3) SA 1 (CC); 1998 (4) BCLR 399 (CC) at para 6; also *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) per Kriegler J at para 178.

33 Local government elections were held for all municipalities in South Africa between November 1996 and May 1997. The "pre-interim phase" of local government transition is defined in section 1 of the Transition Act as meaning "the period commencing on the date of commencement of this Act and ending with the commencement of the interim phase". "Interim phase" is defined as meaning "the period commencing on the day after elections are held for transitional councils as contemplated in section 9 and ending with the implementation of final arrangements to be enacted by a competent legislative authority."

provisions of the Structures Act.

[17] Mr Olver, the Deputy Director General for Local Government, who deposed to the answering affidavit on behalf of the national government in both applications, deals with the history of local government which, like so much of our history, was characterised by racial discrimination and segregation.[34] Those divisions have left deep scars on our society, and as Mr Olver points out, vast disparities still exist in different local government areas in relation to service infrastructure, tax bases and institutional capacity. That was not and could not be disputed by the provinces.

[18] This history is referred to in the preamble to the Structures Act, which records that:

> ". . . past policies have bequeathed a legacy of massive poverty, gross inequalities in municipal services, and disrupted spatial, social and economic environments in which our people continue to live and work . . . "

[19] The preamble then goes on to set out a vision for local government:

> ". . . in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic development, [and] encourage a safe and healthy environment . . ."

[20] The Structures Act provides a detailed framework for the final phase of the

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[34] See below at para 44.

transition to democratic local government, which, according to the preamble, is "to be transformed in line with the vision of democratic and developmental local government". Mr Olver explains why the various provisions of the Structures Act are considered by the government to be the best way of dealing with this. That, however, is not an issue before this Court. The means chosen must be consistent with the requirements of the Constitution. If they are, they are valid. If they are not, they are invalid, even if they are an effective way of dealing with the problems that exist.

[21] Broadly speaking, the Structures Act deals with the definition and creation of municipalities. It establishes the criteria for determining the different categories of municipality;[35] assigns the application of these criteria;[36] defines the types of municipalities that may be established within the different categories of municipality;[37] provides guidelines for selecting types of municipalities;[38] makes provision for the establishment of municipalities;[39] makes provision for internal structures of municipalities, including various committees that may be established;[40] sets out the

35 Chapter 1, part 1

36 Chapter 1, part 1.

37 Chapter 1, part 2.

38 Chapter 2.

39 Chapter 2.

40 Chapters 3 and 4.

functions and powers of municipalities;[41] and deals with other miscellaneous matters such as transitional arrangements and regulations.[42]

THE CONSTITUTIONAL CHALLENGE

[22] The constitutional challenges can be divided into two main groups. First, it was contended that the provisions of the Structures Act encroach on the powers of the provinces. This challenge concerned in particular the provincial power to establish municipalities in terms of section 155(6) of the Constitution. Second, it was contended that the Structures Act encroaches on the constitutional powers of municipalities. This challenge related in particular to a municipal council's power to elect executive committees or other committees in violation of section 160(1)(c) of the Constitution and their power to regulate their internal affairs in terms of section 160(6) of the Constitution.

[23] In regard to both these complaints, the national government contended that although the Constitution allocates powers to provinces and municipalities in Chapter 7, it does not deprive Parliament of legislating in relation to the same matters. The broad contention advanced by the national government was that, in terms of section 44(1)(a)(ii) of the Constitution, Parliament has legislative capacity in all fields other than the

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41 Chapter 5.

42 Chapter 6.

exclusive powers referred to in Schedule 5. The powers vested in the provinces and municipalities in Chapter 7 of the Constitution are accordingly concurrent with those of the national government, so it was argued. This broad contention shall be considered before I turn to the specific challenges themselves.

THE CONCURRENCY ARGUMENT

[24] In order to set the stage on which the constitutional challenges will be considered, it is necessary first to consider the contention by the national government that in terms of section 44(1)(a)(ii) it has, except for matters falling within Schedule 5, concurrent powers with the provinces and municipalities.

[25] The legislative power vested in Parliament by section 44(1)(a)(ii) "to pass legislation with regard to any matter . . . excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5" must be exercised, in terms of subsection (4), "in accordance with, and within the limits of, the Constitution". Thus, where on a proper construction of the Constitution such limits exist, they constrain the residual power of Parliament.

[26] There are a number of such constraints in the Constitution. The most obvious example is the power to pass or amend a provincial constitution which, on a proper

construction of section 104(1) of the Constitution, is clearly an exclusive provincial competence. Other provisions of the Constitution also place constraints on the powers of Parliament. A few examples are: the provisions of Chapter 2,[43] the "manner and form" procedures prescribed by the Constitution for the passing of legislation,[44] the entrenchment of the judicial power in the courts by Chapter 8, the protection given to state institutions protecting democracy by Chapter 9, legislation sanctioning the withdrawal of money from a provincial revenue fund which, apart from the provisions of the Constitution, is an exclusive provincial competence,[45] and the fiscal powers of provinces and municipalities which in terms of Chapter 13 are subject to regulation, but not repeal, by Parliament.

[27] The question then is whether, on a proper construction of Chapter 7 of the Constitution dealing with local government, the provinces are correct in contending that there are certain constraints upon Parliament's powers. If regard is had to the plan for local government set out in Chapter 7, we see that there is indeed a comprehensive scheme set out in the Chapter for the allocation of powers between the national, provincial and local levels of government. That is apparent not only from the way the Chapter is drafted, with the allocation of specific powers and functions to different

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43 The Bill of Rights.

44 Sections 73 to 77 and the constraints this places on the power of Parliament to delegate its legislative powers; see in this regard the decision in the *Executive Council, Western Cape* Case, above n 32.

45 Section 226(2).

spheres of government, but also from the provisions of section 164 that:

> "Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation."

[28] The submission that Parliament has concurrent power with the other spheres of government in respect of all powers vested in such spheres by Chapter 7 is inconsistent with the language of the provisions of Chapter 7 itself, and cannot be reconciled with the terms of section 164. If Parliament indeed had full residual power in respect of all matters referred to in Chapter 7, there would have been no need for the reference in section 164 to "any matter not dealt with in the Constitution". The only explanation that Mr Trengove could offer for this conundrum was that the provision was necessary because national legislation includes subordinate legislation. But this is no answer. If subordinate legislation was contemplated one would expect that to have been referred to specifically. In any event, if Parliament has residual powers in respect of all matters dealt with in Chapter 7, that would include the power to pass laws dealing with such matters and to sanction the making of subordinate legislation if that should be necessary. The power to sanction subordinate legislation is an incident of the legislative power, and does not require a provision such as section 164. It is necessary, therefore, to consider the allocation of powers made in Chapter 7 and to decide whether, on a proper construction of each of those provisions, they constrain Parliament in the manner contended for by the provinces.

[29] Municipalities have the fiscal and budgetary powers vested in them by Chapter 13 of the Constitution, and a general power to "govern" local government affairs. This general power is "subject to national and provincial legislation".[46] The powers and functions of municipalities are set out in section 156 but it is clear from sections 155(7) and 151(3) that these powers are subject to supervision by national and provincial governments, and that national and provincial legislation has precedence over municipal legislation. The powers of municipalities must, however, be respected by the national and provincial governments which may not use their powers to "compromise or impede a municipality's ability or *right* to exercise its powers or perform its functions" (emphasis supplied).[47] There is also a duty on national and provincial governments "by legislative and other measures" to support and strengthen the capacity of municipalities to manage their own affairs[48] and an obligation imposed by section 41(1)(g) of the Constitution on all spheres of government to "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". The Constitution therefore protects the role of local government, and places certain constraints upon the powers of Parliament to interfere with local government decisions. It is neither necessary nor desirable to attempt to define these constraints in any detail. It is sufficient to say that the constraints exist, and if an

46 Section 151(3).

47 Section 151(4).

48 Section 154(1).

Act of Parliament is inconsistent with such constraints it would to that extent be invalid.[49]

[30] Chapter 7 of the Constitution also allocates powers and functions to national and provincial governments in relation to the establishment and supervision of local governments. These provisions also place constraints upon the power that Parliament has under section 44. For example, the provision of section 155(5) that "[p]rovincial legislation must determine the different types of municipality to be established in the province" is the allocation of a specific power to the provincial level of government. National legislation inconsistent with such provisions would also be inconsistent with the Constitution and to that extent invalid.

[31] It is in this context that the various arguments put forward by the provinces have to be considered.

DISCUSSION OF THE CHALLENGES

[32] It will be convenient to consider the constitutional challenges to the Structures Act under the following headings: (a) establishment powers; (b) encroachment on municipal powers; (c) challenge to Chapter 4 and related provisions; and (e) supremacy clause.

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49 Section 2 of the Constitution.

A. ESTABLISHMENT POWERS

[33] Under this heading I consider the constitutional validity of sections 4, 5, 6(2), 11, 12 and 13.

Sections 4 and 5

[34] Sections 4 and 5 of the Structures Act provide:

> "**Application of criteria**
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> 4. (1) The Minister must apply the criteria set out in section 2 and determine whether an area in terms of the criteria must have a single category A municipality or whether it must have municipalities of both category C and category B.
>
> (2) The Minister may determine that an area must have a category A municipality only after consultation with the MEC for local government in the province concerned, the Demarcation Board, SALGA and organised local government in the province.
>
> **Declaration of metropolitan areas**
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> 5. (1) If the Minister determines that an area must have a single category A municipality, the Minister, by notice in the *Government Gazette*, must declare that area as a metropolitan area.
>
> (2) When declaring an area as a metropolitan area the Minister designates the area by identifying the nodal points of the area but must leave the determination of the outer boundaries to the Demarcation Board."

[35] The principal issue for determination in this regard is the location of the power to apply the criteria for determining the categories of municipality. The relevant provision of the Constitution is section 155, which deals with the establishment of municipalities. That section provides:

> "**Establishment of Municipalities**
>
> 155. (1) There are the following categories of municipality:
>
> (a) **Category A**: A municipality that has exclusive municipal executive and legislative authority in its area.
>
> (b) **Category B**: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
>
> (c) **Category C**: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.
>
> (2) National legislation must define the different types of municipality that may be established within each category.
>
> (3) National legislation must -
>
> (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
>
> (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
>
> (c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

(4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.

(5) Provincial legislation must determine the different types of municipality to be established in the province.

(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must -

(a) provide for the monitoring and support of local government in the province; and

(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(6A) . . . .

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

[36] Mr Dickson, who, together with Ms Gabriel, appeared for KwaZulu-Natal, led the attack in this regard. He argued in support of the contention made in the founding affidavit that the power to apply the criteria vested exclusively in the provincial governments. This power, he maintained, is contained in section 155(6) which gives the provincial governments the power to "establish" municipalities. He submitted that the power to establish municipalities encompasses the application of the criteria. In the course of oral argument, however, he made two concessions: first, that the power is not expressly provided for, although he nevertheless maintained that it arises by implication;

and second, that the power comprehended in section 155(6) is an executive power.

[37] In its founding affidavit, a similar contention was made by the Western Cape, which also contended that section 5 of the Structures Act was inconsistent with section 155(3)(b) of the Constitution. This section requires municipal boundaries to be determined by an independent authority and so, it was contended, the empowerment of the national government to apply the criteria to determine which "areas" should have category A municipalities has the effect of usurping a function of the demarcation of the municipal boundaries by the Demarcation Board. In its argument the Western Cape supported both contentions, submitting in respect of the second contention that the identification of nodal points of an area forms part of the process of demarcation and that the criteria contained in section 2 of the Structures Act should accordingly be applied by the Demarcation Board and not the Minister.

[38] Mr Trengove contended that the Constitution is silent on where the power to apply the criteria resides. This being the case, he submitted, the matter falls to be governed by section 164 of the Constitution.[50]

[39] The contention by KwaZulu-Natal is premised on the proposition that section 155(6) confers legislative power on the provinces to establish municipalities. This

[50] Section 164 is quoted in full above at para 27.

contention cannot be upheld. Whenever the framers of the Constitution intended to confer legislative powers, they said so expressly. Chapter 7 of the Constitution follows this pattern. Although the words "national government" and "provincial government" are used loosely in Chapter 7 to refer both to the legislature and to the executive,[51] when a legislative power is contemplated, then consistently with the pattern of the Constitution, it is expressly stated. Thus, section 154(1) refers to "by legislative and other measures"; 154(2), "national or provincial legislation"; 155(1), "executive and legislative authority"; 155(2), "national legislation"; 155(3) and (4), "national legislation"; 155(5), "provincial legislation"; the second part of 155(6), "by legislative or other measures"; 155(7), "legislative and executive authority"; 156(3), "national or provincial legislation"; 157(1)(b), "national legislation"; 157(2) and (6), "national legislation"; 158(1)(a), "national legislation"; 158(1)(b), "national legislation"; 158(2), "national legislation"; 159(1) and (2), "national legislation"; 160(1)(c), "national legislation"; 160(5), "national legislation"; 160(8)(c), "national legislation"; 161, "provincial legislation within the framework of national legislation"; and 164, "by national legislation or by provincial legislation within the framework of national legislation".

[40] In my view, if the framers of the Constitution had intended to confer legislative powers on the provinces to establish municipalities, they would have said so expressly

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[51] There is a reference to the national and provincial governments having the power to deal with particular matters by "legislative and other measures" (section 154(1)); "by legislative or other measures" (the latter part of section 155(6)); and to them having "the legislative and executive authority" to deal with certain matters (section 155(7)).

as they did in other provisions of the Constitution conferring legislative powers.

[41] In the course of his argument, Mr Dickson conceded that section 155(6) does not expressly confer the legislative powers contended for. He nevertheless submitted that that power arose by implication. Having regard to the pattern used in the Constitution in conferring legislative power, it would require a clear implication that this was intended. Such implication does not arise. Indeed, there are considerations which militate against such implication.

[42] First, the initial part of section 155(6) states that provincial governments "must establish" municipalities. This is an executive act. It has to be done in a manner consistent with the national legislation referred to in subsections (2) and (3) of section 155. There is no reference to provincial legislation in this context. This must be contrasted with the second part of section 155(6), which deals with matters which have to be carried out by provincial governments by "legislative or other measures". The second part of section 155(6), therefore, confers legislative powers on the provinces in relation to the matters referred to therein.

[43] Second, the legislative history of section 155(6) refutes any suggestion that it confers legislative powers. The unamended text of section 155(2)(a) of the Constitution, as it was first presented for certification, read as follows:

"(1) National legislation must determine -

(a) the different categories of municipality that may be established;

(b) appropriate fiscal powers and functions for each category; and

(c) procedures and criteria for the demarcation of municipal boundaries by an independent authority.

(2) Provincial government, by legislative or other measures, must -

(a) establish municipalities;

(b) provide for the monitoring and support of local government in the province; and

(c) promote the development of local government capacity to perform its functions and its ability to manage its own affairs.

. . ."

In the certification proceedings[52] this Court held that "NT 155(2)(a) . . . afforded [provincial governments] the legislative competence to 'establish municipalities'". In its amended form, section 155(6) now limits the legislative powers of the provincial governments to monitoring and providing support to local government, and promoting the development of local government. This legislative history supports the conclusion that section 155(6) intended to confer only executive powers on the provinces in relation to the establishment of municipalities. It neither confers legislative power expressly nor by implication.

[44] The next question for determination is whether the Constitution is silent on the issue of the application of the criteria, as contended by Mr Trengove. A provision in a

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[52] *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) at para 368.

Constitution must be construed purposively and in the light of the constitutional context in which it occurs.[53] Our history, too, may not be ignored in that process. Local government is the closest government can get to the people. That is where the delivery must be seen to be taking place. The challenge facing the government at the local government level is profound.[54] Our history has produced a rigid pattern of racial division in society. Black residential areas were, and still are, characterised by a lack of amenities, physical infrastructure and services. Where these exist, they are of inferior quality compared to those enjoyed in historically white residential areas.[55] Local government was equally divided along racial lines.[56] In recognition of this history, the negotiations relating to the transformation of local government were conducted separately from the negotiations regarding the transition of power at the national and provincial levels.[57] These negotiations gave birth to the Local Government Transition Act, 209 of 1993, which was intended to govern the transition of local government from a racially determined to a democratically elected local government.[58] In the light of this history, it is unlikely that the question of the application of the criteria, which is foundational to the

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53 *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

54 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 2.

55 See in this regard the comments of this Court in *Fedsure Life Assurance*, above n 54, at para 2, and *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 19.

56 *ANC v Minister of Local Government*, above n 32, para 5.

57 *Executive Council, Western Cape*, above n 32, para 181.

58 See above at para 1.

establishment of municipalities and the transition to the new order, would have been left unattended.

[45] With that prelude, I now turn to consider the argument advanced by Mr Trengove. In my view, a decision on this issue turns ultimately on the proper construction of sections 155(3)(a) and (b) read with section 155(6). In order to determine the question presented here, it is necessary to construe these provisions in the context of the constitutional scheme of the allocation of powers and functions of the national government, provincial government and the Demarcation Board in relation to the establishment of municipalities. In this respect there is, in my view, a fundamental flaw in the line of reasoning pursued both by counsel for KwaZulu-Natal and the national government, as neither takes sufficient account of the fact that the provisions of section 155(3)(a) must be read together with subsection (3)(b).

[46] The scheme of the allocation of powers and functions which emerges from section 155 of the Constitution is the following: (a) the role of the national government is limited to establishing criteria for determining different categories of municipality,[59] establishing criteria and procedures for determining municipal boundaries,[60] defining different types of municipalities that may be established within each category,[61] and making provision

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59 Section 155(3)(a).

60 Section 155(3)(b).

61 Section 155(2).

for how powers and functions are to be divided between municipalities with shared powers;[62] (b) the power to determine municipal boundaries vests solely in the Demarcation Board;[63] and (c) the role of the provincial government is limited to determining the types of municipalities that may be established within the province,[64] and establishing municipalities "in a manner consistent with the [national] legislation enacted in terms of subsections (2) and (3)".[65] The question that arises is where the power to apply the criteria to establish categories of municipality naturally falls in this constitutional scheme of powers and functions. In my view, the answer to this question must be sought in the functions required to be performed under this scheme.

[47] The authority to determine municipal boundaries vests solely in the Demarcation Board. Municipal boundaries include boundaries of different categories of municipality. There is nothing in subsection (3)(b) to suggest that the boundaries referred to therein exclude the boundaries of categories of municipality. Indeed, Mr Trengove accepted that that is so. In fulfilling its constitutional obligation to determine the boundaries of the categories of municipality, the Demarcation Board must not only apply the criteria for determining municipal boundaries, but it must, of necessity, apply the criteria for determining when an area should have a particular category of municipality. Such

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62 Section 155(3)(c).

63 Section 155(3)(b).

64 Section 155(5).

65 Section 155(6).

necessity arises from the fact that, in the context of Chapter 7, the determination of boundaries cannot take place in isolation; it can only occur in relation to the boundaries of a specific category (or categories) of municipality. Without determining the category of municipality, the determination of the boundaries becomes a meaningless exercise. In this constitutional scheme of functions, the task of applying the criteria for determining when an area should have a particular category of municipality naturally falls on the Demarcation Board. In this sense, subsections (3)(a) and (b) must be read together. The Demarcation Board must determine municipal boundaries in accordance with the criteria and the procedure established for that purpose in the light of the criteria for determining the categories of municipality.

[48] The view expressed by O'Regan J in her judgment rests on the premise that section 155(3)(a) does not expressly say who must apply the criteria. That is so if section 155(3)(a) is viewed in isolation. I do not agree with the conclusion that because section 155(3)(a) does not say so expressly, section 164 must, therefore, apply. Section 155(3)(a) cannot be construed in isolation but must be construed purposively and in the context in which it occurs. It occurs in the context of the scheme of the allocation of powers and functions in relation to the establishment of municipalities set out in section 155, and it is that context which must inform its construction. In particular, it must be construed in the light of section 155(3)(b) and the functions that are required to be performed under section 155(3)(b). Once it is accepted that the Demarcation Board cannot determine the

boundaries without applying the criteria contemplated in section 155(3)(a) and, therefore, that the authority to determine boundaries necessarily entails the application of those criteria, the conclusion that the Demarcation Board is the proper authority under the Constitution to apply the criteria contemplated in section 155(3)(a) is unavoidable. This construction of sections 155(3)(a) and (b) accords with the scheme of the allocation of powers and functions in section 155.

[49] Nor do I agree with the view that the criteria contemplated in section 155(3)(a) are intended only to determine whether a category A municipality should exist or not and that they have no application to the determination of when category B or C municipalities must exist. This construction, in my view, is inconsistent with the plain language of section 155(3)(a) and the context in which it occurs. Apart from this, the determination of an area where a category A municipality should exist does not necessarily lead to a determination of where a category C municipality should be, and how many category B municipalities should be established within such category C municipalities. The Demarcation Board still has to determine how many category C municipalities have to be established, and how many category B municipalities have to be established within each category C municipality. These are questions that the Demarcation Board has to determine by applying the criteria specified in the Demarcation Act read with the Structures Act. It is only by applying these criteria that the Demarcation Board can determine the relevant areas, and in practice, these questions are answered in the process

of, and are inextricably linked to, a decision as to where the outer boundaries should be of the category C municipalities and the category B municipalities within them. If the Demarcation Board does not have the authority to apply the criteria for determining where the category A municipalities must be, it must follow that it has no authority to apply the criteria to determine where the category C municipalities must be and where the various category B municipalities must be.

[50] The purpose of section 155(3)(b) may well have been to guard against political interference in the process of creating new municipalities, and to this extent the function of determining municipal boundaries is entrusted to an independent authority.

[51] Fixing nodal points may have profound political implications, as it may determine that there will or will not be metropolitan councils in particular parts of the country. This would have a far greater effect than the setting of boundaries of the category A, B and C municipalities thus determined. However, the question before us is not what the political effect of national government applying the criteria is, but who, upon a proper construction of sections 155(3)(a) and (b), has the constitutional authority to apply the criteria.

[52] In the scheme of the allocation of powers relating to the structure, functioning and establishment of municipalities, the obligation to determine municipal boundaries implies more than just drawing the line where the boundaries should be. The Demarcation Board

can only determine boundaries if it knows what it is determining boundaries for. It must have a category of municipality in mind. The criteria required by the Constitution must therefore enable it to determine this threshold question. If section 155(3)(b) is read with section 155(3)(a) there must accordingly be "criteria" and "procedures" sufficient to enable the Demarcation Board to carry out its duties without any further legislation or executive action from the national or provincial levels of government. It is an accepted principle of interpretation that where two subsections deal with the same subject matter these are usually read together.[66] This rule of construction is applicable in constitutional interpretation. It is consistent with a purposive interpretation of the Constitution. It is also significant that in terms of section 155(6), municipalities have to be established *in a manner* consistent with the legislation enacted in terms of sections 155(2) and (3). The provision does not say that the establishment must be consistent with the legislation enacted in terms of sections 155(2) and (3) and national legislation. This seems to me to contemplate that the criteria and procedures prescribed by national legislation in terms of sections 155(2) and (3) for determining categories and determining boundaries will indeed be sufficient to enable the Demarcation Board to carry out its boundary determining obligation.

[53] There is no need for the criteria to be self-executing. It is sufficient if the criteria can be applied by the Demarcation Board to determine where the different categories of

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66 *Aziz v Divisional Council, Cape and Another* 1962 (4) SA 719 (A) at 726E; *S v Yolelo* 1981 (1) SA 1002 (A) at 1011A-B.

municipality should be. If the criteria are not sufficient for this purpose the legislation would be inconsistent with the Constitution. That is not the position in the present case. If section 2 of the Structures Act is read with section 25 of the Demarcation Act there are criteria sufficient to enable the Demarcation Board to make the various decisions that have to be made. It can do so by applying the criteria after hearing all interested parties. That is consistent with democracy and accords with the scheme of the Constitution, which requires an independent body to determine the boundaries of municipalities.

[54] The Constitution requires that there be three categories of municipality. That is not a legislative choice. What is left for legislation is the setting of criteria for determining where there should be category A, B and C municipalities. Legislation which does not prescribe criteria for determining when and where there should be different categories would be unconstitutional. The Constitution does not require there to be wards. That is a legislative choice. If that choice is made, then legally there must be category A, B and C municipalities and the electoral system must make provision for wards. The matter is then referred to an independent authority/authorities. The independent authority has to determine the boundaries of the different categories of municipality in accordance with criteria and procedures determined by national legislation. That is also how the independent authority must determine the boundaries of the wards. There seems to be no difference. In my view, the Minister could not be empowered to fix nodal points for each of the wards as this would have adverse

implications for democracy. The criteria must be applied by the independent authority in accordance with the prescribed procedures. Once this is accepted, there is no reason why the same should not apply to the application of the criteria to decide where different categories of municipality must be.

[55] I conclude therefore that the scheme for the allocation of powers relating to the structure, functioning and establishment of municipalities contemplates that the Demarcation Board should determine the boundaries in accordance with the criteria and procedures prescribed by the legislation contemplated by sections 155(2) and (3) and that it should be able to do so without being constrained in any way by the national or provincial governments. The argument that the Constitution is silent on the application of the criteria must therefore fail.

[56] It is in this context that section 155(6) must be interpreted. Seen in this context, it means that the provincial government must establish municipalities in accordance with the boundaries as determined by the Demarcation Board. The establishment powers of the provincial governments entail nothing more than the power to set up municipalities under the existing legislation. They do not comprehend the power to apply the criteria for determining when an area should have a particular category of municipality. Nor does the Constitution authorise the national government to apply the criteria.

[57] National legislation is confined to setting criteria for determining categories and criteria and procedures for the determining of boundaries. It is not specifically authorised to do more than this. If it was contemplated that national legislation could, in addition to setting criteria for categories, also determine who should apply the criteria, one would have expected this to have been said explicitly. Having regard to the careful allocation of powers in section 155, the omission is not without significance.

[58] It cannot be suggested that section 5 is severable from section 4. Section 5 deals with the declaration of category A municipalities after the Minister has applied the criteria in terms of section 4 of the Structures Act. When declaring an area as a metropolitan area, the Minister is required to identify the "nodal points of the area". The expression "nodal points" is not defined and it is difficult to discern exactly what it means. The Cape of Good Hope High Court suggested in its judgment that it has its ordinary meaning of "central point".[67] Another possible meaning of "nodal points" is the meaning given by the Oxford English Dictionary[68] which defines a "nodal point" as "a stopping- or starting-point; a centre of convergence or divergence; a point constituting a node of any kind". It is not necessary here to decide the exact meaning of "nodal points". What is important for the purposes of the present case is the fact that the Minister is empowered to fix more than one point, and that the fixing of the points determines

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67 CHC judgment, above n 3, at para 41.

68 2 ed, Clarendon Press, Oxford, 1989.

whether there will be category A municipalities or not. In addition, this has a material impact on where the boundaries of category A municipalities will be. This, in my view, interferes with the function of the Demarcation Board to determine municipal boundaries. In any event, the declaration of an area as a metropolitan area is part of the application of the criteria. Section 5 of the Structures Acts is therefore not severable from section 4.

[59] It follows that, in purporting to authorise the Minister to apply the criteria set out in section 2 of the Structures Act, sections 4 and 5 have fallen foul of the provisions of the Constitution. For that reason they are invalid.

Section 6

[60] As indicated previously,[69] section 155(1) of the Constitution specifies three categories of municipality: category A municipalities, which have exclusive municipal executive and legislative authority in their areas; category B municipalities, which share municipal executive and legislative authority in their areas with category C municipalities within whose area they fall; and category C municipalities for areas that include more than one municipality.

[61] Section 6 of the Structures Act provides:

> "(1) If a part of an area that in terms of section 3 must have municipalities of both

[69] Para 13.

> category C and category B, is declared in terms of subsection (2) as a district management area, that part does not have a category B municipality.
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> (2) The Minister, on the recommendation of the Demarcation Board and after consulting the MEC for local government in the province concerned, may declare a part of an area that must have municipalities of both category C and category B as a district management area if the establishment of a category B municipality in that part of the area will not be conducive to fulfilment of the objectives set out in section 24 of the Demarcation Act.
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> . . ."

[62] Section 6(3) of the Structures Act makes provision for the manner in which the declaration of a district management area may be withdrawn and the consequences attaching to such withdrawal.

[63] The Western Cape raised two objections to the constitutionality of section 6(2). First, no provision is made within the categories of municipality recognised by section 155 of the Constitution for a district management area. The Constitution permits only three categories of municipality, and a district management area is a fourth category, so it was argued. Second, the authority vested in the Minister to determine whether or not there should be a district management area within a category C municipality is inconsistent with the power of provinces to "establish" municipalities.

[64] As indicated above,[70] the function of the Demarcation Board includes the

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70 Para 47.

determination of the boundaries of the categories of municipality. Section 6 deals with a situation where, having regard to the demarcation criteria set out in section 24 of the the Demarcation Act,[71] an area which is within a category C municipality is not conducive to the establishment of a category B municipality. In such an event, the Demarcation Board must recommend to the Minister that it is not conducive to establish a category B municipality in that particular area. In terms of section 6(2) of the Structures Act, the Minister, on the recommendation of the Demarcation Board and after consultation with the MEC,[72] may declare such an area a district management area.

[65] The answer to the first objection is that a district management area is neither a category nor a type of municipality. It is a geographical area that is governed by only one municipality. What section 155(1) requires is that a category C municipality should be a municipality in an area that includes more than one municipality. It does not require that there be category B municipalities for the whole of such area; nor does it require the category C municipality to share any or all of its functions with a category B municipality. This is to be contrasted with the position of a category B municipality, which is obliged to share municipal executive and legislative authority in its area with a category C municipality.

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71 The criteria are set out in sections 24 and 25 of the Demarcation Act.

72 The Structures Act defines the MEC as "the member of the Executive Council of a province responsible for local government in the province". This person will be referred to in this judgment as "the MEC".

[66] A district management area is not a separate municipality, but is part of the district municipality by which it is governed. It is, therefore, also not a fourth category of municipality. A district municipality, as defined in section 1 of the Structures Act, is a category C municipality, as described in section 155(1)(c) of the Constitution, and has only to include more than one municipality within its area. No more than that is required by the Constitution. The first objection is, therefore, without merit.

[67] The second objection is premised on the proposition that the provinces have legislative powers to establish municipalities. This proposition has already been rejected.[73]

[68] In my view, the problem with section 6(2) lies elsewhere. Upon a proper construction, it gives the Minister a discretion to decide whether to accept the recommendation of the Demarcation Board in relation to where the boundaries should be. In the exercise of this discretion the Minister may, therefore, reject a boundary determined by the Demarcation Board. Yet the scheme for the allocation of powers relating to the structure, functioning and establishment of municipalities contemplates that the Demarcation Board should determine boundaries in accordance with the criteria and procedures prescribed by the legislation contemplated in sections 155(2) and (3), and that it should be able to do this without being constrained in any way by the national or

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[73] Paras 39 to 43.

provincial governments. If section 6(2) is to have any meaning, it subjects the decision of the Demarcation Board in relation to the municipal boundaries to the discretion of the Minister. This, in my view, is impermissible. To the extent that section 6(2) of the Structures Act gives the Minister a discretion whether to accept the boundaries determined by the Demarcation Board in respect of categories of municipality, it is inconsistent with sections 155(2) and (3) of the Constitution.

Section 11

[69] Section 11 of the Structures Act provides:

> "Provincial legislation must determine for each category of municipality the different types of municipality that may be established in that category in the province."

It was contended that section 11 is inconsistent with sections 155(5) and (6) of the Constitution which make provision for provincial legislation to determine "the different types of municipality to be established in the province", and to do so "in a manner consistent with the legislation enacted" in terms of section 155(2). The only difference between section 11 of the Structures Act and section 155(5) of the Constitution is that the Act refers to the different types of municipality to be established for each category, whilst the Constitution refers only to the different types of municipality to be established. The addition of the words "for each category" in section 11 does not detract in any way from the powers of the provincial legislature, and counsel were unable to point to any specific basis for objection. The Constitution requires the provincial legislation to be consistent

with the national legislation enacted in terms of section 155(2). According to section 155(3) the national legislation that is required has to set criteria for the different types of municipality that may be established *in each category*. The Act does this, and as the selection to be made by the provinces must be consistent with such criteria, the provisions of section 11 are not inconsistent with section 155(5) of the Constitution. In view of the express provisions of sections 155(2) and (5) of the Constitution, section 11 may not have been necessary. But since section 11 accurately reflects the powers of the provincial legislature to determine the different types of municipality for each category, its provisions are not inconsistent with the Constitution.[74]

Sections 12 and 16(1)(a)

[70] Section 12 is a procedural section that sets out the steps to be taken in establishing a municipality. Section 16 deals with the amendment of notices issued in terms of section 12.[75] The constitutional complaint against section 12 was that the national government has no constitutional authority to tell the provinces how to set about establishing municipalities. To do so, the provinces maintained, violates section 155(6) of the Constitution, which empowers the provinces to establish municipalities.

[71] This challenge is premised on the proposition that section 155(6) of the

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74 Cf *Ex Parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997* 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) at paras 21 to 27.

75 Although the Western Cape placed only section 16(1)(a) in issue, it is clear that the whole of section 16 (and parts of section 17) is linked to section 12, and that it stands or falls with that section.

Constitution confers the legislative power to establish municipalities upon the provinces. This proposition has already been considered and rejected.[76] The Constitution confers only executive powers on the provinces to establish municipalities.

[72] The executive powers of the provinces to establish municipalities must, of course, be exercised within the framework of legislation. In relation to the legislative regulation of such establishment, the Constitution is silent, and national legislation may prescribe how this establishment is to be done in terms of section 164 of the Constitution.

[73] The power to establish municipalities in section 155(6) must be distinguished from the power to determine the types of municipality, dealt with in section 155(5). The latter power vests in the provinces. It allows them, prospectively, to determine the types of municipality that will exist in each of the areas of the province (as divided by the Demarcation Board) *when the municipalities are established*. Section 155(6) is concerned with the actual establishment of the municipalities and confers executive powers only on the provinces to do so. Section 12 gives effect to section 155(6) and therefore does not offend the Constitution.

[74] The only provision in section 12 which requires separate consideration is section 12(3)(b). Section 12(3) provides that:

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76 Paras 39 to 43.

> "(3) The notice establishing the municipality must specify-
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> (a) the category of municipality that is established;
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> (b) the type of municipality that is established; . . ."

[75] As will become evident when I deal with section 13, section 155(5) confers upon the provincial government both the legislative and executive power to establish types of municipality in the province. Therefore, to the extent that section 12(3)(b) refers to the type of municipality that is established, it may appear to be dealing with a matter which falls within the competence of the provinces. In my view, it does not. Section 12(3) provides a legislative framework within which categories of municipality are to be established. This is within the competence of the national government. The reference to the type of municipality was, in my view, intended to ensure that the notice establishing a municipality is both coherent and comprehensive.[77] Properly construed, section 12(3)(b) simply requires the provincial government to include in the notice of establishment the type of municipality that will be operational in the area being established. This type will have already been determined by the province in terms of section 155(5), in the exercise of its legislative and executive function to decide upon the type of each municipality to be established.

[76] Section 12 is therefore not inconsistent with the Constitution and the constitutional

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[77] Compare *Certification of the Constitution of the Western Cape*, above n 74.

challenge to it must fail, as must the challenge to section 16(1)(a).

Section 13

[77] Section 13 provides:

> "(1) The Minister, by notice in the *Government Gazette*, may determine guidelines to assist MECs for local government to decide which type of municipality would be appropriate for a particular area.
> (2) An MEC for local government must take these guidelines into account when establishing a municipality in terms of section 12 or changing the type of a municipality in terms of section 16(1)(a)."

[78] The provinces contended that Parliament has no powers to prescribe to the provinces guidelines which they must take into account in the exercise of their legislative power to determine the types of municipality that may be established in the provinces.

[79] On its face, the issue raised by the provinces may appear to be insignificant. However, upon a proper consideration, the issue is not a trivial one. It goes to the fundamental principle of the allocation of powers between the national government and the provincial governments. This principle is entrenched, for instance, in section 41(1)(e) of the Constitution (all spheres of government must respect the constitutional status, institutions, powers and functions of government in the other spheres); section 41(1)(g) (spheres of government 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); and section 44(4) (when exercising its legislative authority, Parliament must act in accordance with, and within the limits of, the Constitution). These provisions must be understood in the light of the supremacy of the Constitution, set out in section 2 of the Constitution, which provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid . . ."

[80] All these provisions underscore the significance of recognising the principle of the allocation of powers between national government and the provincial governments. The Constitution therefore sets out limits within which each sphere of government must exercise its constitutional powers. Beyond these limits, conduct becomes unconstitutional. This principle was given effect to by this Court in *Fedsure* when it said:

> "It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[78]

[81] Limits on the powers and functions on each sphere of government must therefore be observed. The enquiry, therefore, is whether the impugned provisions deal with a matter which falls within the powers conferred upon the sphere of government enacting the challenged provision. If it does not fall within its powers, that sphere of government has acted outside its powers and the impugned legislation cannot stand. The importance

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[78] *Fedsure Life Assurance*, above n 54, at para 58.

or otherwise of the matter in issue is not relevant. It is the principle that is relevant and which must be given effect to.

[82] The question, therefore, is whether what section 13 purports to do falls within the powers conferred upon the national government. Section 155(5) confers on the provinces the power to determine the different types of municipalities which may be established within a province. This power must necessarily include the legislative and executive power to establish the types in the provinces and to determine in which areas the types are to be established. Section 155(5) must be read with section 155(6), which deals with the establishment of municipalities. Read together, these two provisions mean that in relation to the establishment of categories of municipality in the province, the provincial governments have executive powers only, while in relation to the establishment of the types of municipalities, provincial governments have both the legislative and executive powers.

[83] Section 13 of the Structures Act, in peremptory terms, tells the provinces how they must set about exercising a power in respect of a matter which falls outside the competence of the national government. It is true that the MEC is only required to take the guidelines into account, and is not obliged to implement them. That the MEC, having taken the guidelines into account, is not obliged to follow them, matters not. Nor is the fact that the Minister may decide not to lay down any guidelines, of any moment. What

matters is that the national government has legislated on a matter which falls outside of its competence.

[84] Section 13 deals with a matter which section 155(5) of the Constitution vests in provincial legislatures, namely the determination of "the different types of municipality to be established in the province". The section is, therefore, inconsistent with section 155(5) of the Constitution.

B. ENCROACHMENT ON MUNICIPAL POWERS

[85] Here I consider the challenge to sections 7 to 10, 20 and 33.[79] Section 7 defines

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[79] Sections 7 to 10 provide:

"7. The different types of municipality that may be established within each category of municipality are defined in accordance with the following systems of municipal government or combinations of those systems, as set out in sections 8, 9 and 10:
(a) Collective executive system which allows for the exercise of executive authority through an executive committee in which the executive leadership of the municipality is collectively vested.
(b) Mayoral executive system which allows for the exercise of executive authority through an executive mayor in whom the executive leadership of the municipality is vested and who is assisted by a mayoral committee.
(c) Plenary executive system which limits the exercise of executive authority to the municipal council itself.
(d) Subcouncil participatory system which allows for delegated powers to be exercised by subcouncils established for parts of the municipality.
(e) Ward participatory system which allows for matters of local concern to wards to be dealt with by committees established for wards.

8. There are the following types of category A municipalities:
(a) a municipality with a collective executive system;
(b) a municipality with a collective executive system combined with a subcouncil participatory system;
(c) a municipality with a collective executive system combined with a ward participatory system;
(d) a municipality with a collective executive system combined with both a subcouncil and

a ward participatory system;

(e) a municipality with a mayoral executive system;

(f) a municipality with a mayoral executive system combined with a subcouncil participatory system;

(g) a municipality with a mayoral executive system combined with a ward participatory system; and

(h) a municipality with a mayoral executive system combined with both a subcouncil and a ward participatory system.

9. There are the following types of category B municipalities:

(a) a municipality with a collective executive system;

(b) a municipality with a collective executive system combined with a ward participatory system;

(c) a municipality with a mayoral executive system;

(d) a municipality with a mayoral executive system combined with a ward participatory system;

(e) a municipality with a plenary executive system; and

(f) a municipality with a plenary executive system combined with a ward participatory system.

10. There are the following types of category C municipalities:

(a) a municipality with a collective executive system;

(b) a municipality with a mayoral executive system; and

(c) a municipality with a plenary executive system."

Section 20 provides:

"(1) The number of councillors of a municipal council-

(a) must be determined in accordance with a formula determined by the Minister by notice in the *Government Gazette*, which formula must be based on the number of voters registered on that municipality's segment of the national common voters roll;

(b) may not be fewer than three or more than 90 councillors, if it is a local or district municipality; and

(c) may not be more than 270 councillors, if it is a metropolitan municipality.

(2) Different formulae may be determined in terms of subsection (1)(a) for the different categories of municipalities.

(3) The MEC for local government in a province may deviate from the number of councillors determined for a municipality in terms of subsection (1) by-

(a) increasing the number of councillors if extreme distances, a lack of effective communication in the municipality or other exceptional circumstances render it necessary; or

(b) decreasing the number of councillors if it is necessary to achieve the most effective size for-

(i) active participation by all councillors at council meetings;

(ii) good and timely executive and legislative decisions;

(iii) responsiveness and accountability of councillors, taking into account the possible use of modern communication techniques and facilities; or

(iv) the optimum use of municipal funds for councillor allowances and administrative support facilities.

(4) A deviation in terms of subsection (3) may be no more than-

(a) three of the number determined for the municipality in accordance with the subsection (1)(a) formula, if 30 or fewer councillors have been determined for the municipality in

five types of municipality that may be established within each category of municipality. The types of municipality are defined according to systems of municipal government. They are the collective executive system, mayoral executive system, plenary executive system, subcouncil participatory system, and ward participatory system. Sections 8, 9 and 10 set out the different types of municipality that may be established under each of the three categories of municipality. Except for category C municipalities, which comprise only the executive systems, the types of municipalities that may be established in the other categories of municipality comprise combinations of both the executive and participatory systems. Section 20 deals with the determination of the number of councillors in a municipal council. Section 33 lays down the criteria for the establishment of committees by municipalities.

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terms of the formula, provided that a council of fewer than seven may not be decreased; or

(b) 10 per cent of the number determined for the municipality in accordance with the subsection (1)(a) formula, if more than 30 councillors have been determined for the municipality in terms of the formula.

(5) The number of councillors determined for a district municipality in terms of subsections (1) to (4) must be increased by any number of councillors required to give effect to item 15(3) of Schedule 2."

Section 33 provides:

"A municipality may establish a committee provided for in this Act if-

(a) the municipality is of a type that is empowered in terms of this Act to establish a committee of the desired kind;

(b) the establishment of the committee is necessary, taking into account-

(i) the extent of the functions and powers of the municipality;

(ii) the need for the delegation of those functions and powers in order to ensure efficiency and effectiveness in their performance; and

(iii) the financial and administrative resources of the municipality available to support the proposed committee; and

(c) in the case of the establishment of an executive committee, the municipality has more than nine councillors."

Sections 7 to 10 and 33

[86] The constitutional challenge directed at sections 7 to 10 is that they encroach upon the municipal power to choose whether to have an executive committee, or some other committee, as set out in the provisions of section 160(1)(c) of the Constitution. The gist of the argument which counsel presented was this: although section 160(1)(c) of the Constitution provides that the power to elect committees is "subject to national legislation", the national legislation there contemplated is limited to the national legislation provided for in section 160(5)(b). That subsection provides that national legislation may establish criteria for determining whether municipal councils may elect an executive committee, or other committees of a municipal council. It was argued that sections 7 to 10 do not constitute criteria as contemplated by section 160(5)(b), as criteria imply an element of choice.

[87] The fallacy in the argument lies in the fact that it assumes that national legislation referred to in section 160(1)(c) is limited to the legislation contemplated in section 160(5)(b). That is not so. Section 160(1)(c) confers this power "subject to national legislation".[80] What this provision conveys is that the right of municipalities to elect committees will not prevail where there is national legislation to the contrary.[81] There is

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80 This Court, in *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) adopted the meaning given to the phrase "subject to" in *S v Marwane* 1982 (3) SA 717 (A) at 747H - 748A.

81 *Zantsi v Council of State*, above n 80, at para 27; *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 8.

nothing either in section 160(1)(c) or elsewhere in the Constitution to suggest such a limitation. In my view the national legislation referred to in section 160(1)(c) must include any other legislation passed by Parliament in terms of Chapter 7 of the Constitution. If the source of the power to pass such legislation is those other provisions of Chapter 7 of the Constitution, and not section 160(5)(b), the question whether the legislation is also sanctioned by section 160(5)(b) is not relevant. If the legislation is within the scope of national legislation sanctioned by Chapter 7, the municipal power to elect committees must be exercised subject to that legislation. The provisions to which objection is taken are those dealing with typology and they are sanctioned by section 155(2). The municipal power to elect executive or other committees is therefore subordinate to these provisions and to the provincial power to select types of municipalities. If this has the effect of precluding particular municipalities from electing executive or other committees, that results from the provisions of the Constitution itself and cannot be challenged as being a breach of section 160(5)(b). Once it is clear that the first leg of the provinces' contention is flawed, it is not necessary for us to consider the second leg, that is, whether the typology itself constitutes "criteria" as contemplated by section 160(5)(b).

[88] It follows that the challenge to sections 7 to 10 and section 33 must fail.

Section 20

[89] In terms of section 160(5)(a) of the Constitution, "[n]ational legislation may provide criteria for determining . . . the size of a Municipal Council".

[90] Sections 20(1) and (2) of the Structures Act provide:

> "(1) The number of councillors of a municipal council -
>
> (a) must be determined in accordance with a formula determined by the Minister by notice in the *Government Gazette*, which formula must be based on the number of voters registered on that municipality's segment of the national common voters roll;
>
> (b) may not be fewer than three or more than 90 councillors, if it is a local or district municipality; and
>
> (c) may not be more than 270 councillors, if it is a metropolitan municipality.
>
> (2) Different formulae may be determined in terms of subsection (1)(a) for the different categories of municipalities."

[91] KwaZulu-Natal has raised two objections to sections 20(1) and (2). The gist of the first objection is that these provisions do not provide criteria as required by section 160(5)(a) of the Constitution, but instead provide for a mandatory formula. There is no merit in this objection. Criteria are standards by which a thing is judged, assessed or identified.[82] The formula contemplated in section 20(1)(a) constitutes such a standard and

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[82] The Oxford English Dictionary, above n 68, defines a criterion as: "[a] test, principle, rule, canon, or standard, by which anything is judged or estimated". "Standard" is in turn defined as: "A rule, principle, or means of judgement or estimation; a criterion, measure". The New Shorter Oxford English Dictionary (4 ed, Clarendon Press, Oxford, 1993) defines "criterion" as: "[a] principle, standard, or test by which a thing is judged, assessed, or identified".

A similar meaning has been given to the term by the United States Supreme Court. In *Pittston Coal*

is, therefore, a criterion as contemplated in section 160(5)(a) of the Constitution.

[92] The submission that section 20(1)(a) is invalid because it provides "a mandatory formula" is equally without merit. It fails to have sufficient regard to the provisions of section 157 of the Constitution. The composition and election of municipal councils is dealt with in section 157 of the Constitution. Section 157(1) anticipates the election of councillors in accordance with a scheme set out in subsections (2), (3), (4) and (5). Section 157(2) provides:

> "The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system -
>
> (a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
>
> (b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll."

[93] Sections 160(5)(a) and 157(2) of the Constitution must be read together. The formulae in section 20 of the Structures Act are no more than these provisions require.

[94] The second objection was that section 20 is bad because it fails to provide clear

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Group et al v Sebben et al 488 US 105 (1988) at 113 the Court adopted a definition of criteria similar to that in the Oxford English Dictionary, contained in Webster's Ninth New Collegiate Dictionary 307 (1983), and held that criteria "are 'standard[s] on which a judgment or decision may be based'".

or adequate criteria on which the formulae are to be based. This objection is premised on the proposition that when Parliament delegates its law-making functions it must provide clear or adequate criteria for the exercise of the delegated power. It is not necessary to decide the correctness of this proposition because, even if it is correct, section 20(1)(a) of the Structures Act prescribes the framework within which the Minister must exercise delegated authority. In terms of section 20(1)(a), the "formula must be based on the number of voters registered on that municipality's segment of the national common voters roll". This, in my view, circumscribes the power delegated to the Minister. The delegation does not, therefore, amount to the assignment of plenary legislative power to the Minister as contended by KwaZulu-Natal.

[95] It follows that the challenge to sections 20(1) and (2) of the Structures Act must fail.

C. THE CHALLENGE TO CHAPTER 4 AND RELATED PROVISIONS

[96] The Western Cape contended that the provisions of Chapter 4, and sections 18(4), 29(1), 30(5) and 36 to 39 of the Structures Act are inconsistent with section 160(6) of the Constitution, which provides:

> "A Municipal Council may make by-laws which prescribe rules and orders for -
>
> (a) its internal arrangements;

(b) its business and proceedings; and

(c) the establishment, composition, procedures, powers and functions of its committees."

[97] The question for determination is whether Chapter 4 and the other provisions challenged are in conflict with section 160(6) of the Constitution. It is necessary first to determine the proper ambit of the power conferred upon municipalities by section 160(6).

[98] Section 160(6) comes into operation once a municipality has been established, its membership determined and its structures put in place. Section 160(6) confers on municipalities exclusive powers in relation to a narrow area. This relates to the power to make rules and orders for their "internal arrangements" and their "business and proceedings" as well as the "establishment, composition, procedures, powers and functions of [their] committees". This power, therefore, relates to internal domestic matters that are necessary for the effective performance by the municipalities of their constitutional obligations. However, this power is subject to the provisions of the Constitution. Provisions of the Constitution to which this power is subject and which would therefore constrain its ambit include section 154(1) (national and provincial governments must support and strengthen the capacity of municipalities to manage their own affairs), section 155(7) (national and provincial governments have the power to ensure that municipalities perform their executive functions effectively), section 155(6)(a) (power of provincial government to monitor and support local governments and to

promote their development to enhance their ability to manage their own affairs), section 160(1)(c) (power of municipalities to appoint committees is subject to national legislation)[83] and section 160(8) (right of members of a municipal council to participate in its proceedings and those of its committees may be regulated by national legislation).

[99] To determine the proper ambit of the power conferred upon municipalities by section 160(6), it is useful to compare section 160(6) with other provisions in the Constitution which deal with "rules and orders" in relation to the national legislature and provincial legislatures. Section 57 is a provision similar in language to section 160(6). It provides, in pertinent part:

> "(1) The National Assembly may -
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
>
> (2) The rules and orders of the National Assembly must provide for -
>
> (a) the establishment, composition, powers, functions, procedures and duration of its committees;
>
> (b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

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83 The effect of section 160(1)(c) is that the right of municipalities to appoint committees is limited by legislation to the contrary. *Zantsi v Council of State* above n 80; *Ynuico v Minister of Trade and Industry* above n 81.

. . .”[84]

[100] It is clear that this provision confers a power upon the National Assembly to regulate its internal proceedings, business and working committees. However, that power must be read in the context of the other provisions of the Constitution regulating the National Assembly, such as the regulation of the election and removal of the Speaker and Deputy-Speaker,[85] the regulation of the voting procedures and quorums in the National Assembly[86] and the regulation of public access to the National Assembly.[87] In addition, it should be noted that in the case of the national legislature, the election, appointment and functioning of what is, in effect, its executive committee, the President and Cabinet, is fully regulated by sections 83 to 102. Thorough constitutional regulation of provincial executives is similarly to be found in sections 125 to 141. These provisions make it plain that the constitutional power of legislatures to regulate the internal proceedings of committees is a narrow power, not a broad one, and is related not to the executive committees of these legislatures, but only to other committees entrusted with specific tasks or portfolios. The power also does not relate to a power to regulate the main

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84 See also section 70 of the Constitution which relates to the National Council of Provinces and section 116 which relates to provincial legislatures, both of which are formulated in similar terms to section 57; see also section 45 which relates to the power of the National Assembly and National Council of Provinces to establish a joint rules committee to make rules and orders concerning the joint business of the two chambers of the national legislature. Section 116 of the Constitution confers, in similar terms, the same power to provincial legislatures.

85 See section 52.

86 See section 53 as well as sections 73 to 82 which regulate the legislative process in detail.

87 See section 59.

structural components of the legislature, which are fully regulated by the Constitution, but only to those working committees which either chamber of the legislature may decide to establish, and also disestablish, from time to time.

[101] In my view, section 160(6) should be interpreted in a similar fashion. Although it is an important power conferred upon municipalities, its scope is relatively narrow and does not relate to the power to regulate the establishment or functioning of the executive of municipal councils, whatever form that executive may take, or any other committee of the municipality which is a key part of its democratic structure. It relates only to task and working committees which may be established and disestablished from time to time.

[102] The provisions in Chapter 4 of the Structures Act which are impugned by the provinces as invading the power of municipalities in terms of section 160(6) are the following: the establishment and composition of executive committees and mayors (sections 42 to 53); the election, powers and functions of executive mayors and mayoral committees (sections 54 to 60); the establishment, composition, powers and functions of metropolitan subcouncils (sections 61 to 71); and the establishment and powers and functions of ward committees (sections 72 to 78). All these matters relate to the regulation of the executive of the local government or to committees which form part of the structure of a particular municipality, such as ward committees and metropolitan subcouncils. These are not committees contemplated by section 160(6). These are

matters concerning "powers, functions and other features of local government" which are required to be provided for in national or provincial legislation.[88] There can be no objection therefore to their being regulated by national legislation.

[103] The committees which fall within those contemplated in section 160(6)(c) are those regulated by section 71, 79 and 80 of the Structures Act.[89] The challenge to these

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88 As this Court pointed out in the second certification judgment, above n 13, at para 80:
"In terms of [Constitutional Principle] XXIV the Constitution must provide a 'framework for local government powers, functions and structures' whilst the 'comprehensive powers, functions and other features of local government shall be set out' in national or provincial legislation, or in both. The [Constitutional Principle] contemplates, therefore, that the Constitution will provide no more than a framework and that the details of the [Local Government] system would be a matter for legislation."

89 Section 71 provides:
"A metropolitan subcouncil may appoint committees, including a management committee, from among its members to assist it in the performance of its duties and the exercise of its powers."

Section 79 provides:
"(1) A municipal council may-
(a) establish one or more committees necessary for the effective and efficient performance of any of its functions or the exercise of any of its powers;
(b) appoint the members of such a committee from among its members; and
(c) dissolve a committee at any time.
(2) The municipal council-
(a) must determine the functions of a committee;
(b) may delegate duties and powers to it in terms of section 32;
(c) must appoint the chairperson;
(d) may authorise a committee to co-opt advisory members who are not members of the council within the limits determined by the council;
(e) may remove a member of a committee at any time; and
(f) may determine a committee's procedure."

Section 80 reads:
"(1) If a municipal council has an executive committee or executive mayor, it may appoint in terms of section 79, committees of councillors to assist the executive committee or executive mayor.
(2) Such committees may not in number exceed the number of members of the executive committee or mayoral committee.
(3) The executive committee or executive mayor-
(a) appoints a chairperson for each committee from the executive committee or mayoral committee;
(b) may delegate any powers and duties of the executive committee or executive

provisions is premised on the proposition that the constitutional power of the municipalities to appoint committees is without limits. This premise is wrong. The power of municipalities to appoint committees is subject to section 160(1)(c). They have the power to elect "an executive committee or other committees subject to national legislation". There is nothing in this provision which suggests that "other committees" are limited to any particular committee. This provision governs the appointment of any committee, including the committees contemplated in section 160(6)(c) of the Constitution. The effect of section 160(1)(c) is that the power of the municipalities to appoint committees contemplated in section 160(1)(c) is subject to national legislation. Therefore there can be no objections to sections 71, 79 and 80.

[104] Apart from this, these provisions largely repeat the provisions of the Constitution which afford municipal councils the power to determine whether to establish committees or not. They do not limit that power in any way.[90] As such, no complaint can be made about them.

[105] Several of the provisions require separate consideration. Section 79(2)(a) requires

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mayor to the committee;

(c) is not divested of the responsibility concerning the exercise of the power or the performance of the duty; and

(d) may vary or revoke any decision taken by a committee, subject to any vested rights.

(4) Such a committee must report to the executive committee or executive mayor in accordance with the directions of the executive committee or executive mayor."

90 See *Certification of the Constitution of the Western Cape*, above n 74, at paras 21 to 27; compare the discussion of section 13 of the Structures Act, above, at paras 77 to 84.

that a municipal council must determine the functions of a committee. In my view, even though this is a mandatory provision it does not invade the ambit of the section 160(6). When a municipality establishes a committee in the context of section 160(6), it seems plain that it must determine the functions of that committee. If that is so, section 79(2)(a) constitutes no invasion or limitation of the municipality's power, merely an articulation of it. Section 80(2) provides that the numbers of a committee may not exceed the number of members of the executive committee or mayoral committee. This limitation of the numbers of committee members is a criterion for determining the size of a committee. The national legislature is empowered to determine such criteria in terms of section 160(5)(c).[91] Section 80(4) provides that a committee must report back to the executive committee or mayor "in accordance with the directions of the executive committee or executive mayor". This provision does not restrict the powers of municipalities in terms of section 160(6) either. It merely requires a committee to report back in accordance with the instructions given to it.

[106] Sections 79(2)(c) and section 80(3)(a) require the municipal council or the executive committee or mayor to appoint chairpersons for committees it appoints. In my view, these provisions are not a limitation of the power conferred upon municipalities by section 160(6) in that they relate to a matter which may be regulated by national legislation in terms of section 160(1)(c). To the extent that national legislation may

[91] Section 160(5)(c) provides that "[n]ational legislation may provide criteria for determining . . . the size of the executive committee or any other committee of a Municipal Council."

regulate the "election of other committees", that in my view is broad enough to regulate the question of the appointment of chairpersons of such committees. Sections 79(2)(c) and 80(3)(a) therefore are not beyond the competence of the national legislature.

[107] It was also contended that section 82 is unconstitutional. In terms of this section a municipal council is obliged to "appoint a municipal manager who is the head of administration and also the accounting officer for the municipality". The appointment of the municipal manager and determination of terms and conditions of employment are done by the council, subject to approval by the executive committee or executive mayor, where appropriate.[92] The municipal manager is the head of the administration and the chief accounting officer of the municipality;[93] responsible for calling the first meeting of a municipal council after it has been elected;[94] and responsible for calling by-elections (after consultation with the Independent Electoral Commission ("the IEC")).[95] It is significant that if the municipal manager does not call by-elections within the prescribed period, the MEC for Local Government in the province (after consultation with the IEC) must do so.[96] In addition, the municipal manager has designated duties in relation to elections and these include informing the chief electoral officer if no party applies for

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92 Section 30(5)(c).

93 Section 82.

94 Section 29(2).

95 Section 25(3).

96 Section 25(4).

registration or every party is rejected,[97] and the determination of nomination forms for municipal office bearers.[98] In addition, newly appointed councillors are required to declare their financial interests to the municipal manager,[99] or any change in their financial interests.[100] Municipal managers must also be informed of the names of traditional leaders in council.[101]

[108] In terms of section 216(1)(a) of the Constitution, the national government "must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government . . .".[102] This provision imposes a constitutional obligation on the national government to set up appropriate structures for the municipalities to control their expenditure. The office of the municipal manager is one such structure. In addition, in terms of section 190(1)(a) of the Constitution, the IEC must manage the municipal elections in accordance with national legislation. To the extent that the municipal manager performs duties in relation to municipal elections, the

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97 Schedule 1 Item 15(2).

98 Schedule 3 Item 3(1).

99 Schedule 5 Item 7(1).

100 Schedule 5 Item 7(2).

101 Schedule 6 item 1.

102 Section 216(1) provides:
"National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing-
(a) generally recognised accounting practice;
(b) uniform expenditure classifications; and
(c) uniform treasury norms and standards."

appointment of the municipal manager is in accordance with the power of the national government to regulate municipal elections. Finally, it would nevertheless be permissible for national government to make provision for the appointment of the municipal manager in terms of section 155(7). That provision authorises national government to enact legislation to regulate the exercise by municipalities of their executive authority.[103]

[109] It is therefore clear that the municipal manager is a key structure of a municipality and not merely a personnel appointment as contemplated in section 160(1)(d) of the Constitution. I am therefore satisfied that national government has the constitutional authority to enact section 82.

[110] The Western Cape also challenged sections 18(4), 29(1), 30(5) and 36 to 39 on the same basis as Chapter 4. None of these sections deal with matters contemplated in section 160(6). Sections 36 to 39 of the Structures Act regulate the elections of speakers of municipalities, as well as their functions and term of office. The election and removal of the Speaker of the National Assembly is regulated by section 52 and schedule 3, Part A of the Constitution. The fact that the Speaker of the National Assembly is directly regulated by the Constitution in this way is a strong indication that when the National Assembly is given power in terms of section 57 to regulate its internal affairs by rules and orders, this does not extend to regulating the election of speakers. The same, it seems to

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103 Section 155 is quoted in full at para 35 above.

me, must apply to the power given to municipalities in terms of section 160(6). It does not extend to the regulation of the office of speaker.

[111] Section 18(4) deals with the identification of full-time members of a municipal council. This is not a matter which relates to internal arrangements, business, proceedings or committees. Section 29(1) deals with the convening of meetings of municipalities. The convening of national and provincial legislatures is regulated directly by the Constitution in terms of sections 51(1), 63(1) and 110. It is clear that this is not considered to be something that falls within the rules and orders of these legislatures. Neither is it a matter which falls within section 160(6) of the Constitution. Section 30(5) requires a report from the executive committee or executive mayor before a municipal council takes certain decisions. This is a regulation of the legislative procedure. Once again legislative process is carefully regulated by the Constitution in relation to the national legislature by sections 73 to 82, and in relation to provincial legislatures by sections 119 to 124. The regulation of legislative process is not, therefore, a matter which falls within the ambit of section 160(6).

[112] Chapter 4, sections 18(4), 29(1), 30(5) and 36 to 39 are, therefore, not inconsistent with section 160(6) of the Constitution.

Section 91(1)

[113] Section 91(1) provides:

> "The MEC for local government in a province, within a policy framework as may be determined by the Minister, and by notice in the *Provincial Gazette*, may exempt a municipality in the province from a provision of section 36(2), (3) or (4), 38 to 41, 45 to 47, 48(2), (3) and (4), 50 to 53, 58, 65 to 71, 75 and 76."

[114] As indicated earlier,[104] sections 36 to 78 set up six institutions: speakers, executive committees, mayors, executive mayors, metropolitan subcouncils, and ward committees. The provisions of these sections may be divided into two broad categories: substantive sections - those dealing with establishment, powers and functions; and procedural sections - those dealing with the way in which the bodies conduct their affairs. It is only in respect of this latter category that exemptions may be granted.[105] The exemptions that

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104 Para 102.

105 Exemptions may be obtained from the following sections: 36(2), 36(3), 36(4), 38, 39, 40, 41, 45, 46, 47, 48(2), 48(3), 48(4), 50, 51, 52, 53, 58, 65, 66, 67, 68, 69, 70, 71, 75 and 76. Sections 36(2), 36(3), 36(4), 45, 48(2), 48(3) and 65 all deal with election procedures (when, how and who) for the various bodies. Sections 38, 46, 48(4), 66 and 75 deal with the terms of office of the bodies. Sections 39, 47, 48(4) and 67 deal with when an office will be deemed to have been vacated during a term. Section 40, 53 and 58 deal with the procedure for the removal from office of functionaries. Sections 41, 50, 51, 52, 68, 69 and 70 deal with procedures for meetings, including who should perform a function in the absence of a designated functionary, quorums and procedure to allow a body to determine its own procedures. Section 71 allows a metropolitan subcouncil to appoint its own committees. Section 76 regulates the procedure for filling a vacancy on a ward committee.

Exemptions may not be obtained from sections 36(1), 36(5), 37, 42, 43, 44, 48(1), 48(5), 48(6), 49, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 72, 73, 74, 77, 78, 79, 80, 81 and 82.Sections 36(1), 48(1) and 82 oblige a municipal council to appoint a speaker and a municipal manager, and to elect a mayor (where appropriate). Section 36(5) prevents anyone from holding the office of speaker and mayor/executive mayor simultaneously. Sections 42, 54, 61 and 72 prescribe which types of municipality may establish the various internal structures and functionaries. Sections 43, 55, 62, 63 and 73 deal with the procedure for establishing the structures and functionaries, and their composition. Sections 37, 44, 49, 56, 64 and 74 deal with the powers and functions of the bodies. Sections 48(5), 48(6) and 57 prevent a mayor or executive mayor from sitting for more than two terms consecutively. Section 77 prohibits remuneration of members of ward committees. Sections 79 and 80 provide a framework within which municipal councils may establish their own committees. Section 81 deals with the participation in municipal councils of traditional leaders.

may be granted are not in the nature of temporary exemptions, granted to deal with an unexpected event. This seems clear from a reading of section 91(2) which provides that:

> "[a] municipality exempted from a provision of this Act in terms of subsection (1) may pass its own legislation with regard to the matter dealt with in the exempted provision."

The purpose of the exemption then, is to grant municipalities greater autonomy to regulate their affairs.[106] Such a provision is in accordance with the requirements of section 154(1) of the Constitution, which provides:

> "The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."

[115] The constitutional challenge to section 91(1) by the Western Cape is premised on the proposition that it was not open to national government to regulate municipalities in the manner Chapter 4 purports to do. Since I have held that the objection to Chapter 4 is without substance, it follows that this attack on section 91(1) must likewise fail.

[116] The constitutional complaint of KwaZulu-Natal rests on a different basis. While not challenging the purpose of the provision, it objected to the manner in which the

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The following sections seem to deal with procedural matters. However, no exemptions may be granted in respect of them. This may simply be a matter of legislative oversight. Section 78 determines when a ward committee may be dissolved. Section 59 deals with the vacation of office during term of an executive mayor. Section 60 deals with mayoral committees.

106 This was the interpretation given to the section by KwaZulu-Natal.

national legislation sought to regulate the granting of exemptions. The gist of the complaint was that section 91(1) is unconstitutional because it provides no safeguards against "abuse and arbitrary application" of the power it confers on the Minister.

[117] I would point out at the outset that the enquiry is not whether the delegated power is open to abuse. The fact that the delegated power may be abused does not determine the question whether there is constitutional authority to delegate the power in question. The enquiry is whether there is constitutional authority to delegate the power in question. Once it is accepted, as here, that such authority exists, the fact that such power may be abused is not a relevant consideration. If delegated power is abused, the conduct of those abusing the power would be unconstitutional and therefore open to challenge. Accordingly, if either the Minister or the provincial MEC abuse their power in the sense that they act illegally, their conduct may be challenged.

[118] This challenge by KwaZulu-Natal rests on the proposition that in delegating its law-making authority, Parliament must provide safeguards against the abuse of the delegated power. It is not necessary to decide here the correctness of this proposition because there are sufficient safeguards against the abuse and arbitrary application of the power to exempt municipalities. The power has first been delegated to the Minister of the national government who is a member of, and therefore accountable to, Parliament. The Minister is required to formulate "a policy framework" for the granting of

exemptions. The decision whether to exempt a municipality is to be exercised by a provincial MEC on a case by case basis. This will obviously require some investigation into, amongst other things, the capacity of the municipality to manage its own affairs. The MEC is a member of, and therefore accountable to, the provincial government. An exemption to a particular municipality will presumably be granted pursuant to an application by the municipality concerned. It seems to me that in these circumstances there are sufficient safeguards against the abuse or arbitrary application contended for by KwaZulu-Natal.

[119] For these reasons, the constitutional attack on section 91(1) must fail.

D. MISCELLANEOUS PROVISIONS

Under this heading I deal with the constitutional attacks on sections 24(1) and 32(1).

Section 24(1)

[120] Section 159(1) of the Constitution provides:

> "The term of a Municipal Council may be no more than five years, as determined by national legislation."

[121] The constitutional attack on section 24 is premised on the proposition that it constitutes an impermissible assignment of plenary legislative power to the Minister, and

that it does not constitute "subordinate legislation" within the meaning of section 239 of the Constitution.[107] Section 24 provides:

> "(1) The term of municipal councils is no more than five years as determined by the Minister by notice in the *Government Gazette*, calculated from the day following the date or dates set for the previous election of all municipal councils in terms of subsection (2).
>
> (2) Whenever necessary, the Minister, after consulting the Electoral Commission, must, by notice in the *Government Gazette*, call and set a date or dates for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils . . ."

[122] The authority of Parliament to delegate its law-making functions is subject to the Constitution,[108] and the authority to make subordinate legislation must be exercised within the framework of the statute under which the authority is delegated.

[123] The competence of Parliament to delegate its law-making function was recognised by this Court in *Executive Council, Western Cape*.[109] The Court held:

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[107] Section 239 reads as follows:
"In the Constitution, unless the context indicates otherwise -
'national legislation' includes -
(a) subordinate legislation made in terms of an Act of Parliament; and
(b) legislation that was in force when the Constitution took effect and that is administered by the national government;
. . ."

[108] Section 44(4) of the Constitution.

[109] above n 32, at para 51.

> "The legislative authority vested in Parliament under s37 of the Constitution is expressed in wide terms - 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including . . . the power to amend the Act under which the assignment is made."

[124] Although the Court was concerned with the interim Constitution, it seems to me that the same principle applies to the present Constitution. It is a principle of universal application which is recognised in many countries.[110] This authority is, of course, subject to the Constitution. The enquiry is whether the Constitution authorises the delegation of the power in question. Whether there is constitutional authority to delegate is therefore a matter of constitutional interpretation. The language used in the Constitution and the context in which the provisions being construed occur are important considerations in that process.

[125] The Constitution uses a range of expressions when it confers legislative power upon the national legislature in Chapter 7. Sometimes it states that "national legislation

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[110] The authorities in other jurisdictions are discussed in *Executive Council, Western Cape*, above n 32, at paras 53 to 60.

must"; at other times it states that something will be dealt with "as determined by national legislation"; and at other times it uses the formulation "national legislation may". Where one of the first two formulations is used, it seems to me to be a strong indication that the legislative power may not be delegated by the legislature, although this will of course also depend upon context.

[126] Section 159(1) of the Constitution makes it clear that all municipal councils will have a uniform term of office, subject to a maximum of five years. It requires national legislation to determine such term of office by using the expression "as determined by legislation". The term so established is subject to the prescribed maximum of five years. Section 159(2) requires that a municipal election be held within 90 days of the date that the previous council was dissolved or its term expired. The term of office of an elected legislative body such as a municipal council is a crucial aspect of the functioning of that council. In the case of the National Assembly, section 49(1) of the Constitution determines the term, and in the case of the provincial legislatures, section 108(1) of the Constitution determines the terms. Given its importance in the democratic political process, and given the language of section 159(1), the conclusion that section 159(1) does not permit this matter to be delegated by Parliament, but requires the term of office to be determined by Parliament itself, is unavoidable. In addition to the importance of this matter, I also take cognizance of the fact that it is one which Parliament could easily have determined itself for it is not a matter which requires the different circumstances of each

municipal council to be taken into consideration. All that is required is to fix a term which will apply to all councils. In my view, this is not a matter which the Constitution permits to be delegated. The delegation was, therefore, impermissible and section 24(1) must be held to be inconsistent with section 159(1) of the Constitution.

Section 32

[127] KwaZulu-Natal contended that section 32 seeks to set out a comprehensive blue-print for municipal delegation and in doing so violates the autonomy of municipalities recognised in section 160(2) of the Constitution.[111] In my view there is no merit in this argument. Section 160(2) simply prohibits municipalities from delegating certain matters. It does not give them an unqualified right to delegate any other matter. Section 32 requires a municipal council to "develop a system of delegation that will maximise administrative and operational efficiency . . . ".[112] In addition, it provides how the power to delegate may be exercised and to which structures it may be delegated. It does not in any way take away from municipalities the power to delegate matters other than those excluded by section 160(2).

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111 Section 160(2) reads:
"The following functions may not be delegated by a Municipal Council:
(a) The passing of by-laws;
(b) the approval of budgets;
(c) the imposition of rates and other taxes, levies and duties; and
(d) the raising of loans."

112 Section 32(1).

[128] Section 154(1) of the Constitution confers wide legislative authority on national government in respect of municipalities. It authorises national and the provincial governments to enact legislation to empower the municipalities to manage their own affairs.[113] This is wide enough to confer legislative authority on national government to enact section 32. Section 32 is, therefore, not inconsistent with section 160(2) of the Constitution.

E. SUPREMACY CLAUSE

[129] Section 93(2) provides:

> "If any conflict relating to the matters dealt with in this Act arises between this Act and the provisions of any other law, except the Constitution, the provisions of this Act prevail."

[130] The constitutional challenge to section 93(2) is premised on the proposition that it is in conflict with sections 146 to 150 of the Constitution. These are the provisions which deal with conflicts between laws. The premise is wrong. Upon a proper construction, there is no conflict between section 93(2) and these provisions of the Constitution.

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113 Section 154(1) is quoted in full above at para 114.

[131] While the manner in which the provision is drafted may not be the most felicitous, the essence of what it conveys is nonetheless clear.[114] The section expressly recognises the supremacy of the Constitution. It provides that if there is any conflict between the Structures Act and the provisions of the Constitution, which includes sections 146 to 150 of the Constitution, the Constitution prevails. It follows that sections 146 to 150 of the Constitution and not section 93(2) will determine whether national legislation will prevail over provincial legislation. The constitutional attack on section 93(2) must, therefore, fail.

SUMMARY

[132] To sum up, therefore, I conclude that: (a) sections 4 and 5 are unconstitutional insofar as they empower the Minister to declare an area a metropolitan area, since that task belongs to the Demarcation Board; (b) section 6(2) is unconstitutional insofar as it gives a discretion to the Minister to accept the recommendation of the Demarcation Board in declaring a district management area, since that too is a task for the Demarcation Board; (c) section 13 is unconstitutional insofar as it empowers the Minister to prescribe guidelines for the MEC to take into account when deciding which type of municipality would be appropriate for a particular area, since the power to do so belongs to the provinces; and (d) section 24(1) is unconstitutional insofar as it delegates the power to

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[114] Similar provisions are to be found in other legislation. See, for example, the Labour Relations Act, 66 of 1995 and the Liquor Bill [B131B-98].

determine the term of office of municipal councils to the Minister, because the Constitution requires that the term of office be determined by national legislation.

REMEDY

[133] Sections 4, 5, 6(2), 13 and 24(1) of the Structures Act have been found to be inconsistent with the Constitution. Two related questions arise for determination: first, is it possible to excise these sections and second, do the remaining provisions of the Structures Act give effect to the purpose of the Structures Act?[115]

[134] In regard to sections 4 and 5, both questions, in my view, must be answered in the affirmative. These two sections relate to the application of the criteria, which, I have found, the Minister has no power under the Constitution to apply. Sections 2 and 3 read with section 25 of the Demarcation Act provide sufficient criteria to enable the Demarcation Board to carry out its functions. Sections 4 and 5, therefore, can be severed from the Structures Act. The same is true of sections 13 and 24(1).

[135] Section 6(2) has been found to be unconstitutional. Subsections (1) and (3) are dependent on subsection (2). The mechanism for declaring management areas does not, in itself, offend the Constitution. It appears to contemplate areas which are not yet ready

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115 *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at paras 15 and 16.

to be declared as category B municipalities, but which in due course may become suitable for the establishment of category B municipalities. If the entire section 6 is struck down, there will be no mechanism for declaring district management areas. In addition, we have found that section 6(2) offends the Constitution only to the extent that it gives the Minister a discretion, the exercise of which might interfere with the function of the Demarcation Board. In these circumstances, it seems to me that the national government must be given the opportunity to correct the defect in section 6. In the interim, however, the provisions of section 6(2) must be applied in a manner which will not interfere with the function of the Demarcation Board.

COSTS

[136] Then there is the question of costs. In *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*,[116] this Court confirmed that the general rule in civil litigation that costs should follow the result is not as readily applicable in this Court as in others. Dealing with costs in constitutional matters, Mahomed DP said the following:

> "A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the Court takes a view which is different from the view taken by the petitioner. This, of course, does not

[116] 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC).

> mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party."[117]

[137] The above rule was applied in *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995*.[118] On the other hand, this Court has in the past made orders for costs against national or provincial government when it has been an unsuccessful party.[119]

[138] In the present cases there seem to me to be important considerations which militate against the award of costs. First, the provinces have failed in their challenge to the constitutionality of the Structures Act as a whole. Second, while the provinces may have been successful on important issues relating to the application of the criteria, they failed in their principal assertion that the power to apply the criteria was a provincial competence. Third, the issues which these cases were concerned with were of

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117 *In re: Education Bill*, above n 116, at para 36.

118 1996 (4) SA 653 (CC); at para 49.

119 *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 66; *Executive Council, Western Cape*, above n 32, at para 123.

considerable national importance, involving as they did the authority to establish municipalities. Fourth, the issues raised were both difficult and substantial, and the opposition to the challenge not without substance. In these circumstances the interests of justice require that no order as to costs be made.

ORDER

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

1. The application for direct access under Rule 17 is granted.
2. The application to amend the notice of motion is granted.
3. Sections 4, 5, 13 and 24(1) of the Local Government: Municipal Structures Act, 117 of 1998 are inconsistent with the provisions of the Constitution and accordingly invalid.
4. 4.1 Section 6(2) of the above Act is inconsistent with the provisions of the Constitution and accordingly invalid;

   4.2 the declaration of invalidity in paragraph 4.1 above is suspended for a period of one year, as from the date of this order, in order to afford Parliament an opportunity of correcting the defect in question;

   4.3 pending the correction of the defect in question or the expiry of the

period of one year, whichever occurs first, the Minister must, under the provisions of section 6(2) of the said Act, approve every recommendation made by the Demarcation Board for purposes of section 6 and make a declaration under section 6(2) accordingly;

4.4 in the event of the period of one year referred to in paragraph 4.3 above expiring before the defect in question is corrected, the declaration of invalidity in paragraph 4.1 above will only take effect as from the date of such expiry.

5. Save for the above the main applications are dismissed.

6. All parties in both applications are to pay their own costs, including the costs incurred in connection with the interim relief.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Madala J and Sachs J concur in the judgment of Ngcobo J.

O'REGAN J:

[140] I have had the opportunity of reading the judgment prepared by Ngcobo J. I dissent from his conclusion that sections 4, 5 and 6(2) of the Local Government: Municipal Structures Act, 117 of 1998 (the Structures Act) are unconstitutional and accordingly dissent from his order in that respect. In my view, those provisions give rise to no constitutional rupture for the reasons that follow.

The constitutional scheme

[141] The principal constitutional provision relevant to determining the constitutionality of sections 4, 5 and 6 is section 155 which, for ease of understanding, I repeat:

> "**Establishment of Municipalities**
>
> (1) There are the following categories of municipality:
>
> (a) **Category A**: A municipality that has exclusive municipal executive and legislative authority in its area.
>
> (b) **Category B**: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
>
> (c) **Category C**: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.
>
> (2) National legislation must define the different types of municipality that may be established within each category.
>
> (3) National legislation must —
>
> (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
>
> (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
>
> (c) subject to section 229, make provision for an appropriate division of

> powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.
>
> (4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.
>
> (5) Provincial legislation must determine the different types of municipality to be established in the province.
>
> (6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsection (2) and (3) and, by legislative or other measures, must —
>
> (a) provide for the monitoring and support of local government in the province; and
>
> (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
>
> (6A) . . .
>
> (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

It is clear from section 155(1) that the Constitution provides for three categories of local government. These were described by this Court in the second Certification judgment as "(a) self-standing municipalities, (b) municipalities that form part of a comprehensive co-ordinating structure, and (c) municipalities that perform coordinating functions."[120] The

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120 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) at para 77.

Structures Act refers to these three categories of municipality as metropolitan municipalities, local municipalities and district municipalities.

[142] It is also clear that section 155 specifies four requirements which national legislation must meet. First, it must define the different types of municipality that may be established within each category of municipality.[121] Secondly, it must provide "the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C".[122] Thirdly, it must provide criteria and procedures for the determination of the boundaries of all municipalities which must be drawn by an independent authority.[123] Fourthly it must make provision for an appropriate division of powers and functions between local and district municipalities.[124] All this is subject to section 155(4) which requires the legislation to "take into account the need to provide municipal services in an equitable and sustainable manner".

[143] Once national legislation has provided the types of municipality which may be established for each category of municipality, each province must, by legislation, select

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121 Section 155(2).

122 Section 155(3)(a).

123 Section 155(3)(b).

124 Section 155(3)(c).

a provincial list of types of municipality for each category from the national list.[125] This provincial list will then be applicable in the province concerned. The province must establish the municipalities[126] and thereafter monitor and support local government and promote the development of local government capacity within the province.[127]

[144] The process for establishing municipalities contemplated by section 155 seems to me to be the following: (a) the enactment of national legislation contemplated in section 155(2)and (3); (b) the identification for each area of the category of municipality to be established by the application of criteria to be set out in the national legislation; (c) the determination of boundaries for municipalities by an independent body which shall apply criteria and follow procedures established in the national legislation; (d) the enactment of provincial legislation in each province identifying the types of municipality which may be established in each province; and (e) the establishment of municipalities by provinces in terms of the relevant national and provincial legislation.

Challenge to sections 4 and 5 of the Structures Act

[145] My difference with Ngcobo J relates to the question whether sections 4 and 5 of the Structures Act are in conflict with section 155 of the Constitution. They read as follows:

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125 Section 155(5).

126 Section 155(6).

127 Sections 155(6)(a) and (b).

> "4. (1) The Minister must apply the criteria set out in section 2 and determine whether an area in terms of the criteria must have a single category A municipality or whether it must have municipalities of both category C and category B.
>
> (2) The Minister may determine that an area must have a category A municipality only after consultation with the MEC for local government in the province concerned, the Demarcation Board, SALGA and organised local government in the province.
>
> 5. (1) If the Minister determines that an area must have a single category A municipality, the Minister, by notice in the *Government Gazette*, must declare that area as a metropolitan area.
>
> (2) When declaring an area as a metropolitan area the Minister designates the area by identifying the nodal points of the area but must leave the determination of the outer boundaries to the Demarcation Board."

In summary, these provisions require the Minister to apply the criteria provided in section 2 of the Structures Act to determine whether an area shall have a category A municipality or not. The Minister is required to identify the area concerned by identifying the nodal points of the area, but he must leave the determination of the boundaries of the area to the Demarcation Board.

[146] The question is whether it is constitutionally permissible for national legislation to empower the Minister to apply the criteria contemplated by section 155(3)(a) of the Constitution. Ngcobo J holds that it is not, because the Constitution requires the criteria to be applied by the independent authority referred to in section 155(3)(b).

[147] One preliminary issue needs brief consideration. It relates to whether the criteria contemplated by section 155(3)(a) are determinative without requiring the exercise of any further judgment. It was suggested during argument that section 155(3)(a) contemplates that no agency will be needed to apply the criteria, as section 155(3)(a) contemplates that such criteria will be self-executing or may be applied automatically and uncontroversially. If section 155(3)(a) did contemplate such criteria then it would follow that the criteria established by section 2 of the Structures Act would not meet the demands of the section for they quite clearly require the exercise of judgment in their application. Section 2 of the Structures Act provides that:

> "An area must have a single category A municipality if that area can reasonably be regarded as —
>
> (a) a conurbation featuring—
>
> (i) areas of high population density;
>
> (ii) an intense movement of people, goods, and services;
>
> (iii) extensive development; and
>
> (iv) multiple business districts and industrial areas;
>
> (b) a centre of economic activity with a complex and diverse economy;
>
> (c) a single area for which integrated development planning is desirable; and
>
> (d) having strong interdependent social and economic linkages between its constituent units."

It is possible to identify a criterion which would determine whether a category A municipality should exist sufficiently precisely to require the exercise of no further judgment. For example, a criterion could state that a category A municipality should be

established for an area of a specific size whose population density exceeded a certain figure. However, given the complex and sensitive task of establishing democratic and functional local government, I have no doubt that the Constitution does not require the legislature to adopt such criteria. The task of deciding whether a category A municipality is appropriate or not is too complex to permit a simple determinative criterion or criteria. The criteria established in section 2 of the Structures Act properly reflect that.

[148] The question raised by the litigants in this Court was whether the Constitution specifies the person or agency who must apply the criteria in section 155(3)(a). If the Constitution leaves the question open, then, in terms of section 164, it is a matter that may be regulated by national legislation. Section 164 provides that:

> "Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation."

The question therefore, is whether the Constitution expressly or by implication specifies who should apply the criteria contemplated by section 155(3)(a). If it does not, then the matter falls to Parliament to regulate in terms of the residual power conferred by section 164.

[149] To answer that question, it is necessary to consider section 155(3) as a whole. Section 155(3) requires three things of national legislation: criteria for determining

whether a category A municipality should exist; criteria and procedures for the determining of boundaries of municipalities; and provision for an appropriate division of powers between local and district municipalities, which need not be uniform even within the area of one category C municipality. As to the latter, the Constitution makes no express provision as to who will in fact decide in each particular case what division of powers will be appropriate. The Structures Act confers that power upon provincial governments. It provides that when the member of an Executive Council of a province (MEC) establishes a municipality in terms of section 12 of the Act, that MEC shall determine the division of functions and powers in terms of section 84 and 85 of the Structures Act.

[150] In respect of only one of the three matters regulated by section 155(3), therefore, does the Constitution expressly specify the agent responsible for applying the national legislation. That agent is the independent authority which is to be responsible for the determination of municipal boundaries in terms of section 155(3)(b). Express provision indicating that this authority should either be responsible for applying the criteria contemplated by section 155(3)(a) or that it will determine the division of powers between a district municipality and a local municipality is absent. On a straightforward reading of section 155(3), therefore, it seems plain that the Constitution does not specify who should apply the criteria in section 155(3)(a) or, in relation to any specific municipality, determine a division of powers as contemplated by section 155(3)(c). By

contrast, section 155(3) does prescribe who must draw the boundaries. In terms of section 155(3)(b), they must be drawn in terms of the legislative criteria and procedures by an independent authority.

[151] The independent authority referred to in section 155(3)(b) enjoys no elaboration elsewhere in the Constitution. Unlike other independent agencies established by the Constitution with the purpose of protecting and promoting democracy,[128] its institution and procedures are left entirely to national legislation, with the only requirement being that it be "independent". Section 157(4) requires that ward boundaries be delimited by an independent authority to be established by, and to operate in terms of, national legislation. It does not require, however, that the independent authority contemplated by section 157(4) be the same authority as that contemplated in section 155(3)(b), although it would clearly make sense if it were. The task conferred by section 157(4) relates to drawing ward boundaries, once a decision has been taken that wards shall be established. The Constitution does not say that the authority must decide whether wards shall be established or not. The task entrusted by section 157(4) is the task of delimiting ward boundaries and no more, just as the task conferred by section 155(3)(b) is to determine municipal boundaries. There is nothing express in section 155 or elsewhere in the Constitution to suggest that the authority referred to in section 155(3)(b) should be given greater powers than the determination of boundaries.

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[128] See chapter 10 of the Constitution.

[152] In my view, therefore, the answer to the question is clear. Section 155(3)(a) and section 155(3)(c) mandate no specific agency for giving effect to the matters with which they are concerned while, by contrast, section 155(3)(b) does specify an agency. The silence in sections 155(3)(a) and (c) means that these are matters not regulated by the Constitution and that they therefore fall within the residual allocation of powers in section 164. National legislation may regulate them. That is what has happened in this case. Whether we approve or disapprove of the choice of agent selected by the national legislature is irrelevant. The Constitution empowered the national legislature so to choose.

[153] In the majority judgment, Ngcobo J holds that on a proper construction of sections 155(3)(a) and (b) the Constitution requires that the criteria set by national government in terms of section 155(3)(a) be applied by the independent authority referred to in section 155(3)(b). I cannot agree.

[154] Ngcobo J gives five reasons: first, he states that the Court should be reluctant to find that the Constitution does not regulate this matter at all; secondly, that section 155(3)(a) and (b) should be read together which means that the independent authority must apply the section 155(3)(a) criteria; thirdly, that because the independent authority will have to consider the criteria relevant to determining whether a category A

municipality should be established or not in drawing boundaries, it must therefore be the only authority which applies those criteria; fourthly, that the Minister's determination of nodal points in terms of section 5 of the Structures Act will affect the boundary-drawing exercise of the independent authority; and finally, that in requiring municipalities' boundaries to be determined by an independent authority the Constitution seeks to prevent "political interference in the process of creating new municipalities".[129] I consider each of these reasons.

[155] Ngcobo J finds that we should be slow to find that the Constitution is silent on an issue and that therefore we should seek to read section 155(3) in a way to avoid any silences. There may be a principle of interpretation in terms of which one should be reluctant to find that the Constitution has failed to regulate an essential matter that one would have expected it to regulate. In relation to chapter 7 of the Constitution, however, such a principle cannot have application. As Ngcobo J holds, chapter 7 of the Constitution contains a careful division of powers in relation to local government between national government, provincial government and local government itself.[130] The chapter then provides, in its final section, section 164, that any matters not dealt with in that chapter may be prescribed by national legislation or provincial legislation within the framework of national legislation. That there is a provision to govern the residue shows

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129 At para 50 of his judgment.

130 See paras 24 - 31 of Ngcobo J's judgment with which I agree.

that the Constitution explicitly contemplates matters relating to local government which it has not regulated expressly or impliedly. Section 164 makes it plain that generally legislative competence in respect of such matters will then be enjoyed by the national legislature or a provincial legislature within the framework of national legislation if such exists.

[156] Nor does the fractured and shameful history of local government in South Africa provide a basis for a reluctance to find that the Constitution is silent on a particular matter. If anything, the complex web of legislative provisions that is the legacy of a racist system of government and the resultant fragmentation of systems of local government throughout the country render comprehensive treatment in the Constitution an ambitious if not impossible task. Section 164 is practical recognition of this.

[157] In my view there is neither a textual nor contextual reason for being reluctant to find that the Constitution is silent on a matter within the ambit of chapter 7. The inclusion within chapter 7 of a provision to govern such situations suggests that the drafters foresaw that there would be matters which, either by design or default, were not comprehensively regulated in the chapter. In the circumstances, where chapter 7 fails to deal with a matter concerning local government, section 164 governs and national legislation may prescribe for such a matter either comprehensively or as a framework within which provincial legislation may prescribe further. Whether or not chapter 7 does

deal with a matter concerning local government or not will depend upon a proper interpretation of the relevant provisions of that chapter. That interpretation should not, in my view, be weighted by a presumption against finding that the matter has not been regulated. Indeed, Ngcobo J finds, in my view quite correctly, that the important question of the legislative regulation of the establishment of municipalities is something upon which the Constitution is silent and which therefore falls to Parliament in terms of section 164 of the Constitution.[131]

[158] Ngcobo J also reasons that section 155(3)(a) and (b) should be read together and that such a reading requires a conclusion that the independent authority will apply the criteria referred to in section 155(3)(a). I accept that section 155(3)(a) and (b) should be read together, but I do not accept that doing so produces the result suggested. In my view, the two subsections cannot be read together so as to exclude section 155(3)(c). Section 155(3) must be seen as a whole. Only one of the three separate matters dealt with by section 155(3) contains an express reference to an agency[132] and the task expressly imposed on that authority is to determine boundaries, not to apply the section 155(3)(a) criteria.

[159] It is correct that deciding whether a category A municipality is to be established

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131 See para 72 of his judgment.

132 Section 155(3)(b).

or not will inevitably impact on the boundary to be drawn. The independent authority will determine the boundaries of any specific municipality in the light of its knowledge that such municipality is to be a metropolitan one, or a district one containing at least one local municipality. The question we are concerned with is whether the Constitution requires the independent authority to determine which category of municipality should be established in each area as well as determining the boundaries of each municipality.

[160] The role of the independent authority is to determine boundaries. A "boundary" is defined in the Oxford English Dictionary as: "[t]hat which serves to indicate the bounds or limits of anything whether material or immaterial; also the limit itself." The boundaries to be determined therefore need to be lines marking the outer limits of a municipality. That is the express task which the Constitution entrusts to the independent authority. That task will not be performed in a vacuum. A wide range of factors will influence that task, as appears from section 25 of the Local Government: Municipal Demarcation Act.[133] In addition, the task will be influenced by the category of

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[133] Act 27 of 1998. Section 25 provides as follows:
"In order to attain the objectives set out in section 24, the Board must, when determining a municipal boundary, take into account —
(a) the interdependence of people, communities and economies as indicated by —
(i) existing and expected patterns of human settlement and migration;
(ii) employment;
(iii) commuting and dominant transport movements;
(iv) spending;
(v) the use of amenities, recreational facilities and infrastructure; and
(vi) commercial and industrial linkages;
(b) the need for cohesive, integrated and unfragmented areas, including metropolitan areas;
(c) the financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively;
(d) the need to share and redistribute financial and administrative resources;

municipality for which the boundary is being determined.

[161] Under the impugned provisions, the Minister's statutory function is to identify nodal points. The meaning of "nodal point" in section 5(2) must be interpreted in the context of the Structures Act as a whole and of the Constitution. One of the Oxford English Dictionary definitions of "nodal point" is "a centre of convergence or divergence", another is a "point relating to a node". "Node" has a variety of scientific meanings including the "point on a stem from where leaves grow." Nodal point must be understood in the context of the Act. Section 2 of the Act provides that a category A municipality should exist in an area which contains a conurbation with high population density, intense movement of goods and people, extensive development and multiple business districts in respect of which integrated development planning is desirable. The Oxford English Dictionary defines "conurbation" as "an extended urban area consisting of several towns and merging suburbs". It seems to me, therefore, that "nodal point" as used in section 5(2) should be understood to refer to as the centres of convergence or the

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(e) provincial and municipal boundaries;
(f) areas of traditional rural communities;
(g) existing and proposed functional boundaries, including magisterial districts, voting districts, health, transport, police and census enumerator boundaries;
(h) existing and expected land use, social, economic and transport planning;
(i) the need for co-ordinated municipal, provincial and national programmes and services, including the needs for the administration of justice and health care;
(j) topographical, environmental and physical characteristics of the area;
(k) the administrative consequences of its boundary determination on —
    (i) municipal creditworthiness;
    (ii) existing municipalities, their council members and staff; and
    (iii) any other relevant matter; and
(l) the need to rationalise the total number of municipalities within different categories and of different types to achieve the objectives of effective and sustainable service delivery, financial viability and macro-economic stability."

points of growth in an area which contains a conurbation and therefore has multiple business districts and an intense movement of people and goods in respect of which integrated development planning is desirable. The Minister is therefore empowered to identify the nodal points of a conurbation around which the boundaries may be drawn. Identifying nodal points will indeed impact upon the decision as to where to draw the boundaries, but it will not, in my view, usurp the constitutional function of the independent authority which is to determine the boundary lines in respect of municipalities.

[162] Complex questions may arise in regard to the Minister's power to identify nodal points in terms of section 5(2) of the Structures Act. That power, however, must always be exercised subject to section 155(3)(b) and the constitutional role of the independent authority (as section 5(2) expressly acknowledges). If the Minister were to exercise the powers in a manner that conflicted with section 155(3)(b), that exercise would be subject to review.

[163] A range of factors will influence the independent authority when it goes about its task of determining boundaries. One of these will be the category of municipality and, where that municipality is a category A municipality, the criteria the legislature specified for determining when category A municipalities should exist. The fact that these criteria may be relevant not only to whether a category A municipality should exist, but also to

how its boundaries should be drawn, does not mean that it is the same authority which must apply the criteria in both cases. The Constitution does not prohibit the application of the criteria by more than one agency or person. Nor is there any other reason why the criteria should not be applied by two separate agencies. Once the Constitution does not regulate the matter expressly or by implication, there is no reason why the Minister should not apply the criteria to determine which areas should have category A municipalities; and the independent authority apply them thereafter to determine the boundaries of municipalities.

[164] The final reason supporting Ngcobo J's conclusion that the Constitution requires the section 155(3)(a) criteria to be applied by the independent authority is the need to prevent "political interference in the process of creating new municipalities". The task of creating new municipalities is, by its nature, a task with immense political implications. It has such implications regardless of who undertakes the task. It requires consideration of a range of complex considerations relating to socio-economic development.

[165] That the decision may have profound economic or political implications is not a valid ground for concluding that it may not properly be taken by an elected politician. Politicians are required to make difficult and controversial decisions that affect the public. When they make those decisions poorly, they run the risk of adverse consequences in

future elections. When they make them unlawfully, they can be called to account in court. A vibrant democracy necessarily entails that many controversial political decisions are made by elected politicians. We should avoid concluding that this is either improper or impermissible unless the Constitution suggests otherwise. There is nothing in the nature of the Minister's power that would have rendered it improper for the Constitution, or Parliament in terms of its section 164 power, to have conferred this task upon an independent authority. However, neither Parliament, nor, in my view, the Constitution have so conferred this task.

[166] It is not unusual for an independent authority to be given the task of determining boundaries to avoid a particular form of political interference — gerrymandering. This is a term used to describe a process whereby electoral boundaries are drawn to influence the outcome of elections in favour of a political party. A troubling form arises in "first-past-the-post" electoral systems in which the constituencies may be drawn in a way that results in votes having differential value. It may well be that the Constitution entrusts the task of determining boundaries to an independent authority to reduce the risk of gerrymandering.

[167] However, there are other safeguards in the Constitution which limit the potential for gerrymandering. First, the Constitution requires an electoral system for local government elections based on proportional representation. Even where a pure list

system is not adopted, but some provision is made for ward representation, section 157(3) requires that the system must ensure that the total number of members elected from each party reflects the total proportion of votes cast for those parties in the elections. Gerrymandering based on drawing lines which weaken the weight of any particular vote is, therefore, prevented by a constitutional insistence on a system of proportional representation. Secondly, we have a firmly entrenched right to vote in section 19(3) of the Constitution. Thirdly, section 1(d) of the Constitution affirms that one of the founding values of the Constitution is "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government . . .". These protections exist to protect each citizen's right to vote.

[168] The power given to the Minister by sections 4 and 5 of the Structures Act to decide whether an area should have a category A municipality allows him or her to make an important political decision. It does not, in my view, however, permit improper interference in the process of establishing new municipalities. The Minister's power is bounded by the legislative criteria required by section 155(3)(a) of the Constitution. Section 4(1) accordingly makes it plain that the criteria govern the decision:

> ". . . the Minister must apply the criteria set out in section 2 and determine whether an area in terms of the criteria must have a single category A municipality . . .".

The Minister's decision can, therefore, have no effect on the weight of individual votes and is constrained by the legislative criteria contained in section 2. There was no

suggestion that section 2 did not establish legitimate and proper criteria. Legislative criteria not based on objective factors consistent with democracy would also have been subject to constitutional review. It would not be open to the legislature to establish a criterion that would expressly permit gerrymandering or other improper political interference.

[169] In summary, I accept that entrusting the task of boundary determination to an independent authority may be based on a desire to prevent improper political interference in the process of establishing municipalities. I do not accept, however, that it is necessarily implicit that such authority must determine whether an area should have a category A municipality or category B and C municipalities. Such a decision is a political one based on criteria such as what is desirable for the economic and social development of the area which in my view it is quite appropriate for a government minister to make. I cannot accept, therefore, that the Constitution requires that the independent authority must apply the criteria in section 155(3)(a) when the Constitution does not say so. The reasoning of the majority judgment suggests that giving the task of determining categories to the independent authority would produce a coherent and efficient system. I do not disagree. However, the question for this Court remains what the constitutional text requires, not what we consider to be desirable or efficient or appropriate.

[170] For the above reasons, it is my view that sections 4 and 5 of the Structures Act are

not inconsistent with the provisions of the Constitution.

Section 6 of the Structures Act

[171] Section 6 of the Act provides:

> "(1) If a part of an area that in terms of section 3 must have municipalities of both category C and category B, is declared in terms of subsection (2) as a district management area, that part does not have a category B municipality.
> (2) The Minister, on the recommendation of the Demarcation Board and after consulting the MEC for local government in the province concerned, may declare a part of an area that must have municipalities of both category C and category B as a district management area if the establishment of a category B municipality in that part of the area will not be conducive to fulfilment of the objectives set out in section 24 of the Demarcation Act.
> (3)(a) The Minister, on recommendation of the Demarcation Board and after consulting the MEC for local government in the province concerned, may by notice in the *Government Gazette* withdraw the declaration of an area as a district management area.
> (b) When such declaration is withdrawn, the MEC for local government in the province concerned must, with effect from the date of the next election of municipal councils —
> (i) establish a municipality for that area in terms of section 12; or
> (ii) include that area into another local municipality in terms of section 16."

[172] Two objections were raised to this provision.[134] I agree with Ngcobo J, for the reasons he gives, that there is no merit in the two arguments raised by the parties. Ngcobo J however finds that to the extent that section 6(2) empowers the Minister to

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134 See para 61 of Ngcobo J's judgment.

decide whether or not to accept the recommendation of the independent authority in relation to whether a district management area should be established within the area of a district municipality, it is in conflict with section 155(3)(b) of the Constitution because it impermissibly infringes the powers of the independent authority. I cannot agree with this conclusion. It is correct that the Minister's power to refuse to accept the authority's recommendation may well require a reconsideration of the boundaries. For where a boundary has been determined on the assumption that no local municipality will exist, it may well need to be altered when it is decided that a municipality shall exist. It does not seem to me that granting the power to the Minister to reject the recommendation of the independent authority improperly trammels the constitutional task entrusted to that authority. That authority remains responsible for the determining of the municipal boundaries and the Minister may not usurp that function. It is in my view necessarily implicit in section 6(2) that once the Minister has rejected the authority's proposal the matter returns to the authority for it to redraw the boundary.

[173] In my view, the power granted to the Minister by section 6(2) to declare district management areas is a matter which is not dealt with in chapter 7 of the Constitution. The definitions contained in section 155(1) of the Constitution do contemplate the possibility that there will be areas falling within the boundaries of a category C municipality that do not fall also within the area of a category B municipality. The Structures Act calls such areas district management areas. As the Constitution contains

no express provision regulating the declaration of such areas, it is a matter that therefore may be regulated by national legislation in terms of section 164 of the Constitution. Parliament has exercised this power by passing section 6(2) and no constitutional complaint can arise. In passing, I observe, however, that section 6(3)(b) in respect of which no complaint was raised before us, may well raise questions concerning whether it constitutes an improper invasion of the task entrusted to the independent authority by section 155(3)(b). As the matter was not raised on the papers or argued before us, nothing further need be said.

[174] For the reasons given in this judgment and to the extent indicated, I respectfully dissent from the judgment of Ngcobo J. I concur in paragraphs 1, 2 and 6 of his order, and with the rest of his judgment and the reasons for it. I concur in paragraph 3 to the extent that it refers to sections 13 and 24(1) of the Structures Act.

Mokgoro J and Cameron AJ concur in the judgment of O'Regan J.

For the Executive Council of the Province of the Western Cape:

JC Heunis SC and A Schippers instructed by MFB Mathee Brukman attorney.

For the Executive Council of KwaZulu-Natal:

AJ Dickson SC and AA Gabriel, instructed by Austen Smith attorney.

For the Minister of Provincial Affairs and Constitutional Development of South Africa and The President of the Republic of South Africa:

W Trengove SC and M Chaskalson instructed by the State Attorney.