CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 49/00

INDEPENDENT ELECTORAL COMMISSION Appellant

versus

LANGEBERG MUNICIPALITY
(as successor to the Stilbaai Municipality) Respondent

Heard on : 20 February 2001

Decided on : 07 June 2001

JUDGMENT

YACOOB J :

Introduction

[1] This appeal concerns the local government elections of 5 December 2000 for the Langeberg Municipal Council. Central to the issues raised in the Cape of Good Hope High Court (the High Court) was whether the Electoral Commission[1] who is the appellant (the Commission) should provide more than one voting station for a voting district in terms of section 19(1) and (2) of the Local Government: Municipal Electoral Act 27 of

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[1] Referred to as such in sections 181(1)(f), 190 and 191 of the Constitution and in the Electoral Commission Act 51 of 1996 but commonly known, and referred to by the parties in these proceedings, as the Independent Electoral Commission.

2000. Section 19 reads:

> "(1) Subject to subsection (3), the Commission must establish for an election a voting station, or a voting station and a mobile voting station, or only a mobile voting station, in each voting district in which the election will be held.
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> (2) The Commission may establish a mobile voting station or a mobile station in addition to a voting station, only if—
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> (a) the voting district is a large and sparsely populated area; and
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> (b) the Commission considers it necessary to assist voters who would otherwise have to travel long distances to reach the voting station.
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> (3) When determining the location of a voting station the Commission may take into account—
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> (a) any facts that could affect the free, fair and orderly conduct of the election;
>
> (b) population density; and
>
> (c) the need to avoid congestion at the voting stations."

The case in the High Court was brought by the Stilbaai Municipality (Stilbaai). The essence of the application was that the single voting station established for a particular voting district made it unduly difficult for the people living in an area within that voting district which may be referred to as "Stilbaai town" to exercise their vote.

[2] The factual background is this. Stilbaai town previously fell within another voting district. Demarcation then placed the area of Stilbaai town in the same voting district as the township of Melkhoutfontein where the Commission located the voting station. The upshot was that residents of Stilbaai town who had previously cast their votes at a nearby voting station would now have had to travel some ten kilometres to the voting station at the Melkhoutfontein Community Hall. According to the affidavit of the Chief Executive Officer of Stilbaai, a substantial percentage of voters would effectively be excluded from

voting as, for a variety of reasons, they would not be able to travel to Melkhoutfontein. Consequently the Chief Executive Officer wrote to the Commission asking that Stilbaai town be provided with a separate voting station. This request was turned down because, according to the letter refusing the request, "only one Voting Station per Voting District is allowed."

[3] Stilbaai then requested the creation of a separate voting district for Stilbaai town.[2] This request was also not acceded to apparently because of the impact such a change would have on the voters' roll.[3] Instead the Commission's provincial office offered to move the voting station from the Melkhoutfontein Community Hall to a spot roughly equidistant from Stilbaai town and Melkhoutfontein, or to provide a mobile voting station that would service both Stilbaai town and Melkhoutfontein in the place of the voting station already provided for. The mobile voting station would spend half its time at Melkhoutfontein and half at Stilbaai town. This offer was later repeated by the Commission's Director of Delimitation. This was not acceptable to Stilbaai who wanted a mobile voting station in the Stilbaai town area for the entire voting period in addition to the voting station located at Melkhoutfontein. The letter stipulating this requirement threatened legal action if their request was not granted.

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2 The import of this was that in terms of section 19(1) a voting station would have to be established in Stilbaai town.

3 According to the Commission voter registration had to be aligned with voting district data. That had already been finalised. Time constraints and logistics did not admit of the redoing of the process pursuant to the creation of a new voting district.

[4] A few days thereafter and before any response from the Commission, Stilbaai brought an urgent application before the High Court seeking a review of the Commission's decision and an order directing the Commission to set up a separate voting district for Stilbaai town or to provide it[4] with a mobile voting station[5] for the entire voting period on election day. The basis of the application was that the Commission's refusal to accede to Stilbaai's requests was unreasonable, an infringement of the concerned voters' constitutional rights[6] and at variance with the applicable legislation.

[5] The High Court granted the following order:

> "(a) Respondent's refusal to provide for an additional voting station for the Stilbaai Town portion of the Melhoutfontein Voting District No. 97330024 in Ward 2 of the Municipality WC042 is hereby reviewed and set aside.
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> (b) Respondent is directed to provide a mobile voting station additional to the voting station at Melkhoutfontein Community Hall for the voters of the Stilbaai Town area for the full voting period on the day of the municipal elections to take place between 1 November 2000 and 31 January 2001, apparently to be announced on Sunday 1 October, 2000.
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> (c) Respondent is directed to pay the costs incurred by applicant in these proceedings

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4 Stilbaai town.

5 In addition to the voting station located in Melkhoutfontein.

6 The municipality made specific reference to section 19 of the Constitution (see later). This section reads:

> (1) Every citizen is free to make political choices, which includes the right—
> (a) to form a political party;
> (b) to participate in the activities of, or recruit members for, a political party; and
> (c) to campaign for a political party or cause.
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
> (3) Every adult citizen has the right—
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
> (b) to stand for public office and, if elected, to hold office."

From the content of the affidavits reliance was on section 19(2).

> including those incurred on 15 September, which stood down for later determination, on a party and party basis such costs to include the costs of two counsel."

Soon thereafter, and of its own volition, the Commission set up a separate voting district with its own voting station in Stilbaai town. Stilbaai thus got more than the court order had directed.

[6] The Commission challenges the following findings in the judgment of the Cape High Court:

(a) Stilbaai had *locus standi* to bring the application;

(b) the Commission is not an organ of state within a sphere of government and section 41(3) of the Constitution accordingly did not have to be satisfied before Stilbaai launched the proceedings against the Commission in the High Court;

(c) the Commission had contravened the provisions of section 19 of the Constitution which entitled the voters of Stilbaai town to have a voting station as near to them as that provided for the voters of Melkhoutfontein; and

(d) a director of the Commission responsible for the determination of voting districts and voting stations had failed to "properly apply his mind to the situation before him".

[7] The respondent resists the appeal on the ground of mootness. It contends that the

elections have come and gone and that the Commission has, by creating an additional voting district after the judgment of the High Court had been given, removed the possibility of any live dispute between the parties.

[8] There is a preliminary issue which must first be determined. It arises because Stilbaai has, since the High Court judgment, been disestablished and subsumed under the Langeberg Municipality in the process of restructuring of local government. This was done by notice pursuant to section 12 of the Local Government: Municipal Structures Act 117 of 1998 and became effective on 5 November 2000. Accordingly, Stilbaai did not exist as at the date of the appeal and Mr Duminy who appeared for the respondent was asked to clarify his authority to act and undertook to do so by filing supplementary affidavits. These affidavits have now been filed. They throw no light on whether the Langeberg Municipality resolved to oppose the appeal. However, it appears from these papers that on 28 November 2000 and while it still existed, Stilbaai had resolved to oppose the appeal. In terms of section 17(3)(a) of the notice that disestablished Stilbaai any resolution taken by a disestablished municipality, subject to certain qualifications that are irrelevant for present purposes, must be deemed to have been taken by the new municipality.[7] To the extent that it may be necessary the Langeberg Municipality is substituted for Stilbaai as the respondent.

Mootness

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[7] The making of stipulations of the nature of those contained in section 17(3)(a) is contemplated in section 12 of the Local Government: Municipal Structures Act 117 of 1998.

[9] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[8] Ackermann J said:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

Even though a matter may be moot as between the parties in the sense defined by Ackermann J, that does not necessarily constitute an absolute bar to its justiciability. This Court has a discretion whether or not to consider it. Langa DP, in *President, Ordinary Court-Martial and Others v Freedom of Expression Institute and Others*,[9] throws some light on how such discretion ought to be exercised. The conclusion in that judgment is that section 172(2) of the Constitution does not oblige this Court to hear proceedings concerning confirmation of orders of unconstitutionality of legislative measures which have since been repealed but has a discretion to do so and "should consider whether any order it may make will have any practical effect either on the parties or on others".[10] The reasoning is equally applicable to this appeal.

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8 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at n18. See also *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15 where Didcott J said:

> "A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones."

9 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC).

10 Above note 9 at para 16. In similar vein Chaskalson *et al* in *Constitutional Law of South Africa* Revision Service 2 at 8-16 have this to say:

> " . . . mootness will be a possible bar to relief in constitutional cases where the constitutional issue is not merely moot as between the parties but is also moot relative to society at large."

[10] In high courts, sitting as courts of appeal, and in the Supreme Court of Appeal (SCA) the situation is governed by section 21A of the Supreme Court Act 59 of 1959.[11] This is to be contrasted with the position in this Court where there is no equivalent statutory provision.[12] A number of SCA judgments have dealt with the exercise of a discretion in terms of this section.[13] The case of *Natal Rugby Union v Gould*[14] is illustrative of the application of this section. It concerned the correctness of the procedure that had been followed in electing the president of the Union. By the time the appeal was heard the Union had held a re-election in accordance with the procedure contended for by the respondent. Howie JA held:

> "Had there been no appeal the judgment of the Court below would in all probability have continued to influence the procedure adopted in respect of office bearer elections at future union meetings. There was, of course, nothing irregular or unfair in the procedures adopted at the re-election meeting, viewed purely in isolation, without regard to the constitution. But the union does have this constitution. It is the chosen instrument by which the union's affairs are to be regulated and the union, its office bearers and council members are entitled to have it interpreted in order to guide them in the future. In the circumstances I consider that determination of the appeal will, quite apart from the issue

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11 Section 21A reads:

> "(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court, the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
>
> . . .
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> (3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs."

12 See *Ordinary Court Martial* case, above n 9 at para 13.

13 *McDonald's Corporation v Joburgers Drive-Inn Restaurant* 1997 (1) SA 1 (A) at 14C; Premier, *Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA) at 1143A-B; *Western Cape Education Department and Another v George* 1998 (3) SA 77 (SCA); at 84G; *Simon NO v Air Operations of Europe AB and Others*1999 (1) SA 217 (SCA) at 226I-227A; *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 444I-45B.

14 Above n 13.

of costs in the Court below, have a 'practical effect or result' within the meaning of s 21A of the Supreme Court Act."

[11] This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.

[12] There is no live controversy between the parties. The elections are over and there is no suggestion that any order we make could have any impact on them. Stilbaai was satisfied with the provision ultimately made by the Commission. No purpose will be served by determining now whether the High Court was right when it concluded that the section 19(2) rights of the voters of Stilbaai town had been infringed by the Commission's decision concerning the establishment of a voting station there. Nor is there any practical value in deciding whether the Commission's director of delimitation properly applied his mind to the need for Stilbaai town to become a separate voting district or to have an additional mobile voting station.

[13] In ordering the Commission to provide a mobile voting station in Stilbaai town in

addition to the voting station at Melkhoutfontein the High Court failed to consider the conjunctive conditions precedent contained in paragraphs (a) and (b) of section 19(2) of the Local Government: Municipal Electoral Act.[15] A mobile voting station, whether on its own or additional to a voting station may only be established if "the voting district is a large and sparsely populated area" *and* "the Commission considers it necessary to assist voters who would otherwise have to travel long distances to reach the voting station."[16] We make the following comment without expressing any view on the correctness of the conclusion reached. The judgment deals with distances but does not address the sparseness of the population relative to the size of the area. The basis on which the court ordered the provision of the mobile voting station is not apparent.

[14] Having said that, a determination of the conditions precedent would turn on the facts. As the disputes between the parties are moot and as future cases might present different factual matrixes it would serve no purpose to resolve them.

Standing

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15 Act 27 of 2000.

16 Section 19(2)(a) and (b).

[15] In holding that Stilbaai did have *locus standi* to bring the application the High Court relied on sections 19(2) and 38(c) of the Constitution.[17] Subsections (b) to (e) of section 38 deal with the capacity[18] of persons to bring challenges under the Bill of Rights in a representative capacity. Some of these provisions manifestly go beyond common law rules of standing in this regard. Such extension accords with constitutionalism.[19] Beyond this broad proposition there is no clarity at present as to what the outer reaches of these subsections are. For example, and with specific reference to section 38(c), the following are by no means easy questions to answer:

(a) Whether a person bringing a constitutional challenge as a member of, or in the interests of, a group or class of persons requires a mandate from members of the group or class;

(b) What it is that constitutes a class or group - what should the nature of the common thread or factor be;

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17 Section 19(2) reads:

> "Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution."

Section 38 reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are ─
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

18 The term normally used for this in constitutional jurisprudence being "standing".

19 See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (which dealt with section 7(4) of the interim Constitution, the predecessor to section 38) at paras 165, 167, 229, 230 and 233.

(c) What entitles someone who is not a member of the group or class to act on behalf of those who are:

- must such person demonstrate some connection with a member or some interest in the outcome of the litigation:

- what should the nature of such "connection" or "interest" be;

- in what way, if at all, must the "interest" differ from that envisaged in section 38(a);

(d) Whether a local government, even if it has the capacity to act on its own behalf in regard to a particular Bill of Rights issue, has the power (in the sense of *vires*) to do so in the interest of others.

Some of these issues have been dealt with in a number of high court judgments.[20]

[16] The Commission contended that Stilbaai had no *locus standi* at all as the subject matter of the litigation did not involve the exercise or performance of its powers, functions and duties and matters incidental thereto. Stilbaai contented itself with the submission that all issues were moot and, as a result, no substantial argument in support of *locus standi* was forthcoming from it. As a consequence this Court did not have the benefit of full argument on section 38(c). Thus the many questions[21] that would have to be addressed in giving content to the section were not canvassed. Accordingly, although it may be of

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20 *Lifestyle Amusement Centre (Pty) Ltd and Others v The Minister of Justice and Others* 1995 (1) BCLR 104 (C); *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) SA 155 (N); *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W); *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (B), 1998 (11) 1373 (B); *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T); [1999] 4 All SA 407.

21 Para 15 above.

practical future value for a municipality to know whether it has *locus standi* to bring proceedings of this kind, it is a complex issue of considerable importance which has not been sufficiently argued before us. Nor is the matter fully canvassed in the judgment of the High Court. In the circumstances it would not be in the interests of justice to determine this moot issue.

Section 41(3) of the Constitution

[17] The question whether a municipality must comply with the provisions of section 41(3) before it institutes proceedings against the Commission is on a different footing. It is of considerable practical future importance. The finding that a municipality does not have to comply with these provisions before it sues the Commission is referred to in the High Court judgment. The converse was forcefully argued in this Court. There is sufficient material before us to enable the issue to be meaningfully addressed. In the circumstances, it is in the interests of justice to determine this question.

[18] It was submitted on behalf of the Commission that chapter 3 of the Constitution was applicable to the dispute between itself and Stilbaai and that the latter had instituted proceedings without having complied with section 41(3) of the Constitution. That section requires an organ of state involved in an intergovernmental dispute to make every effort to settle it before a court is approached. Stilbaai addressed no argument to us in this regard. The Commission's submissions were two-fold. In the first place, it was contended that the Commission was an organ of state within a sphere of government as contemplated by section 41. The second submission was that section 41(3) did not require an organ of state

to be within a sphere of government before the section was applicable to it and that the section was applicable to all organs of state whether or not they were within a sphere of government.[22]

[19] It was common cause that Stilbaai was an organ of state within the meaning of section 41(3) of the Constitution and that the provisions of the subsection would have been applicable to the proceedings brought by it against the Commission if the dispute that gave rise to the proceedings could properly be characterised as an intergovernmental dispute. The dispute would be intergovernmental only if the Commission is in some way part of government as contemplated in chapter 3 of the Constitution. This must be determined by having regard to the chapter as a whole.

[20] Section 40(1) says that government in the Republic is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. Subsection (2) then obliges all spheres of government to observe and adhere to the principles in the chapter. These principles are then set out in section 41(1) which renders them binding on all spheres of government and all organs of state within each sphere. The principles are concerned with the way in which spheres of government and organs of state within each sphere must relate to each other. Subsection (2)(a) of section 41 requires an Act of Parliament to establish or provide for structures and institutions to

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[22] Section 41(3) provides:

> "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."

promote and facilitate intergovernmental relations. The concept of intergovernmental relations here is inescapably a reference to relations between spheres of government and organs of state within those spheres.

[21] "Intergovernmental disputes" are referred to for the first time in section 41(2)(b) which is to the effect that an Act of Parliament must also provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. An intergovernmental dispute is therefore a dispute between parties that are part of government in the sense of being either a sphere of government or an organ of state within a sphere of government.

[22] The Commission exercises public powers and performs public functions in terms of the Constitution and it is therefore an organ of state as defined in section 239 of the Constitution.[23] The question then is whether it is part of government in that, as an organ of state, it falls within a sphere of government contemplated by chapter 3 of the Constitution. It was created by chapter 9 of the Constitution which is headed "State Institutions Supporting Constitutional Democracy". Section 181(1) provides that it is to strengthen

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[23] Section 239 of the Constitution defines organ of state as follows:

> " 'organ of state' means—
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> (a) any department of state or administration in the national, provincial or local sphere of government; or
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> (b) any other functionary or institution—
>
> (ii) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation,
>
> but does not include a court or a judicial officer".

constitutional democracy in the Republic.

[23] The Commission's point of departure in addressing this question was that its functions according to section 190 of the Constitution were to manage the elections of national, provincial and municipal legislative bodies[24] and that this function was a governmental one. The next step taken by the Commission was to place this function within a sphere of government. Counsel pointed out that this function was included neither in Schedule 4 nor Schedule 5 of the Constitution and submitted that this function accordingly did not fall within those functional areas allocated to provincial government[25] or local government[26] and that it therefore fell within the purview of Parliament by reason of the provisions of section 44(1) of the Constitution.[27] The final leg of the submission was that because the Commission performs a function which falls within the legislative terrain of the national legislature, the Commission itself falls within the national sphere of government.

[24] There is no doubt that the holding of free and fair elections for the national,

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24 Section 190 of the Constitution provides:

> "(1) The Electoral Commission must—
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> (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
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> (b) ensure that those elections are free and fair; and
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> (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible."

25 Section 104 of the Constitution.

26 Section 156 of the Constitution.

27 That section confers on the National Assembly the exclusive power to legislate with regard to all matters except those listed in Schedule 4 and Schedule 5.

provincial and local legislatures is not a private function. It is a public function and therefore a state function performed by a state institution. In this broad sense, the Commission does perform a governmental function. More specifically, it implements national legislation concerning the conduct of elections.[28] What would otherwise be an executive function to implement national legislation is vested by the Constitution in the Commission. That does not mean, however, that the Commission falls within the national sphere of government as contemplated by chapter 3 of the Constitution.

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28 Section 190(1)(a) of the Constitution.

[25] What is meant by "national sphere of government" must now be considered. Chapter 4 of the Constitution is about Parliament while chapter 5 is concerned with the national executive. Section 43(a) is to the effect that the legislative authority of the national sphere of government is vested in Parliament and section 44 defines that legislative authority in detail. In summary, national legislative authority includes the power to make laws for the country concerning all matters except the functional areas described in Part 2 of Schedule 4 and Part 2 of Schedule 5. In these areas, Parliament has limited legislative authority.[29] According to section 85 of the Constitution the executive authority of the Republic (national executive authority) is vested in the President who exercises that authority together with the other members of the Cabinet. The ways in which that authority may be exercised are particularised.[30] Amongst these is the co-ordination of the functions of state departments and administrations. The pattern is clear. Chapters 4 and 5 deal with the national sphere of government: in other words the national sphere of government comprises at least Parliament, the President and the Cabinet all of which must exercise national legislative and executive authority within the functional areas to which the national sphere of government is limited. These state organs comprise the national sphere of government and are within it. They are not section 239 organs of state because they are neither departments nor administrations within the national sphere of government. The national executive co-ordinates these departments and administrations consisting of employees.

[26] We conclude that the national sphere of government comprises at least Parliament

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29 Section 44(2).

30 Section 85(2).

and the national executive including the President. The national sphere of government is distinct in the sense that it is separate from the other spheres. It is allocated limited functional areas in terms of the Constitution. The provincial and national spheres of government have concurrent powers in relation to those functional areas described in Schedule 4 of the Constitution. All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 are designed in an effort to achieve this result.

[27] It is now possible to address the question whether the Commission is an organ of state which can be said to be within the national sphere of government. It is not, for the reasons that follow. In the first place, the Commission cannot be said to be a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with section 85(2) of the Constitution. Secondly, the Constitution, in effect, describes the Commission as a state institution that strengthens constitutional democracy, and nowhere in chapter 9 is there anything from which an inference may be drawn that it is a part of the national government. The term "state" is broader than "national government" and embraces all spheres of government. Thirdly, under section 181(2) the Commission is independent, subject only to the

Constitution and the law. It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air, and it is clear that the chapter intends to make a distinction between the state and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national.

[28] As Langa DP said[31]:

> "The Commission is one of the State institutions provided for in chapter 9 of the Constitution and whose function under section 181(1) is to "strengthen constitutional democracy in the Republic". Under section 181(2) its independence is entrenched and as an institution, is made subject only to 'the Constitution and the law'. For its part, it is required to be impartial and to 'exercise [its] powers and perform [its] functions without fear, favour or prejudice.' Section 181(3) prescribes positive obligations on other organs of state who must, ' . . . through legislative and other measures, . . . assist and protect [it] to ensure [its] independence, impartiality, dignity and effectiveness . . .'.Section 181(4) specifically prohibits any "person or organ of the state" from interfering with its functioning. Section 181(5) provides that:
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> > 'These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.'
>
> Although Constitutional Principle ("CP") VIII enacted in Schedule 4 of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) provided amongst other things for regular elections, there was no CP which required the establishment of an independent body to administer them. Nevertheless, in the first certification judgment, this Court commented as follows on the independence of the

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31 *New National Party vs Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at paras 74 and 75.

Commission as provided for in the constitutional text it was dealing with:

> ' . . . NT 181(2) provides that the Electoral Commission shall be independent and that its powers and functions shall be performed impartially. Presumably Parliament will in its wisdom ensure that the legislation establishing the Electoral Commission guarantees its manifest independence and impartiality. Such legislation is, of course, justiciable.' [Footnote omitted.]

[29] In elaborating on the independence of the Commission Langa DP said[32]:

"In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to 'independence'. The first is 'financial independence'. This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.

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32 Above n 31at paras 98 and 99.

> The second factor, 'administrative independence', implies that there will be [no][33] control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires 'to ensure [its] independence, impartiality, dignity and effectiveness'. The Department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary."

The Commission cannot be independent of the national government, yet be part of it.

[30] The Commission has tried to make some point of the fact that the conduct of the election falls within the national legislative authority of Parliament contending that this is a factor which points to the Commission being part of the national sphere of government. This is an oversimplification. It is true that the Commission must manage the elections of national, provincial and municipal legislative bodies in accordance with national legislation.[34] But this legislation cannot compromise the independence of the Commission.[35] The Commission is clearly a state structure. The fact that a state structure has to perform its functions in accordance with national legislation does not mean that it falls within the national sphere of government.

[31] Our Constitution has created institutions like the Commission that perform their

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33 There is an error in the published extract. The Deputy President intended to say that administrative independence implies that there will be no control over those matters directly connected with the functions to be performed by the Commission. There is no interdependence between the Commission and the national sphere of government in the sense anticipated in section 40(1) of the Constitution.

34 Section 190(1)(a).

35 Section 181(2).

functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and the other chapter 9 bodies - was so that they should be and manifestly be seen to be outside government. The Commission is not an organ of state within the national sphere of government. The dispute between Stilbaai and the Commission cannot therefore be classified as an intergovernmental dispute. There might be good reasons for organs of state not to litigate against the Commission except as a last resort. An organ of state suing the Commission, however, does not have to comply with section 41(3).

Costs

[32] Mr Heunis argued that the adverse costs order against the Commission should be set aside. On the approach adopted, which does not deal with the merits, it seems only fair that each party should bear its own costs of the appeal and that the High Court's order on costs should not be disturbed.

Order

[33] The following order is made:

a) It is declared that a dispute between the Electoral Commission and a sphere of government or an organ of state within a sphere of government is not an intergovernmental dispute for the purpose of section 41(3) of the Constitution.

b) There is no order as to costs.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Somyalo AJ concur in the judgment of Yacoob J.

For the appellant: JC Heunis SC and RF Van Rooyen instructed by Heunis and Heunis Attorneys, Cape Town.

For the respondent: WRE Duminy SC instructed by SA Hofmeyer and Son Attorneys, Riversdale.