

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and another

Case CCT 15/99

Decided on 15 October 1999

Media Summary

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

1. As part of the process of restructuring local government in South Africa, Parliament passed the Local Government: Municipal Structures Act. The Act became law in December 1998 but only came into operation on 1 February 1999. The provinces of KwaZulu-Natal and the Western Cape approached the Court alleging that the Structures Act as a whole, and certain sections of the Act in particular, violated Chapter 7 of the Constitution which deals with local government. They sought permission to come to the Court directly. Because the matter was of considerable national importance, and the issues confined to legal arguments rather than factual disputes, and in view of the fact that local government elections are scheduled for November 2000, the provinces were granted direct access. The two cases were heard together because the issues raised in them overlapped substantially. In a judgment concurred in by the majority of the justices of the Court, Ngcobo J held that the Structures Act is not unconstitutional, but that five of the sections of the Act are inconsistent with the Constitution and are accordingly invalid.
2. Chapter 7 of the Constitution divides powers and functions relating to the structure and control of local government between different organs of state. All the justices were agreed that the national level of government has no powers in respect of such matters other than those allocated to it by Chapter 7. The differences between them related to how the provisions of the Constitution dealing with the allocation of such powers should be construed.
3. The Constitution empowers the national level of government to establish criteria for determining whether an area should have a metropolitan council. These criteria are prescribed by the Structures Act, sections 4 and 5 of which allow the national Minister for Provincial and Local Government to apply the criteria in order to declare areas as metropolitan areas, and to fix nodal points within those areas around which the boundaries must be drawn. The provinces had argued that the declaration of metropolitan areas is a provincial power being incidental to the power to establish municipalities. All the justices were in agreement that this argument should be rejected. The majority held, however, that the application of the criteria formed part of the function of boundary determination which the Constitution vests in the Demarcation Board, and not the national or provincial levels of government, and that sections 4 and 5 were unconstitutional for this reason.

4. In a dissenting judgment concurred in by Mokgoro J and Cameron AJ, O'Regan J held that sections 4 and 5 are constitutional. O'Regan J found that the Constitution does not specify who may apply the criteria to determine which areas must have metropolitan municipalities. National legislation could, therefore, deal with this matter as envisaged by section 164 of the Constitution, and the Minister could accordingly be entrusted with the task. The Demarcation Board's constitutional role is limited to drawing boundaries.
5. The provinces also attacked section 6 of the Act, which allows the Minister, on the recommendation of the Demarcation Board, to declare an area a district management area. They argued that such an area is a fourth category of municipality and is inconsistent with the Constitution, which makes provision for only three categories of municipalities. All the justices of the Court rejected this argument, holding that a district management area is part of a district municipality and not a separate municipality. The majority held that the establishment of district management areas impacts on the boundaries of municipalities and is accordingly a function to be performed by the Demarcation Board. The majority therefore held that section 6(2) was unconstitutional insofar as it attempted to give the Minister a discretion whether to accept the recommendations of the Demarcation Board. This declaration of invalidity was suspended for a period of one year, to enable Parliament to amend the defect. The Court ordered, however, that until the defect is corrected, the Minister is obliged to give effect to a recommendation of the Demarcation Board that a particular area be declared a district management area.
6. In relation to section 6, O'Regan J held that while the Minister's refusal to declare a district management area may well require the Demarcation Board to reconsider the boundaries it has drawn, the Act implies that in this case the matter must return to the Demarcation Board. As long as the Minister does not usurp the function of drawing boundaries, there can be no constitutional complaint because the Minister refuses to declare a district management area.
7. The other major challenge by the provinces was directed at the manner in which the types of municipality are defined in the Structures Act. The typology adopted in the Act links the types of municipality with an internal structure, for example a mayoral system or a collective executive system. The provinces argued that by linking the type of municipality with its governing structure, the Act infringes the Constitution which gives municipalities autonomy to choose their own structures. All the justices of the Court were in agreement that the Constitution permits national government to regulate municipal structures in this way.
8. Section 13(2) of the Act allows the Minister to issue guidelines which the provinces are obliged to take into account when choosing their types. While noting that the issue was at first glance a trivial one, all the justices of the Court agreed that it is important to protect the allocation of powers envisaged in the Constitution, and declared section 13 to be invalid because it impinges upon the power given by the Constitution to the provinces to decide upon the types of municipality to be established in the province.
9. Section 24(1) of the Act empowers the Minister to fix the term of office of municipal councils. All the justices were agreed that the Constitution requires this to be done by Parliament itself and, therefore, that the delegation of the power to the Minister is inconsistent with the Constitution.

10. The constitutionality of various other sections of the Act was also challenged by the provinces. These challenges were rejected by all the justices on the grounds that the disputed provisions fall within the powers conferred on the national level of government by the Constitution.

11. In the result, the Court unanimously declared sections 13 and 24(1) of the Act to be invalid. Sections 4, 5, and 6(2) of the Act were also declared by the majority to be invalid. The declaration of invalidity of section 6(2) was suspended for a year. The Court did not make any order as to costs.