

Explanatory Note

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

The Electoral Commission appealed against an order of the Cape High Court which had ordered it to provide a second voting station in a single voting district in Stilbaai for the municipal elections in December 2000. The Commission instead established a separate voting district but nevertheless appealed to resolve some law points.

The Constitutional Court held that there was no live issue between the parties, the separate district having satisfied Stilbaai (which has since been absorbed in the new Langeberg municipality). As the elections were over, no order of appeal could have any effect and no purpose would be served by determining now whether the High Court was right in making the order it did.

Nevertheless the Court held that the question whether a municipality must comply with the provisions of section 41(3) of the Constitution before it institutes proceedings against the Commission is of considerable practical future importance. The Court decided that it was, in the circumstances, in the interests of justice to determine that question. Section 41(3) of the Constitution requires an organ of state involved in an intergovernmental dispute to make every reasonable effort to settle it by means of mechanisms and procedures provided for that purpose, and to exhaust all other remedies before it approached a court to resolve the dispute.

The Court held that, for section 41(3) to be applicable to a dispute between Stilbaai and the Commission, the dispute would have to be intergovernmental for the purpose of that section. The dispute could be classed as intergovernmental only if the Commission could be said to be a part of government or an organ of state within a sphere of government. The Commission contended that it was an organ of state within the national sphere of government. The Court concluded that:-

- a) all spheres of government, including the national sphere, are interdependent and interrelated in the sense that the functions allocated to each sphere cannot be seen in isolation of each other and none of these spheres nor any government within each sphere has any independence from each other;
- b) the Commission cannot be said to be a department or administration within the national sphere of government, nothing in the Constitution suggests that the Commission is a part of the national government and the Commission is independent in terms of section 181(2) of the Constitution;
- c) the very reason the Constitution created the Commission was that it should be and manifestly be seen to be outside government;
- d) the Commission is accordingly not an organ of state within the national sphere of

government and the dispute between Stilbaai and itself cannot be classified as an intergovernmental dispute.