

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Premier, Western Cape v President of the Republic of South Africa and another **Case CCT 26/98**

Decided on 29 March 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.

This case involves an application to the Constitutional Court by the Premier of the Western Cape to have certain provisions of the Public Service Act, as introduced by the Public Service Amendment Act of 1998, declared unconstitutional and invalid. This was on the basis that the provisions infringed the executive authority of the provinces and detracted from provincial autonomy. The provisions were part of a legislative scheme designed to restructure the public service.

Under the old scheme, the public service was divided into departments at the national level and into provincial administrations at the provincial level. Departments under provincial administrations did not have the same status as national departments. Administrative responsibility for a provincial administration, including all its departments, vested in the head of the provincial administration, the Director-General (DG).

Under the new scheme, a head of a provincial department is accorded the same broad functions and responsibilities as the head of a national department. Provincial departmental heads are no longer accountable to the provincial DG, but to the member of the Executive Council (the MEC) under whose portfolio the department falls. The provincial DG becomes Secretary to the Executive Council of the province, and is responsible for the administration of the Office of the Premier, as well as the co-ordination of intergovernmental and intragovernmental co-operation. A Premier may request the President to establish or abolish provincial departments. The President can only refuse a request if he or she is satisfied that it is inconsistent with the Constitution or the Public Service Act. The Minister of Public Service and Administration is authorised, after consultation with the relevant MEC, to transfer functions to and from provincial administrations and departments on the one hand, and national departments and other bodies, on the other.

The Western Cape government argued that the amendments infringed the executive authority of the province and interfered with its provincial autonomy by encroaching on the functional and institutional integrity of the province. The national government denied this and argued that the Constitution vested the power to structure the public service with Parliament, not with the provinces.

In a unanimous judgment, the Court found that the Constitution expressly requires national legislation to structure the public service. The structure prescribed by the Public Service Amendment Act of 1998 did not infringe the executive authority of provincial

Premiers, nor did it encroach upon the functional or institutional integrity of the provinces.

The Western Cape government has not been deprived of any power vested in it under the Constitution or the Western Cape Constitution. The Premier of the province has the power to appoint the members of the executive council, to determine what departments should be established within the provincial government and to allocate functions to departments. The provincial government appoints functionaries to the provincial administration of the public service and gives instructions necessary to ensure that provincial governmental policy is implemented. The right of the Premier and Executive Council to coordinate the functions of the provincial administration and its departments has been preserved. Political direction and executive responsibility for the functions of provincial governments remain firmly in the hands of the Premier and Executive Council. The new scheme is rational and cannot be said to be inconsistent with the structure of government contemplated by the Constitution. It requires the public service to be organised in a particular way, making provision for proper reporting between the public service and the executive sphere of government, and ensuring that the heads of departments, including the DG, have clear responsibilities both in relation to the administration of their own offices and in reporting to the executive sphere of government.

The Court, however, found that in one respect the Public Service Amendment Act conferred a power on the national Minister that was inconsistent with the Constitution. The national Minister is empowered to transfer functions from a provincial administration or a provincial department to a national department or other body, or from a national body to a provincial body, after consultation with the MEC concerned. The Court concluded that this permitted the Minister to order the transfers of functions against the wishes of the provincial government. The Court held that this power was inconsistent with the Constitution to the extent that it empowered the Minister to make such transfers without the consent of the Premier.

The balance of the Western Cape government's claims were dismissed. No order was made as to costs.

The judgment of the Court was delivered by Chaskalson P and was concurred in by the other members of the Court.