

Provinces vs Structures Act

Demarcation Board walks off with spoils

On 15 October 1999, the Constitutional Court laid down judgements on a range of constitutional challenges to the Structures Act 117 of 1998 that had been brought forward by the Western Cape and KwaZulu-Natal provincial executives. Most of the complaints levelled against the Act had to do with the constitutional scheme of the division of powers between the three spheres of government in relation to local government. The provinces contended that certain provisions of the Act legislated on matters that belong within the ambit of powers of provincial or local governments respectively, and that those provisions were therefore unconstitutional.



All but one of the challenges resulted in an enhancement of the Demarcation Board's powers to the detriment of the national Minister's powers relating to the transformation of local government. The Court divided the challenges, brought forward by the two provinces against the Structures Act, in two groups: the one

group of challenges contend that certain provisions of the Structures Act encroach on provincial powers, and the other group of challenges deal with the alleged inroad into constitutionally protected municipal powers.

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Challenges based on provincial powers

Determining metropolitan areas

Sections 4 and 5 of the Structures Act deal with the Minister's power to determine whether an area must be a metropolitan municipality (category A) or a whether it must have both district (category C) and local municipalities (category B, see *LGL Bulletin* 1999(1) 9). The provinces contended that their constitutional power to 'establish' municipalities (s 155(6) of the Constitution) encompasses the power to determine the category, and that these provisions were unconstitutional in that they confer that power to the Minister.

The Court clarified the scheme of constitutional powers in relation to the establishment of new municipalities by making clear that -

- national government establishes the criteria for determining the categories (s 155(3)(a)) and the criteria for demarcation (s 155(3)(b)), and it defines the different types of municipalities that can be established in each category (s 155(2));
- the Municipal Demarcation Board determines municipal boundaries (s 155(3)(b)); and
- provincial governments determine the types that may be established in their province (s 155(5)) and establish municipalities in accordance with national legislation (s 155(6)).

In the Court's view, the determination of municipal boundaries and the determination of the category of municipality go hand in hand. "Without determining the category of municipality, the determination of the boundaries becomes a meaningless exercise. (...) The Demarcation Board can only determine boundaries if it knows what it is determining boundaries for. It must therefore have a category of municipality in mind." It followed that, in empowering the Minister to determine the categories, section 4 and 5 of the Structures Act were unconstitutional.

The proposed amendment to the

Structures Act, which aims to make the Act conform with this judgement, vests the power to determine the categories with the Demarcation Board. However, where in the original Structures Act the Minister had to consult with the MEC, SALGA and organised local government (see *LGL Bulletin* 1999(1) 10), the Demarcation Board is only instructed to consult with the Minister, leaving out the three stakeholders mentioned above.

Determining district management areas

Section 6 of the Structures Act gives the Minister the power to declare areas where a local municipality cannot be sustained as 'district management areas' on the recommendation of the Demarcation Board (see *LGL Bulletin* 1999(1) 9). The Western Cape raised the objection that the district management area is a 'fourth category', whereas the Constitution only permits three categories.

The Court dismissed this argument. A district management area is neither a 'category' nor a 'type' of municipality, rather it is part of the district municipality by which it is governed.

It was also argued that the power to declare district management areas should lie with the provinces. However, in the same vein as above, the Court emphasised that the Demarcation Board has the power to determine boundaries without being constrained in any way by provin-

cial or national governments. The Court concluded that, because section 6 of the Act allows the Minister to deviate from the Board's recommendation, it is unconstitutional. The power to declare district management areas should lie with the Board. In its order, the Court instructed the Minister to declare district management areas according to the Board's recommendations, pending the correction of the defect in the Structures Act.

The proposed amendment to the Structures Act vests the power to declare district management areas with the Board. In terms of the proposed amendment, the Board can exercise that power without consulting the MEC in the province, whereas in terms of the original section 6, the Minister had to consult the MEC.

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Determining the types in the province

The province has the power to legislate which types can be established in the province, and it has the power to decide which type of municipality will be established in a particular area (s 155(5), see *LGL Bulletin* 1999(1) 8/9)). Section 13 of the Structures Act empowers the Minister to determine guidelines, which the MEC must take into account when establishing a municipality.

This section of the Structures Act, the Court observed, prescribes to the provinces how they must exercise a power which falls within their own constitutional competence. The section is, therefore, inconsistent with section 155(5) of the Constitution.

The proposed amendment accordingly repeals section 13 of the Structures Act.

Challenges based on municipal powers

Executive and other committees

It was argued that sections 7 to 10 of the Structures Act, which introduce the different types of municipalities that may be established in each category, encroach upon the municipal power to choose whether or not to have an executive committee, or some other committee (s 160(1)(c)). The Court observed that this municipal power to elect committees is subject to national legislation. Elsewhere in the Constitution, in section 155(2), national legislation is called for to define the different types. If that national legislation has the effect of precluding particular municipalities from electing executive or other committees, then that results from the Constitution itself and can therefore not be challenged for its constitutionality.

The provisions in the Structures Act pertaining to executive committees, mayors, executive mayors, mayoral committees, metropolitan sub-councils, ward committees and municipal managers (CEOs) were also challenged, and alleged to be in conflict with section 160(6) of the Constitution. Section 160(6) of the Constitution gives the council the power to prescribe rules and orders for its internal arrangements, business and proceedings as well as for the establishment, composition, procedures, powers and functions of its committees. The Court held that there is no conflict. It held that section 160(6) should be interpreted narrowly. It deals with internal domestic matters only and does not relate to institutional aspects that are key to its democratic structure,

such as the establishment and functioning of the executive. The Structures Act could therefore legislate on such matters.

Unlawful delegation

Section 24 of the Structures Act fixes the term of office for municipal councils at no more than five years. This term has been determined by the Minister by notice in the *Government Gazette*. This was held to be unconstitutional. The Constitution, in section 159, stipulates that the term of municipal councils can be no more than five years, as determined by national legislation. The term 'national legislation' precludes Parliament from delegating the power to determine the term for municipal councils to the Minister. The term for municipal councils must be fixed by Parliament in an Act.

The proposed amendment to section 24 replaces the notice in the *Government Gazette* by an Act of Parliament, and provides that that Act must see the light of day not later than 31 August 2000, in time for the 2000 elections.

Impact of the judgement on demarcation of district and metropolitan boundaries

The Minister had already declared five metropolitan areas. The judgement renders this declaration invalid as the authority to decide where there are metropolitan areas must vest with the Demarcation Board. The Board's section 26 notice (see *LGL Bulletin* 1999(3) 9 and 1999(1) 3) of 10 August, announcing its intention to demarcate district boundaries and metro boundaries where metropolitan areas had been identified by the Minister, also became invalid.

The Board then re-issued a section 26 notice on 25 October 1999, announcing its intention to demarcate district and metro boundaries, and invited comments to be submitted within 21 days. Persons who had responded to the notice of 10 August and had submitted comments, were advised that they need not submit them again and that the Board would take them into account. The Board finalised its boundary determinations for districts and metros on 18 November, after which a period of 30 days for objections started (see page 16 of *LGL Bulletin* for the Demarcation Board Circular following on the Constitutional Court judgement). The one significant change was the inclusion of the Port

Elizabeth/Uitenhage area in the identification of metropolitan areas.

Impact on demarcation of local boundaries

The judgement has no implications for the demarcation of local municipalities. The Board published the section 26 notice announcing its intention to demarcate local municipalities throughout South Africa on 11 October 1999. On 19 November, the Board published its own proposed boundaries and this will be followed by further investigations and public hearings on these proposals. On 15 December, the Board's boundary determinations will be published, after which the period for objections will start.

Assessment

The substantial length of the judgement as well as the initial alarming media reports did not necessarily reflect the extent of the impact on the actual process of the transformation of local government. The only impact on demarcation, if any, is that the final determination of district and metro boundaries will be delayed by a month.

What is important about the judgement, however, is that has created clarity on the division of powers between the three spheres of government and the Demarcation Board with regard to the establishment of the new dispensation for local government. The Court's decision has strengthened the Demarcation Board's

independence. While provincial governments were contending that the Minister's powers regarding metros and district management areas were an infringement of their competence regarding local government, and while national government was defending the Minister's powers, the Court made it clear that the Constitution intended the Demarcation Board to be the sole arbiter of municipal boundaries. However, the provinces' assertion of autonomy with regard to choosing the types of municipalities was sanctioned by the Court, and the power of the Minister to lay down guidelines for the MECs in determining the types was held to be in conflict with the Constitution.

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