IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 27/95

In the matter of:

THE EXECUTIVE COUNCIL OF THE WESTERN CAPE LEGISLATURE	First Applicant
THE PREMIER OF THE WESTERN CAPE	Second Applicant
THE MINISTER OF LOCAL GOVERNMENT (WESTERN CAPE)	Third Applicant
STAFFORD PETERSEN	Fourth Applicant
LESLEY HELENE ASHTON	Fifth Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER FOR PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE MINISTER OF JUSTICE	Third Respondent
KAMALASEN CHETTY	Fourth Respondent
C B HERANDIEN	Fifth Respondent

Heard on: 16 August, 30 August and 14 September 1995

Delivered on: 22 September 1995

JUDGMENT

---

[1] **CHASKALSON P:** This case involves fundamental questions of constitutional law. At issue are matters of grave public moment concerning the imminent local government elections. We would have preferred more time for consideration of these questions and the formulationof our views. Time does not permit that however. Because of the urgency of the matter and its possible impact on the local government elections there is a pressing need to announce our conclusions and basic reasoning within the shortest possible time.

Introduction

[2] The case arises from a dispute between the Executive Council of the Western Cape and the national government relating to the validity of amendments to the Local Government Transition Act (the "Transition Act").[1] These amendments were effected by the President by proclamation purporting to act in terms of powers vested in him under the Transition Act. The validity of the proclamations embodying the amendments was challenged on constitutional and non-constitutional grounds.

[3] The constitutional challenge was lodged with the Registrar of this Court at the end of June 1995 with a request that it be dealt with as a matter of urgency.[2] It was said that if the dispute was not resolved promptly the local government elections within the Cape Town metropolitan area could not be held on the date planned, namely 1 November 1995. All the parties asked us to deal with the matter as one of urgency. It was set down for hearing on 16 August 1995 (the term commenced on 15 August) and directions were given in terms

[1] No. 209 of 1993.

[2] In terms of Rule 17 of the Rules of the Constitutional Court.

of Rule 17(5) for the speedy disposal of the preparatory phases of the case.

[4] A simultaneous challenge on non-constitutional grounds, seeking to review the validity of the proclamations as an abuse of the authority vested in the President, was launched in the Cape Provincial Division of the Supreme Court (the "CPD"). The matter was dealt with as one of urgency and on 11 August 1995 the CPD (per Conradie J, Kühn J concurring) dismissed the case.

[5] The relief sought by the Applicants in their original notice of motion to this Court was for an order for the following:

1. Granting them direct access to this Court in terms of section 100(2) of the Constitution[3] read with Rule 17, declaring unconstitutional certain amendments to the Transition Act effected by Proclamations R 58 of 7 June 1995 and R 59 of 8 June 1995 (the "Proclamations"), and the Proclamations themselves.

2. Setting aside the appointment of the Fourth and Fifth Respondents as members of the Provincial Committee for Local Government for the Western Cape Province (the "Committee") which had been effected pursuant to Proclamation R 58 and reinstating the Fourth and Fifth Applicants as members of the Committee (which had been effected by the Third Applicant prior to the enactment of the Proclamations).

[3] Act No. 200 of 1993.

3. Directing that the First, Second and Third Respondents be jointly and severally liable for the costs of this application and that if the Fourth and Fifth Respondents opposed the application that all the Respondents be jointly and severally liable for such costs.

[6] Section 245(1) of the Constitution provides that

> Until elections have been held in terms of the Local Government Transition Act, 1993, local government shall not be restructured otherwise than in accordance with that Act.

The Transition Act was assented to on 20 January 1994, approximately three months before the Constitution came into force. It provides the machinery for the transition from a racially based system of local government to a non-racial system. It establishes the process to be followed in order to reach this goal, a process which was to commence when the Act came into force on 2 February 1994, and to continue until the holding of the first non-racial local government elections which would take place on a date to be promulgated by the Minister of Local Government in the government of national unity.[4]

[7] The Constitution itself makes provision for the complex issues involved in bringing together again in one country, areas which had been separated under apartheid, and at the same time establishing a constitutional state based on respect for fundamental human rights, with a decentralised form of government in place of what had previously been authoritarian rule enforced by a strong central government. On the day the Constitution

[4] Section 9(1) of the Transition Act. Ministerial responsibility was subsequently assigned to the Minister of Provincial Affairs and Constitutional Development in the government of national unity and the Transition Act was amended by Presidential proclamation to reflect this. Proclamation No. R. 129 of 1994. The validity of that Proclamation is also called into question in this case.

came into force fourteen structures of government ceased to exist. They were the four provincial governments, which were non-elected bodies appointed by the central government, the six governments of what were known as self governing territories, which had extensive legislative and executive competences but were part of the Republic of South Africa, and the legislative and executive structures of Transkei, Bophuthatswana, Venda and Ciskei which according to South African law had been independent states. Two of these States were controlled by military regimes, and at the time of the coming into force of the new Constitution two were being administered by administrators appointed by the South African authorities. The legislative competences of these fourteen areas were not the same. Laws differed from area to area, though there were similarities because at one time or another all had been part of South Africa. In addition the Constitution was required to make provision for certain functions which had previously been carried out by the national government, to be transferred as part of the process of decentralisation to the nine new provinces which were established on the day the Constitution came into force, and simultaneously for functions that had previously been performed by the fourteen executive structures which had ceased to exist, to be transferred partly to the national government and partly to the new provincial governments which were to be established. All this was done to ensure constitutional legislative, executive, administrative and judicial continuity.

[8] The mechanism for this process is contained in Chapter 15 of the Constitution in a series of complex transitional provisions dealing with the continuation of laws, and the transitional arrangements for legislative authorities, executive authorities, public

administration, the courts, the judiciary, the ombudsman, local government, the transfer of assets and liabilities and financial matters such as pensions and the like. The dispute in the present case depends on the interpretation of some of these provisions. I mention the complexity of the process because it is relevant to arguments addressed to us in regard to how we should interpret the relevant provisions.

[9] Section 235(8) of the Constitution empowered the President to assign the administration of certain categories of laws to "competent authorities" within the jurisdiction of the various provinces who, by definition, were authorities designated by the Premiers. Some time after the Constitution came into force the President, purporting to act in terms of section 235(8), assigned the executive authority for the administration of the Transition Act to provincial administrators to be designated by the Premiers of each of the provinces. Section 235(8) also empowered the President when he assigned the administration of a law, or at any time thereafter, to amend or adapt such law in order to regulate its application or interpretation. This was permissible "to the extent that [the President] considers it necessary for the efficient carrying out of the assignment." When the President purported to assign the administration of the Transition Act to administrators in the provinces, he also purported to amend the law in terms of his powers under section 235(8). No objection was made by the Applicants at that time to the assignment or to the amendments to the Transition Act. In fact, the Third Applicant claims to be the Administrator in the Western Cape by virtue of such an assignment.

[10] The process of restructuring of local government under the Transition Act proceeded and

on 23 November 1994 Parliament amended the Act to include a provision under which the President was vested with the power to amend the Act by proclamation. He could do this provided the Committees on Provincial and Constitutional Affairs of the Assembly and the Senate consented to the amendments. There was also a requirement under which the amendments had to be tabled in Parliament and would fall away if Parliament passed a resolution disapproving of them. Once again no objection seems to have been taken at the time by the Applicants to the constitutionality of this amendment. A number of proclamations were passed in terms of this provision, and no challenge was made prior to June 1995 to their constitutionality.

Factual Background

[11] On the day that the assignment of the administration of the Transition Act and the consequential amendments were made (15 July 1994), the Second Applicant (the Premier of the Western Cape) designated the Third Applicant (the Minister of local government in the Western Cape) as the competent authority for the administration of the Transition Act for the Western Cape Province. In terms of the Transition Act, the Administrator's duties included the demarcation and delimitation of the Western Cape into areas of jurisdiction of transitional councils and transitional metropolitan sub-structures for the purposes of the local government elections anticipated to be held on 1 November 1995. Section 4(1) of the Transition Act required the Administrator to exercise any power conferred on him by the Act with the concurrence of the Provincial Committee, a body which (in terms of section 3(2) of the Transition Act) has to be "broadly representative of stakeholders in

local government"; section 4(1) requires the Administrator to exercise any power conferred on him by the Transition Act with the concurrence of the Provincial Committee; and section 4(3) then provides that where they fail to concur, the matter is to be resolved by the Special Electoral Court.

[12] The Transition Act as originally enacted provided that after the establishment of provincial government in a province members of a Provincial Committee would hold office during the pleasure of the Executive Council of that provincial government and that vacancies would be filled by the Executive Council. When the events which gave rise to the present dispute occurred, Mr A Boraine and Mr E Kulsen were members of the Committee. Kulsen resigned on 21 February 1995 and on 10 May 1995 the Third Applicant raised the question of Boraine's membership of the Committee with the First Applicant, which resolved to delegate to the Third Applicant the power to dismiss Boraine and to fill the two vacancies. The Third Applicant exercised that power by advising Boraine on 11 May 1995 that his membership was being terminated and by appointing the Fourth and the Fifth Applicants in the place of Boraine and Kulsen on 17 May 1995. The reconstituted Committee met on 23 May 1995 and four of its six members (including the Fourth and Fifth Applicants) approved the demarcation proposal of the Third Applicant.[5] The other two members of the Committee (and Boraine) were opposed to the Third Applicant's demarcation proposal. His actions made it possible for him to avoid referring to the

[5] The Local Government Demarcation Board for the Western Cape, a statutory advisory body appointed in terms of section 11 of the Transition Act, had recommended dividing the Cape Town metropolitan area into six sub-structures. The Third Applicant's proposal combined the Board's proposed Southern and Central sub-structures and its Tygerberg and Eastern sub-structures, and moved the predominantly black residential townships of Lingelethu West and Khayelitsha from Tygerberg into the consolidated Central sub-structure.

Special Electoral Court the dispute which would otherwise have arisen between him and the Committee with regard to his demarcation proposal.[6] Intensive negotiations ensued between the major political parties involved and also between representatives of the provincial and national government authorities concerned.[7] It proved impossible to find common ground, however. In the result the reaction of the central government was for the First Respondent to use his powers under section 16A of the Transition Act to promulgate the Proclamations.

[13] By Proclamation R 58 of 7 June 1995 the First Respondent amended section 3(5) of the Transition Act by transferring the power to appoint and dismiss Committee members from the provincial to the national government.[8] The amendment also served to nullify the appointment by the Third Applicant of the Fourth and Fifth Applicants. The next day the First Respondent amended section 10 of the Transition Act by Proclamation R 59. Before this amendment section 10 of the Transition Act had provided the Administrator with wide powers to make proclamations, *inter alia*, relating to the demarcation of local government

---

[6] The Committee at all material times consisted of six members while section 3(7)(b) of the Transition Act requires a two-thirds majority for any of its decisions.

[7] Of the two major parties in the Government of National Unity the African National Congress holds the majority in the national government and the National Party holds the majority in the Western Cape government.

[8] The amended sub-section reads as follows:

(5)(a) A member of the Committee shall hold office as a member at the Minister's pleasure.

(b) Any vacancy in the membership of the Committee arising for any reason shall be filled by a person appointed by the Minister in consultation with the Minister of Justice and after consultation with the Premier of the province concerned: Provided that any person so appointed shall have knowledge of matters concerning local government and shall reside within the province concerned.

(c) Any appointment of a member of the Committee made by the Executive Council of a province after 30 April 1995, is hereby terminated.

structures and the division of such structures into wards. Proclamation R 59 made section 10 subject to the provisions of a new subsection (4), which effectively invalidated Provincial Committee decisions of the kind in issue taken between 30 April and 7 June. Section 2 of that Proclamation then rendered the amendment explicitly retroactive. The combined effect of the Proclamations was to nullify the appointment of the Fourth and Fifth Applicants as members of the Committee retroactively and also to nullify the Third Applicant's demarcation proposal which the Committee had approved on 23 May 1995. On 15 June 1995 the Second Respondent, acting in consultation with the Third Respondent and after consultation with the Second Applicant, appointed the Fourth and Fifth Respondents as members of the Committee to replace Boraine and Kulsen.

[14] That sequence of events led to the Applicants challenging the Proclamations before the CPD and in this Court. This set in motion a chain of events which has culminated in the Applicants challenging the constitutional validity of section 16A of the Transition Act, and the constitutional validity of the assignment of the administration of the Act to provincial administrators. Not only do the Applicants put in issue the validity of the Presidential proclamation from which the Third Applicant derives his own authority, but in so doing and in challenging the validity of section 16A they put in doubt the validity of everything that has been done under the Transition Act since 15 July 1994, including all the preparations that have been made for the holding of the elections which are scheduled to take place in most of the country on 1 November, barely a month from now.

Direct and Urgent Access

[15] The first aspect to be considered is whether urgent and direct access to this Court should be granted. The manner in which the Applicants launched their assault on the Proclamations led to considerable difficulty, not only for the Respondents but also for this Court. The case was brought on an urgent basis; it was submitted that we had exclusive jurisdiction to hear it and that we should grant direct access to this Court under section 100(2) of the Constitution and Rule 17 of the Constitutional Court Rules. We were told that the local government elections in the Cape Town metropolitan area and in the whole of the Province would be put in jeopardy if the issues were not urgently resolved. It was impressed upon us that the Third Applicant could not act without the concurrence of the Committee and that, until the dispute regarding the composition of the Committee had been resolved, arrangements for local government elections in the Western Cape Province would be at a standstill. It was pointed out that the disputed validity of the Proclamations left in limbo whether it was the national government that had the power to change the composition of the Committee or whether such power still vested in the provincial authority concerned. The Respondents agreed that the matter was of such import and urgency as to justify direct access being afforded to this Court.

[16] There was disagreement, however, on the question whether the essential dispute falls within the exclusive jurisdiction of this Court. It is unnecessary to decide who is right on that issue. It is clear from the provisions of section 98(2)(c) of the Constitution that we do have jurisdiction to enquire into the constitutionality of any law and that, in terms of section 98(2)(e), we also have jurisdiction to deal with disputes of a constitutional nature

between organs of state at any level of government.[9] In any event, the matter has now been referred to this Court by the First Respondent in terms of the powers vested in him by section 82(1)(d) of the Constitution.[10]

[17] Although the elections in the Western Cape metropolitan area are no longer to be held on the 1st November, elections in other parts of the Western Cape are scheduled for that date. The issues raised in these proceedings could also have an impact on the elections elsewhere in the country. We are satisfied that we should make every endeavour to resolve the issues expeditiously and that urgent and direct access to this Court is warranted. An appropriate order will therefore be included at the end of this judgment.

Application to Amend Notice of Motion

[18] The second aspect to be considered is whether we should grant an application by the Applicants to amend their notice of motion to include as their first prayer a challenge to the validity of section 16A of the Transition Act. The application to amend was made so belatedly and diffidently as to cause the Respondents considerable embarrassment and the

---

[9] The relevant provisions of section 98(2) read: "The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including-

> ...
> (c) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
> ... [and]
> (e) any dispute of a constitutional nature between organs of state at any level of government...".

[10] That paragraph, inter alia, empowers the President "to refer disputes of a constitutional nature between ... organs of state at any level of government to the Constitutional Court ..."

Court no little bother. Ordinarily we would not have allowed it. However, the validity of the section is not only central to the present matter but of vital public importance generally. The question has to be decided now and any further delay would not be in the public interest. For that reason the amendment must be allowed and the Court's order contains the relevant provision to that effect.

Summary of Legal Argument before this Court

[19] In their founding affidavits the Applicants attacked the Proclamations on five separate grounds, in substance only one of which was relied upon in the first written argument lodged preparatory to the hearing. The argument that was persisted in was that the Proclamations were unconstitutional because they invaded the "functional or institutional integrity" of the Western Cape Province within the meaning of Constitutional Principle XXII, contained in Schedule 4 to the Constitution read with sections 74(1) and 232(4) thereof.[11] On the day before the hearing the Applicants sought to supplement their attack on the Proclamations by introducing an attack on the Proclamations on the grounds that they violated sections 61 and 62 of the Constitution and on the further ground that section 16A of the Transition Act was itself unconstitutional for its inconsistency with those sections of the Constitution.[12]

[20] Due to the lateness of the introduction of these fresh attacks and due to their possible

[11] It was also vaguely contended that the Proclamations were invalid to the extent to which they purported to have retrospective effect.

[12] The full text of section 61 of the Constitution is set out in paragraph [43] below.

impact on the outcome of this case, the Court granted a postponement giving the Applicants time to augment their submissions and affording the Respondents an opportunity to challenge them so that full and proper argument could be presented. Counsel were invited to consider argument on the possibility that there could be an answer to the Applicants' attack on section 16A if the First Respondent nevertheless had had the power in terms of section 235(8) of the Constitution to do what he had done.

[21] The Applicants' augmented written argument, somewhat surprisingly, contained no express attack on the constitutionality of section 16A. At best there was an alternative submission, relegated to a footnote. The argument also did not deal with the possible application of section 235(8) of the Constitution. The Applicants' augmented written argument, which consolidated all the grounds on which the Applicants at that stage relied, limited the attack on the Proclamations to three submissions. First, their alleged violation of Constitutional Principle XXII; second, their alleged subversion of sections 61 and 62(2) of the Constitution; and finally, that section 16A of the Transition Act, duly "read down" in accordance with section 232(3) of the Constitution so as to authorize only proclamations which do not violate Constitutional Principle XXII or subvert sections 61 and 62(2), renders the Proclamations *ultra vires* that section.

[22] While the written submissions of the Applicants avoided a substantive attack on section 16A, a supplementary affidavit by the Second Applicant impugned its constitutionality. Because of the importance of the point counsel for the Applicants were put to an election at the resumed hearing on 30 August 1995. After some vacillation they then elected to

apply to amend the notice of motion so as to include a prayer for the striking down of section 16A. Counsel for the Respondents opposed the application to amend and - quite justifiably - renewed a complaint expressed in their written submissions, namely that the repeated and unheralded changes of front on the part of the Applicants put the Respondents in the invidious position of not knowing from time to time what case they were to meet. They stressed that no proper explanation had been offered for the vacillation traced above in relation to proceedings instituted over two months earlier and emphasized that the implications of allowing the amendment would be profound. In terms of the proclamations promulgated under the provisions of section 16A, sections 3, 4, 7, 7A, 8, 9, 10, 10A, 11, 13, 16 and 16B Part VA and Schedules 1 and 4 of the Transition Act had been amended or inserted or both, some of them amended more than once. Counsel for the Respondents advanced *ex tempore* argument regarding the attack on section 16A and were given an opportunity to respond further in writing.[13] The Respondents also handed in an affidavit by the First Respondent dealing with his state of mind regarding the jurisdictional prerequisites to a decision to amend the Transition Act by virtue of the power to amend conferred on him by sections 235(8) of the Constitution. Relying on the line of reasoning followed in *Latib's* case[14] counsel for the Respondents argued that it was of no consequence that the Proclamations cited section 16A as the authority for their promulgation and not section 235(8) of the Constitution. They argued that, *ex facie* his affidavit, the First Respondent had made up his mind on the appropriate facts and had

[13] In substance the argument they subsequently lodged did not confront the attack on section 16A. Instead they contended that the attack could not be raised at such a late stage and there was an attempt to outflank the argument by relying on section 235(8) of the Constitution.

[14] *Latib v The Administrator* Transvaal 1969(3) SA 186(T) at 190F-191A. See also *Avenue Delicatessen v Natal Technikon* 1986(1) SA 853(A) at 870I-J; *Klerksdorpse Stadsraad v Renswyk Slaghuis (Edms) Bpk* 1988(3) SA 850(A) at 873E-F.

merely exercised his consequent power under an inappropriate statutory provision.

[23] Subsequent to the hearing this Court realised that there were questions regarding section 235(8) of the Constitution and related provisions which had not been addressed by counsel in their written or oral argument. These questions were of such importance that we considered it necessary to afford the parties an opportunity and the Court the benefit of debating them. The parties' legal representatives were therefore urgently invited to canvass the particular issues at a further hearing set down on 14 September 1995. Having now had that further debate we are satisfied that the case ultimately turns on the resolution of five issues. They are (i) whether the Proclamations fall foul of Constitutional Principle XXII; (ii) whether they are invalidated by section 61 of the Constitution or (iii) by section 62(2) of the Constitution; (iv) whether section 16A of the Transition Act itself is unconstitutional; and (v) whether the Proclamations were nevertheless validly promulgated under section 235(8) of the Constitution. We proceed to consider each of those issues in turn.

Constitutional Principle XXII

[24] The first and main basis of Applicants' attack on the Proclamations was that they were unconstitutional by reason of their being in violation of Constitutional Principle XXII which is contained in Schedule 4 of the Constitution. The relevant provision states:

> The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

[25] It was argued that the terms of the Constitutional Principle were contravened by virtue of the fact that the Proclamations and the legislative amendments effected thereby gave "...rise to a direct assault on the legitimate provincial autonomy and 'functional and institutional integrity' " of the Western Cape. The argument on behalf of the Applicants was based on a characterisation of the Constitutional Principles as being immutable and a contention that they are of application, along with the other provisions of the Constitution, to "all laws made or in force and all acts performed during the period of operation of the present Constitution."

[26] In support of the argument as to the applicability of the Constitutional Principles, much reliance was placed on section 232(4) of the Constitution which provides:

> In interpreting this Constitution a provision in any Schedule ... to this Constitution shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of this Constitution.

[27] The argument on behalf of the Applicants amounted to this: the import in section 232(4) of the Constitution of the phrases "shall not ... have a lesser status than any other provision of this Constitution" and "shall be deemed for all purposes" admit of no qualification; it leaves no room for the suggestion that the Constitutional Principles are mere aids to interpreting the substantive provisions of the Constitution. If anything, they have a higher status than the rest of the provisions in the Constitution.

[28] In response, the principal argument was that the Constitutional Principles are applicable to the making of the final Constitution and do not apply in substance to the transitional period. While noting that the contents of the Constitutional Principles may possibly serve

as an aid to interpreting the other provisions of the Constitution, it was argued that this could not be done selectively. He pointed out that if Constitutional Principle XXII was applicable to the powers and status of provinces under the current Constitution as the Applicants contended, so too would Constitutional Principle XIX which provides, *inter alia*, that "[t]he powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers. . ." Since section 126 of the Constitution provides only for concurrent and no exclusive powers to the provinces, this Constitutional Principle was not intended to be complied with in terms of the current Constitution. Constitutional Principles XXI(2) and (4), XXIII and XXIV were also cited as examples of obvious inconsistencies between the current Constitution and the Constitutional Principles, and as indicating that the provisions of the Constitutional Principles dealing with the status and powers of provinces related to the future and not the present.

[29] The Constitutional Principles are a set of thirty-four provisions contained in Schedule 4 of the Constitution. They represent principles which were agreed upon and adopted by the Negotiating Council of the Multi-Party Negotiating Process to provide definitive guidelines for the drafting of the final Constitution. The current Constitution makes a number of references to the Constitutional Principles. That they have a significant role to play is obvious. The precise ambit of that role is what is in dispute.

[30] In the Preamble the Constitutional Principles are described as a "solemn pact" in accordance with which the elected representatives of all the people of South Africa should be mandated to adopt a new Constitution.

[31] Chapter 5 of the Constitution locates their role in the context of a new constitutional text. In terms of section 71, the new constitutional text "shall comply with the Constitutional Principles" and that text, even though it would have been passed by the Constitutional Assembly, "shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles..."

[32] In terms of section 74 of the Constitution, the Constitutional Principles cannot be repealed or amended and neither can section 74 itself nor any other provision in Chapter 5 in so far as it relates to them or to "the requirement that the new constitutional text shall comply with the Constitutional Principles, or that such text shall be certified by the Constitutional Court as being in compliance therewith."

[33] It is necessary to consider section 232(4) of the Constitution in context. It is contained in Chapter 15 which is entitled "General and Transitional Provisions" and the section itself, according to the heading, deals with "Interpretation". Section 232(4) is not conclusive on the issue of the exact status of the Constitutional Principles in relation to other provisions in the current Constitution. The section is of general application to all the Schedules to the Constitution. It ensures that they are treated for all purposes as if they formed part of the main body of the Constitution, and makes clear that they do not have a *lesser status* than provisions located elsewhere in the Constitution. Ordinarily, the position with regard to matter contained in a schedule is as set out by Kotze JA in *African and European Investment Co. Ltd. v Warren and Others* 1924 AD 308 at 360:

> No doubt a schedule or rule attached to a Statute and forming part of it is binding, but in case of clear conflict between either of them and a section in the body of the Statute itself, the former must give way to the latter.

Craies, *Statute Law* (7th ed. by Edgar, 1971) at 224, notes:

> 'A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment, as any other part,' but if an enactment in a schedule contradicts an earlier clause the clause prevails against the schedule. (Citation omitted).

See also *Driedger on the Construction of Statutes* (3rd ed. by Ruth Sullivan 1994) 278-284, and Steyn, *Die Uitleg van Wette* (1981) 151-152.

[34] Section 232(4) therefore ensures that the Schedules to the current Constitution are regarded not merely as an explanatory adjunct subordinated to the clause to which they are attached. Nor are the Schedules texts lacking constitutional status which could be amended by an ordinary Act of Parliament in terms of section 59; on the contrary, section 232(4) guarantees that, apart from Schedule 4 (which embodies the Constitutional Principles), they can only be amended by a two-thirds majority as provided for in section 64. See also section 74(2). Like all provisions of the Constitution they must be interpreted in their context, and if relevant, can be taken into account in interpreting other provisions of the Constitution.

[35] The Constitutional Principles indeed have a higher status than the rest of the Constitution in that they cannot be amended at all (see section 74). This particular status stems from their special function in the matrix of the two-stage constitution-making process agreed to

during the Multi-Party Negotiation Process and reflected in the text of the Constitution.

[36] Clearly the current Constitution is made up of various components each of which has a specific focus. There are provisions, for instance, which deal with present arrangements and which have no special claim to being included in a future Constitution; there are also specific provisions which are directed at the process of bringing about a new Constitution. The question is where the Constitutional Principles, which are fully part of the current Constitution, fit into the scheme of things.

[37] The language of the Constitution itself provides a strong indication of the applicability and overriding purpose of the Constitutional Principles. It should be mentioned firstly that the current Constitution is, itself, a transitional measure, designed to tide the country over an interim period while a new Constitution is being drafted. Indeed it proclaims itself as an "historic bridge"; it was never intended to be the final destination. Thus while it brings about far-reaching changes in the governance of this country, it also prescribes and regulates the process leading towards the achievement of the final Constitution. In that sense the *historic bridge* is not just between the past, with all that characterised it, and the present, which is governed by this Constitution, but also between the present and the future, which will be governed in terms of the new Constitution. Various provisions of the current Constitution prescribe how the new Constitution should come about and the Constitutional Principles form part of the future-directed framework, as do certain other provisions contained elsewhere in the current Constitution.

[38] Constitutional Principle I states:

> The Constitution of South Africa shall provide ...

This is clearly a reference to the Constitution which the Constitutional Assembly has been mandated to draft and not the current one. Many more of the thirty-four Constitutional Principles are couched in similar language, clearly indicating relevance only to the final Constitution and not to the present. Some of the provisions refer in terms to the current and the new Constitutions; Constitutional Principle II, for example, states:

> Every one shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in *the* Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of *this* Constitution. (My italics).

See also Constitutional Principles XVIII(2) and (3). The whole scheme of XVIII, for instance, clearly distinguishes between "*this* Constitution" and "*the* Constitution".

[39] Perhaps one of the most revealing textual features is the consistency with which the phrases "*the* Constitution" and "*this* Constitution" are used in the text of the current Constitution. The former, with three notable exceptions, is used consistently in the context of the new Constitution and the latter, without exception, in that of the current Constitution. The three exceptions with regard to the former are:

(a) in the Preamble, "... the following provisions are adopted as *the* Constitution of South Africa".

(b) the short title (section 251): "This Act shall be called *the* Constitution of the

Republic of South Africa, 1993 ..."

(c) in section 227(2): "The National Defence Force shall --

(a) exercise its powers and perform its functions solely in the national interest by--

(i) upholding *the* Constitution;

(ii) ... "

The textual consistency referred to is maintained in the entire Schedule 4.

[40] Constitutional Principle XXI refers to *the* Constitution a number of times, and the context is clearly consistent only with the future Constitution. Constitutional Principle XXIII likewise deals with a future Constitution and the operative words are again "the Constitution". It is improbable that Constitutional Principle XXII would have been sandwiched in between those provisions if it was not also dealing with the new Constitution which is in the process of preparation.

[41] It would be strange indeed if these very widely phrased provisions, intended to be given detailed constitutional texture in future, were to be read as impacting immediately and directly on the structures and functions of the present governmental system, not to speak of Chapter 3 on Fundamental Rights. We have no doubt that the Constitutional Principles, like the other provisions of Chapter 5 are intended to be of substantive application in the drafting and adoption of the new Constitution and, by virtue of section 160(3) of the current Constitution, they are also of application to any provincial constitutions which may be adopted. Thus, the statement in section 232(4) that they are for all purposes deemed to

form part of the substance of this Constitution relates to their status and not to their function or operation. In my view, the Applicants' argument on this score entirely misconceives the place of the Constitutional Principles in terms of the total constitutional scheme, and must be rejected.

Section 61 of the Constitution

[42] It was argued that the amendments to the Transition Act purportedly made in terms of Proclamation R 58 constituted legislation "affecting ... the exercise or performance of powers and functions of the provinces", in terms of section 61 of the Constitution, and could only lawfully be effected in accordance with the "manner and form" provisions of that section. As this was not done, that Proclamation, and the action subsequently taken under it, were invalid and of no force or effect.

[43] Section 61 provides that:

> Bills affecting the boundaries or the exercise or performance of the powers and functions of the provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses and, in the case of a Bill, other than a Bill referred to in section 62, affecting the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, unless also approved by a majority of the senators of the province or provinces in question in the Senate.

In terms it applies only to parliamentary enactments and not to legislative action such as the making of proclamations or regulations in terms of such enactments. Any other construction would not only do violence to the language of the section, but would place a severe impediment in the way of effective government.

[44] Prima facie the Proclamations which are in issue in the present case were within the scope of the President's powers under section 16A. But if the section is construed narrowly so as to exclude such authority, or if the section itself is inconsistent with the Constitution and accordingly invalid, the validity of the Proclamations can be impugned.

[45] The principal argument for the Applicants was that section 16A, read literally, authorises the making of legislation in a way which is contrary to the "manner and form" requirements of section 61 of the Constitution, and should therefore be "read down" and confined to an authority to deal with matters which are not within the scope of section 61.

[46] In the judgment given in the CPD proceedings, Conradie J points to the uncertain scope of section 61 and to difficulties that exist in construing its provisions. There are these difficulties; it is, however, not necessary to resolve them in the present case. The sole purpose of section 16A is to enable the President to amend the Transition Act by proclamation. The administration of the Transition Act is vested in provincial organs. If the Transition Act deals with the powers and functions of the provinces within the meaning of section 61, it is difficult to see how the powers under section 16A could ever be exercised without affecting such powers and functions.

[47] Moreover, section 61 is not the only section in the Constitution which prescribes "manner and form" provisions for the passing of legislation. "Manner and form" provisions are also prescribed by sections 59 and 60. Section 59 deals with "ordinary" legislation, and section 60 with “Money Bills”. No purpose would be served by reading down section

16A so as to avoid a challenge based on section 61 of the Constitution, if that would expose the section as read down to a challenge under section 59. This means that we have to deal with the larger question raised by this Court during argument, namely, whether or not it was competent for Parliament by means of section 16A to vest in the President the power to amend the Transition Act by proclamation. The answer to this question depends in the first instance upon whether under our Constitution, Parliament can delegate or assign its law-making powers to the executive or other functionaries, and if so under what circumstances, or whether such powers must always be exercised by Parliament itself in accordance with the provisions of sections 59, 60 and 61 of the Constitution. I will deal with that question later. But first it is necessary to address the argument based on section 62(2) of the Constitution that was advanced on behalf of the Applicants.

Section 62(2) of the Constitution

[48] The argument was that the Proclamations in question amended the powers and executive competence of the provinces within the meaning of sections 126 and 144 of the Constitution, and in particular those of the Western Cape Province, and therefore had to be enacted in accordance with the provisions of section 62(2) of the Constitution. In my view there is no substance in this argument. Section 62 deals with amendments to the Constitution and not with amendments to national legislation such as the Transition Act under which legislative or executive functions can be vested in the provinces. The fact that

the Transition Act is referred to in section 245 of the Constitution does not make it part of the Constitution nor does it require amendments to that Act to be made in accordance with the provisions of section 62. This is made clear by section 232(2) of the Constitution which provides that:

> (a) Any reference in this Constitution to any particular law shall be construed as a reference to that law as it exists from time to time after any amendment or replacement thereof by a competent authority.
>
> (b) An amendment, replacement or repeal of a law referred to in paragraph (a), shall for the purposes of section 62 not be considered to be an amendment of this Constitution, and any such amendment, replacement or repeal of a law shall for its validity be dependent on its consistency with this Constitution in terms of section 4(1).

It was contended by counsel for the Applicants that this does not apply to the Proclamations because they are not referred to in the Constitution and section 232(2) is accordingly not applicable to them. The short answer to this contention is that the Proclamations, if valid, do not amend the Constitution. They amend the Transition Act.

[49] It was also contended that the Proclamations are inconsistent with the proviso to section 62(2), which requires amendments to the legislative and executive competences of a province to be effected with the consent of the relevant provincial legislature. But section 62(2) is a clause dealing with constitutional amendments, and the proviso must be read as qualifying the substantive part of the clause and not as an independent constitutional requirement applicable to any legislation dealing with provincial powers and functions. *S v Mhlungu and Others* 1995 (7) BCLR 793 (SA) at paragraph 32. Where, as in the present case, provincial organs are vested with powers or functions by national legislation, such powers and functions can be changed by national legislation. Changes thus effected do not involve constitutional amendments and do not have to be implemented in

accordance with the provisions of section 62.

The validity of Section 16A of the Local Government Transition Act

[50] Section 16A of the Transition Act provides:

> (1) The President may amend this Act and any Schedule thereto by proclamation in the *Gazette*.
> (2) No proclamation under subsection (1) shall be made unless it is approved by the select committees of the National Assembly and the Senate responsible for constitutional affairs.
> (3) A proclamation under subsection (1) shall commence on a date determined in such proclamation, which may be a date prior to the date of publication of such proclamation.
> (4)(a) The Minister shall submit a copy of a proclamation under subsection (1) within 14 days after the publication thereof to Parliament.
> (b) If Parliament by resolution disapproves of any such proclamation or any provision thereof, such proclamation or provision shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such proclamation or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such proclamation or such provision before it so ceased to be of force and effect.

[51] The legislative authority vested in Parliament under section 37 of the Constitution is expressed in wide terms - "to make laws for the Republic in accordance with this Constitution." In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a

statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.

[52] In the past our courts have given effect to Acts of parliament which vested wide plenary power in the executive. *Binga v Cabinet for South West Africa and Others* 1988 (3) SA 155(A) and *R v Maharaj* 1950 (3) SA 187(A) are examples of such decisions. They are in conformity with English law under which it is accepted that parliament can delegate power to the executive to amend or repeal acts of parliament. S. Wade and C. Forsyth, *Administrative Law*, pp. 863-864 (Clarendon Press, Oxford, 7th ed. 1994). These decisions were, however, given at a time when the Constitution was not entrenched and the doctrine of parliamentary sovereignty prevailed. What has to be decided in the present case is whether such legislation is competent under the new constitutional order in which the Constitution is both entrenched and supreme. This requires us to consider the implications of the separation of powers under the Constitution, the "manner and form" provisions of sections 59, 60 and 61, the implications of the supremacy clause (section 4) and the requirement that parliament shall make laws in accordance with the Constitution (section 37).

[53] In the United States of America, delegation of legislative power to the executive is dealt under the doctrine of separation of powers. Congress as the body in which all federal law-making power has been vested must take legislative decisions in accordance with the

"single, finely wrought and exhaustively considered, procedure" laid down by the US Constitution, which requires laws to be passed bicamerally and then presented to the President for consideration for a possible veto. *INS v Chada* 462 US 919 (1983) per Burger CJ at 951. Delegation of legislative power within prescribed limits is permissible because, as the Supreme Court has said, "[w]ithout capacity to give authorizations of that sort we should have the anomaly of legislative power which in many circumstances calling for its exertion would be but a futility." Per Hughes CJ in *Panama Refining Co. v Ryan* 293 US 388, 421 (1935). The delegation must not, however, be so broad or vague that the authority to whom the power is delegated makes law rather than acting within the framework of law made by Congress. This distinction was explained by Taft CJ in *Hampton & Co v United States* 276 US 394, 407 (1928)(quoting Ranney J in *Wilmington and Zanesville Railroad Co. v Commissioners*, 1 Ohio St. 77 (1852)) as follows:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

[54] In Ireland, under the influence of the United States jurisprudence, the courts have adopted a similar approach. See the comments of McMahon J in the High Court in *Cityview Press Limited and Another v An Chomhairle Oiliuna and Others* [1980] IR 381. The Supreme Court, confirming the decision of McMahon J in the *Cityview Press* case, held that whilst parliament cannot delegate its power to make laws to the executive, it is competent for it to make laws under which a regulatory power is delegated to the executive. The test as to whether lawmaking or regulatory powers have been delegated is "whether what is challenged as an unauthorised delegation of parliamentary power is more than the mere giving effect to principles and policies which are contained in the statute itself. If it be,

then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution." Per O'Higgins CJ, supra, at 395 et seq.

[55] The courts of some Commonwealth countries seem to take a broader view of the power to delegate legislative authority than the courts of the United States, and to permit parliament to delegate plenary law-making powers to the executive, including the power to amend Acts of parliament. In part this is due to the influence of English law and decisions of the Privy Council, and in part to the form of government in such countries. In the United States there is a clear separation of powers between the legislature and the executive. In Commonwealth countries there is usually a clear separation as far as the judiciary is concerned, but not always as clear a separation between the legislature and the executive. Many of the Commonwealth countries have followed the English system of executive government under which the head of the government is the Prime Minister, who sits in parliament and requires its support to govern. Although there is a separation of functions, the Prime Minister and the members of his or her cabinet sit in parliament and are answerable to parliament for their actions.

[56] The influence of English law is referred to by Dixon J in his judgment in the Australian High Court in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. & Meakes v Dignan* [1931] 46 CLR 73 at pages 101-102, in which the Court declined to follow the United States cases. In the same case, Evatt J (at page 114) drew attention to the differences in the form of government of Commonwealth countries and that of the United

States, saying:

> In dealing with the doctrine of "separation" of legislative and executive powers, it must be remembered that, underlying the Commonwealth frame of government, there is the notion of the British system of an Executive which is responsible to Parliament. That system is not in operation under the United States Constitution.
>
> ...
>
> This close relationship between the legislative and executive agencies of the Commonwealth must be kept in mind in examining the contention that it is the Legislature of the Commonwealth, and it alone, which may lawfully exercise legislative power.

In Australia, it seems to have been accepted that the Commonwealth parliament can delegate a legislative power to the executive and vest in the executive the power to make regulations which will take precedence over Acts of Parliament. That is what was done in *Dignan*'s case which, in the context of subordinate legislation, was cited with approval by the Privy Council in *Attorney-General for Australia v The Queen* 1957 AC 288 at 315. In *Cobb & Co Ltd and Others v Kropp and Others* 1967 (1) AC 141 the Privy Council upheld a decision of the Supreme Court of Queensland finding that it was competent for the state legislature to vest in its Commissioner for Transport the power to impose taxes in the form of license fees on transport operators, as well as the power to determine the amount of the fees, which could be made to vary between operator and operator. Queensland had a bi-cameral legislature and the Order in Council under which it was established provided that "all bills for appropriating any part of the public revenue for imposing any new rate tax or impost" should originate in the Legislative Assembly. It was held that the plenary powers vested in the Queensland legislature entitled it to vest this authority in the Commissioner for Transport. A similar decision had previously been given by the Privy Council in *Powell v Apollo Candle Company Ltd.* (1885) 10 AC 282, where a challenge to the levying of customs duties by the Governor of New South Wales under general empowering legislation was unsuccessful.

[57] Seervai in his work on the Indian Constitution deals at length with the Indian jurisprudence on the power of parliament to delegate legislative power to the executive. H. M. Seervai, *Constitutional Law of India*, vol. II, para. 22.1 et seq. (3d ed., 1983). He refers to various judgments and decisions of judges in the Supreme Court of India which in his view contradict each other and vacillate between on the one hand sanctioning a broad delegation of law-making power by parliament to the executive, and on the other, requiring such delegation of legislative power to be carried out within a policy framework prescribed by parliament. Seervai himself takes the view that under the Indian Constitution a legislature has the power to pass a law under which the executive is given the power to implement an Act and to modify its provisions to enable it to work smoothly. He states at paragraph 21.53 that:

> [L]egislative power is not "property" to be jealously guarded by the legislature, but is a means to an end, and if the end is desired by the legislature and the difficulties in achieving that end cannot be foreseen, it is not only desirable but imperative that the power to remove difficulties should be entrusted to the executive Government which would be in charge of the day-to-day working of the law. (Citation omitted).

The cases referred to by Seervai were not available to us at the time this judgment was prepared, and in the limited time that we have had to prepare our judgments it was not feasible to make arrangements to procure copies of the judgments or to trace the development of the law in India since the publication of the third edition of his book in 1983.

[58] In Canada, under the influence of the Privy Council decision in *Hodge v The Queen* (1883) 9 AC 117 and *Shannon v Lower Mainland Dairy Products Board* [1938] AC 708, it seems to be accepted that parliament has wide powers of delegation. Hogg,

Constitutional Law of Canada (3d ed. 1992) at paragraph 14.2, notes:

> The difference between the Canadian and the American systems resides not only in the different language of the two constitutional instruments, but in Canada's retention of the British system of responsible government. The close link between the executive and the legislative branches which is entailed by the British system is utterly inconsistent with any separation of executive and legislative functions.

According to Hogg , although delegation of legislative power between parliament and provincial legislatures is not permitted, delegation of such power by parliament to the executive, "short of a complete abdication of its power", is permissible. Supra paras. 14.2 and 14.3; see also, Finkelstein, *Laskin's Canadian Constitutional Law*, vol. 1, pp. 42-46 (Carswell Student Edition, 5th ed. 1986). It is not clear what the Canadian Courts would regard as "a complete abdication of power". In *Re Gray* (1918) SCR 150, as cited in Hogg, in which this statement was made, upheld wide powers to make laws vested in the Governor in Council. It was followed by the Supreme Court of Canada in *Reference Re Regulations (Chemical) Under War Measures Act* (1943) 1 DLR 248, where it was pointed out (at p. 253) that the Privy Council had laid down the principle that, in an emergency such as war, the autonomy of the Dominion to make laws for the peace, order and good government of the nation, in view of the necessities arising from the emergency, may "displace or overbear the authority of the Provinces" in areas which they would otherwise have had exclusive jurisdiction. These were war cases, and typically greater latitude is allowed to the legislature in such circumstances. *Cf. Dignan's* case (supra) at 99; see also, *Re Manitoba Government Employers Association and Government of Manitoba* 79 DLR (3d) 1 at 15, which suggests that such broad delegations may not be permissible at other times. Hogg suggests that a possible exception to this rule is the federal taxing power because of the constitutional provisions requiring such legislation to

originate in the House of Commons. He refers, at 344, to *In Re Agricultural Products Marketing Act* 84 DLR (3d) 257, in which such a challenge was raised but disposed of by the Supreme Court of Canada on the grounds that the disputed levies were not taxes but administrative charges. The majority of the Court, however, rejected the argument that the taxing power could not be delegated on the basis that if such a delegation were inconsistent with the relevant provisions of the Canadian Constitution, the Act under which the delegation was made should be treated as having impliedly amended them. Id., per Pigeon J at 322. This is in accordance with the rule that an Act inconsistent with the constitution is to be regarded as amending the constitution unless the constitution prescribes special procedures for such amendments and those procedures have not been followed. *Kariapper v Wijesinha* [1968] AC 717(PC) at 742F. An argument along these lines would not be permissible under our Constitution because it prescribes special procedures for amendments. *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A). See also: *Attorney-General for New South Wales v Trethowan* [1932] AC 526 (PC) at 541; *The Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC) at 199.

[59] The Canadian cases referred to in paragraph [58] were decided before the introduction of section 52 into the Canadian Constitution in 1982. This section provides that the Constitution shall be the supreme law and that legislation inconsistent with the Constitution shall be invalid. Neither Hogg nor Finkelstein suggest that this has had any effect on the rule in *Hodge*'s case or the cases that have followed it. Hogg takes the position that the Constitution was in any event supreme prior to the introduction of section 52, and that the amendment did no more than record what has always been accepted [Hogg para. 55.1].

But there is a difference between a constitutional order which limits Parliaments authority to make certain laws and binds Parliament to legislate according to certain procedures, and one which treats Parliament as supreme. Whatever the situation may be in Canada in the light of the Privy Council decisions and the terms of that country's constitution, we have to decide this issue in the light of the terms of our own Constitution.

[60] Whilst it seems to be accepted in most of the Commonwealth that parliament can delegate wide powers to the executive, the separation of powers as far as the judiciary is concerned has been strictly enforced, and the Privy Council has held to be invalid legislation which encroaches upon the judicial power. *Attorney General for Australia v The Queen* (supra) and *Liyanage v The Queen* 1967 (1) AC 259 at 286C (an appeal from the Supreme Court of Ceylon). In *Liyanage*'s case it was said that the power to make laws derived from the Constitution and had to be exercised in accordance with its provisions. Those provisions prevented parliament from issuing bills of attainder to the judiciary.

[61] This brief and somewhat limited survey of the law as it has developed in other countries is sufficient to show that where Parliament is established under a written constitution, the nature and extent of its power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history. Our history, like the history of Commonwealth countries such as Australia, India and Canada was a history of parliamentary supremacy. But our Constitution of 1993 shows a clear intention to break away from that history. The preamble to the Constitution begins by stating the "need to create a new order." That order is established in section 4

of the Constitution which lays down that:

> (1) This Constitution shall be the supreme law of the Republic and any law or Act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
>
> (2) This Constitution shall bind all legislative executive and judicial organs of the State at all levels of government.

Sub-section (2) is of particular importance in the present case.

[62] The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication.

Section 37 of the Constitution spells out what those powers are. It provides that:

> The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution.

The supremacy of the Constitution is reaffirmed in section 37 in two respects. First, the legislative power is declared to be "subject to" the Constitution, which emphasises the dominance of the provisions of the Constitution over Parliament's legislative power, *S v Marwane* 1982(3) SA 717(A) at 747 H - 748 A, and secondly laws have to be made "in accordance with this Constitution." In paragraph [51] of this judgment we I pointed out why it is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive. To do so is not inconsistent with the Constitution; on the contrary it is necessary to give efficacy to the primary

legislative power that Parliament enjoys. But to delegate to the executive the power to amend or repeal Acts of Parliament is quite different. To hold that such power exists by necessary implication from the terms of the Constitution could be subversive of the "manner and form" provisions of sections 59, 60 and 61. Those provisions are not merely directory. They prescribe how laws are to be made and changed and are part of a scheme which guarantees the participation of both houses in the exercise of the legislative authority vested in Parliament under the Constitution, and also establish machinery for breaking deadlocks. There may be exceptional circumstances such as war and emergencies in which there will be a necessary implication that laws can be made without following the forms and procedures prescribed by sections 59, 60 and 61. Section 34 of the Constitution makes provision for the declaration of states of emergency in which provisions of the Constitution can be suspended. It is possible that circumstances short of war or states of emergency will exist from which a necessary implication can arise that Parliament may authorise urgent action to be taken out of necessity. A national disaster as a result of floods or other forces of nature may call for urgent action to be taken inconsistent with existing laws such as environmental laws. And there may well be other situations of urgency in which this type of action will be necessary. But even if this is so (and there is no need to decide this issue in the present case) the conditions in which section 16A were enacted fall short of such an emergency. There was, of course, urgency associated with the implementation of the Transition Act, but the Minister has regulatory powers under the Act, and legislation could have been passed to authorise the President to issue proclamations not inconsistent with the Act. Whether this could have included a power to amend other Acts of Parliament need not now be decided. An unrestricted power to

amend the Transition Act itself cannot be justified on the grounds of necessity, nor can it be said to be a power which by necessary implication is granted by the Constitution to the President. Sections 59, 60 and 61 of the Constitution are part of an entrenched and supreme Constitution. They can only be departed from where the Constitution permits this expressly [section 235 (8) is such a case] or by necessary implication. In the present case neither of these requirements is present.

[63] Insistence upon compliance with the manner and form provisions of the Constitution in these circumstances is not elevating form above substance. The authorisation of legislation such as section 16A allows control over legislation to pass from Parliament to the executive. Later this power could be used to introduce contentious provisions into what was previously uncontentious legislation. Assuming this is done at a time party A has a majority in the Assembly, but not in the Senate, it would be difficult for other parties to secure a resolution of Parliament which would be needed to invalidate the delegation. It would also render ineffective the special procedures prescribed by sections 60 and 61. A contention that this would be a consequence of the Assembly and the Senate having passed the legislation in the first place, would be of little solace to parties in the Senate in a situation in which the authorisation is given at a time when Party A has a majority in the Assembly and the Senate, but later loses its majority in the Senate. In such circumstances, it could block a resolution objecting to legislation enacted under the delegation which could never have been passed without such delegation.

[64] Mr Gauntlett on behalf of the Respondents placed considerable reliance on the fact --

which is also been mentioned in some of the Commowealth judgments -- that Parliament retains control over the functionary to whom plenary legislative power is delegated and can withdraw it if the power is not exercised in accordance with its wishes. In the present case that element of control clearly exists, for the President can only legislate with the consent of the appropriate committees of both the Senate and the Assembly, on which there is multi-party representation, and Parliament can by resolution disapprove of the legislation made by the President, in which event it will cease to have validity. There is also the fact that the statute in issue in the present case is essentially a transitional provision, designed to manage the difficult and complicated transition to democratic local government for a limited period of time. The power vested in the President is a power to amend the Transition Act, which because of its far reaching implications would, even if section 16A were valid, have to be narrowly construed, *R v Secretary of State for Social Security, Ex Parte Britnell* 1991 (1) WLR 198 (HL), and would not necessarily include the power to make fundamental changes to the Act, *S v Mngadi and Others* 1986 (1) SA 526 (N)(but compare the judgment in the case on appeal *sub nom, Attorney-General, Natal v Mngadi and Others* 1989 (2) SA 13 (A) at 21C-F with 21H). These are all factors which could be relied upon to explain and justify the delegation of law-making power to the President in terms of section 16A. But if Parliament does not have the constitutional authority to delegate this power to the executive or to any other body, the reasonableness of the delegation or the absence of objection is irrelevant. The only way in which Parliament can confer power on itself to act contrary to the Constitution is to amend the Constitution. And this was not done in the present case.

[65] The Respondents placed considerable reliance on the fact that section 10 of the Transition Act vests extensive powers in the Administrator who is a provincial functionary. These powers include the power to modify or even repeal Acts of Parliament for the purpose of implementing decisions taken in terms of the Transition Act for the establishment and empowerment of transitional councils. This, they contend, is incorporated by reference through section 245 of the Constitution which requires the restructuring of local government to be carried out in accordance with the provisions of the Transition Act and impliedly sanctions the provisions of section 10 of that Act. Even if it is assumed that the provisions of section 10 of the Transition Act are sanctioned by section 245 of the Constitution (and there is no need to express any opinion on that issue) it does not follow that section 16A which is contained in a post-constitutional Act of Parliament was also sanctioned. The powers vested in the Administrator by section 10 of the Transition Act are limited to the making of "enactments not inconsistent with this [Transition] Act with a view to the transitional regulation of any matter relating to local government". It is essentially a regulatory power which, because of the conflicting provisions of various enactments which were given the force of law by section 229 of the Constitution, might have been needed in order to cut across the provisions of old laws which had not yet been repealed. Section 16A is quite different. It is a general power to amend the Transition Act itself. It is subject to no express limitation and can not be equated to the regulatory powers vested in the Administrators by section 10 of the Transition Act. Such a power cannot be inferred from section 245 of the Constitution.

Section 235 (8) of the Constitution

[66] In the circumstances it is necessary to consider whether the two Proclamations can be justified under the provisions of section 235 (8) of the Constitution. The Respondents contend that if section 16A is inconsistent with the Constitution, the Proclamations were nonetheless within the President's powers under section 235 of the Constitution. Because of the arguments relied on by the Applicants in response to this contention it is necessary to set out the full terms of section 235. It reads as follows:

> (1) A person who immediately before the commencement of this Constitution was-
>
> (a) the State President or a Minister or Deputy Minister of the Republic within the meaning of the previous Constitution;
> (b) the Administrator or a member of the Executive Council of a province; or
> (c) the President, Chief Minister or other chief executive or a Minister, Deputy Minister or other political functionary in a government under any other constitution or constitutional arrangement which was in force in an area which forms part of the national territory,
>
> shall continue in office until the President has been elected in terms of section 77(1)(a) and has assumed office: Provided that a person referred to in paragraph (a), (b) or (c) shall for the purposes of section 42(1)(e) and while continuing in office, be deemed not to hold an office of profit under the Republic.
>
> (2) Any vacancy which may occur in an office referred to in subsection (1)(a), (b) or (c) shall, if necessary, be filled by a person designated by the persons continuing in office in terms of subsection (1)(a), acting in consultation with the Transitional Executive Council.
>
> (3) Executive authority which was vested in a person or persons referred to in subsection (1)(a), (b) or (c) in terms of a constitution or constitutional arrangement in force immediately before the commencement of this Constitution, shall during the period in which the said person or persons continue in office in terms of subsection (1), be exercised in accordance with such constitution or constitutional arrangement, as if it had not been repealed or superseded by this Constitution, and any such person or persons shall continue to be competent to administer any department of state, administration, force or other institution which was entrusted to, and to exercise and perform any power or function which was vested in, him or

her or them immediately before the said commencement: Provided that -

(a) no such executive authority, power or function shall be exercised or performed if the Transitional Executive Council disapproves thereof; and

(b) once the election results of the National Assembly have been certified by the Independent Electoral Commission in terms of the Independent Electoral Commission Act, 1993, the State President referred to in subsection (1)(a) shall exercise and perform his or her powers and functions in consultation with the leader of the party which has received the largest number of votes in the said election.

(4) The Transitional Executive Council may by resolution of a majority of all its members at any time during the period in which the said State President continues in office in terms of subsection (1), require him or her, or any other appropriate authority, to take such steps in terms of any law as are necessary to maintain law and order, including the declaration of a state of emergency or of an area to be an unrest area in terms of an applicable law.

(5) Upon the assumption of office by the President in terms of this Constitution -

(a) the executive authority of the Republic as contemplated in section 75 shall vest in the President acting in accordance with this Constitution; and

(b) the executive authority of a province as contemplated in section 144 shall, subject to subsections (8) and (9), vest in the Premier of that province acting in accordance with this Constitution, or while the Premier of a province has not yet assumed office, in the President acting in accordance with section 75 until the Premier assumes office.

(6) The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows:

(a) All laws with regard to matters which -

(i) do not fall within the functional areas specified in Schedule

6; or

(ii) do fall within such functional areas but are matters referred to in paragraphs (a) to (e) of section 126(3) (which shall be deemed to include all policing matters until the laws in question have been assigned under subsection (8) and for the purposes of which subsection (8) shall apply *mutatis mutandis*),

shall be administered by a competent authority within the jurisdiction of the national government: Provided that any policing functions which but for subparagraph (ii) would have been performed subject to the directions of a member of the Executive Council of a province in terms of section 219(1) shall be performed after consultation with the said member within that province.

(b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3) shall -

(i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1) (a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to

a competent authority within the jurisdiction of the government of such province; or

(ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1)(c), subject to subsections (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this sub-paragraph shall not apply to policing matters, which shall be dealt with as contemplated in paragraph (a).

(c) In this subsection and subsection (8) "competent authority" shall mean -

(i) in relation to a law of which the administration is allocated to the national government, an authority designated by the President; and

(ii) in relation to a law of which the administration is allocated to the government of a province, an authority designated by the Premier of the province.

(7) (a) The President may, after consultation with the Premier of a province, by proclamation in the *Gazette* take such

measures, including legislative measures, as he or she considers necessary for the better achievement of this section.

(b) A copy of a proclamation under paragraph (a), shall be submitted to Parliament within 14 days after the publication thereof.

(c) If Parliament disapproves of any such proclamation or any provision thereof, such proclamation or provision shall thereafter cease to be of force and effect to the extent to which it is so disapproved, but without prejudice to the validity of anything done in terms of such proclamation up to the date upon which it so ceased to be of force and effect, or to any right, privilege, obligation or liability acquired, accrued or incurred as at the said date under and by virtue of such proclamation.

(8) (a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the *Gazette* assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.

(b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that the or she considers it necessary for the efficient carrying out of the assignment, he or she may -

(i) amend or adapt such law in order to regulate its application or interpretation;

(ii) where the assignment does not relate to the whole of such law, repeal and re-enact,

whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and

(iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution.

(c) In regard to any policing power the President may only make that assignment effective upon the rationalisation of the police service as contemplated in section 237: Provided that such assignment to a province may be made where such rationalisation has been completed in such a province.

(d) Any reference in a law to the authority administering such law, shall upon the assignment of such law in terms of paragraph (a) be deemed to be a reference *mutatis mutandis* to the appropriate authority of the province concerned.

(9) (a) If for any reason a provincial government is unable to assume responsibility within 14 days after the election of its Premier, for the administration of a law referred to in subsection (6)(b), the President

> shall by proclamation in the *Gazette* assign the administration of such law to a special administrator or other appropriate authority within the jurisdiction of the national government, either generally or to the extent specified in the proclamation, until that provincial government is able to assume the said responsibility.
>
> (b) Subsection (8) (b) and (d) shall *mutatis mutandis* apply in respect of an assignment under paragraph (a) of this subsection.

The Respondents' contention was that the administration of the Transition Act had been assigned by the President to competent authorities within the provinces in terms of subsection (8) and that the making of the Proclamations was within the scope of his legislative power under sub-section (8) to "amend and adapt" laws assigned under this section.

[67] It was not disputed that the President had purported to assign the administration of parts of the Transition Act to "competent authorities" within the provinces. The Applicants disputed, however, that this was sufficient to give validity to the Proclamations. They advanced three arguments in answer to the Respondents' contention. First, that the President did not purport to act under section 235(8) of the Constitution and in the circumstances he cannot rely on any power that he might have had under it. Second, that the Transition Act did not fall within the scope of the President's powers under section 235(8) to assign laws. And last, if the President was entitled to assign the Transition Act under section 235(8) he was not empowered by that section to make Proclamations R 58 and R 59.

[68] In view of the conclusion to which I have come, it is not necessary to decide whether the President can rely on his powers under section 235(8) even though he did not purport to act in terms of such powers when he made the Proclamations. For the purposes of this judgment, I will assume that this can be done.

[69] The remaining two questions depend upon the proper construction of section 235 of the Constitution. This section makes provision for the transfer of executive authority from the old order to the new order. This purpose, and the circumstances in which it was known that the transfer would have to take place, provide a contextual background relevant to the construction of the section.

[70] Under the old order, executive authority in what is presently the national territory, was regulated by laws of different legal and constitutional orders. There was the legislation of the Republic of South Africa which was in force in approximately 87% of the national territory. In the remainder of the national territory there was the legislation of the six self-governing territories, and also the legislation of Transkei, Bophuthatswana, Venda and Ciskei (the TBVC states) which according to South African law were sovereign independent states.

[71] In the Republic of South Africa executive authority was vested in the State President under section 19 of the 1983 Constitution. It was exercised by the State President himself and by Ministers, Deputy-Ministers, Provincial Administrators, and members of the Executive

Councils of the provinces. These were all functionaries of the national government and all held their positions at the discretion of the State President.

[72] In the self-governing territories executive authority was exercised by Chief Ministers and Ministers. In the TBVC states only Bophuthatswana functioned under a Constitutional form of government at the time the Constitution was adopted. The other three states were ruled by military regimes who made laws by decree. Constitutional government collapsed in Bophuthatswana before the elections took place and the military regime in Ciskei abandoned its control of that territory. The vacuum in these two territories was filled by South African administrators, who also made law by decree.

[73] The laws in force in different parts of the national territory identified the political functionaries who had responsibility for the implementation of these laws. Under the new constitutional order they would cease to have power, and provision had to be made in the Constitution for the manner in which this responsibility would be transferred from the old order to the new order. The framework of the scheme according to which this object was to be achieved was as follows:

i) All laws in force in any part of the national territory would continue in force subject to repeal or amendment by a competent authority [Section 229].

ii) The political functionaries exercising executive power in different parts of the national territory would retain that power until a President had been elected under

the new Constitution and had assumed office [Section 235 (1) and (5)].

iii) Subject to certain conditions not relevant to this case the executive power referred to in (ii) was to be exercised in accordance with the laws previously in existence under the constitutional arrangements previously in force [Section 235(3)].

iv) On the assumption of office by the President elected under the new Constitution executive power would pass from the old functionaries [whose power came to an end at that moment], to the President and Premiers under the new Constitution [Sections 75, 144 and 235(5)].

[74] There were a number of problems which had to be addressed in order to carry out this scheme:

i) The new Constitution allocates legislative power to parliament and to the provincial legislatures. In terms of section 37 parliament is given legislative competence over the whole of the national territory and in respect of all matters. The legislative competence of the provincial legislatures, dealt with in section 126 of the Constitution, is restricted. They have concurrent competence with parliament in respect of the matters referred to in schedule 6 to the Constitution and their territorial competence is limited to the provincial territory. Section 126(3) makes provision for the way in which any conflict that might arise between national laws and provincial laws in this field of concurrent powers is to be

resolved. If there should be such conflict, national laws are given precedence in so far as they meet criteria specified in sections 126(3)(a) to (e) and provincial laws are given precedence in respect of other matters.

ii) The "old laws" had been designed for a different constitutional order. They did not fit the new order territorially, and they vested powers in functionaries who no longer held office and had no precise counterparts under the new constitutional order. They had also been drafted to deal with the powers and functions of legislative bodies which no longer existed and now had to be applied to a different constitutional order in which there were different legislative bodies with different powers and functions. Some of the "old laws" would have dealt with matters which would be within the exclusive competence of parliament, and some with matters which would be within the concurrent competence of the parliament and the provincial legislatures. This distinction could exist not only between different laws, but also within particular laws.

iii) Section 75 of the Constitution provides that:

> The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution.

The provinces are given executive competence by section 144(2)over:

> ...all mattes in respect of which such province has exercised its legislative competence, matters assigned to it by or under section 235 or any law, and matters delegated to it by or under any law.

iv) With the possible exception of the Transition Act with which I will deal later, none of the "old laws" vested legislative powers in the nine new provinces. On the other hand the matters dealt with by the "old laws" were within the legislative competence of Parliament which has competence in respect of all matters. Subject to an assignment or delegation of power to the provinces under an old law -- and this calls for consideration later when the terms of the Transition Act are dealt with -- the source of executive power that the provinces have in respect of the "old laws" is the assignment provisions of section 235. In the absence of such provisions executive power under the "old laws", not being provincial laws within the meaning of section 144 of the Constitution, would have vested in the President and would have been administered by functionaries appointed by him.

[75] The broad scheme under which these problems are dealt with under the Constitution is as follows

i) The old laws remain in force in the parts of the national territory in which they were previously in force until repealed or amended by a competent authority [S229].

ii) They are classified according to the criteria specified in schedule 6 and section 126(3) in order to determine whether the executive authority under such laws should be exercised by a national functionary or a provincial functionary. This is a practical way of arranging for the transfer of executive functions under the old

laws to appropriate functionaries under the new constitutional order. It also permits provinces to establish executive government in the fields of their legislative competence without having first to enact laws for that purpose.

[76] The details according to which the scheme is to be implemented are set out in sections 235(6),(8) and (9). These sub-sections do not seek to classify the laws as laws of Parliament or laws of the provinces. They remain "old laws" in force in parts of the national territory which correspond neither with the national territory nor the provincial territories. What the sub-sections deal with is "the power to exercise executive authority" in terms of such laws.

[77] What sections 235(6), (8) and (9) seek to accomplish is the allocation of the power to exercise executive authority from the President, in whom such authority vested when he assumed office (section 235 (5)(a)) to the Premiers of the province in whom the executive authority of the provinces is vested under the Constitution. It does this by setting criteria for the identification of the "competent authorities" who for this purpose are defined as follows in sub-section 6(c):

> (i) in relation to a law of which the administration is allocated to the national government, an authority designated by the President: and
>
> (ii) in relation to a law of which the administration is allocated to the government of a province, an authority designated by the Premier of the province.

In this way recognition is given to the constitutional status of the President and the Premiers in whom the executive authority of the Republic and the provinces is vested.

[78] Section 235(6) specifies the criteria according to which the allocations are to be made. The two criteria which are of importance in the present case are:

i) Is the matter one which falls within the functional areas specified in schedule 6.

ii) Is the matter one which is referred to in paragraphs (a) to (e) of section 126.

[79] The allocation is to be made to a competent authority within the provinces if

i) It is a matter which falls within the functional areas specified in schedule 6; and

ii) it is not a matter referred to in paragraphs (a) to (e) of section 126.

[80] Sub-sections (8)(a) and (9) cater for a situation in which a province does not have the administrative capacity to carry out the assignment. The Premier of a province can only require the assignment to be made if the administrative capacity to do so exists within the province. If that capacity is not established within fourteen days after the election of the Premier of the province concerned the matter is to be dealt with by "a special administrator or other appropriate authority within the national government" until the provincial government is able to assume that responsibility.

[81] The laws governing the matters to be assigned had not been designed for the new constitutional order, but provision is made in section 235(8)(b) for the President to amend or adapt the laws in order to deal with this problem.

[82] This then is the framework provided by section 235 for dealing with the problem of transferring the power to exercise executive authority from the old order to the new order. In respect of some laws it would have been reasonably clear whether the matter was one which was to go to an authority within the province, or to stay under the control of the national government. But there would have been other instances - and the Transition Act is one - in which there is some difficulty in determining how to deal with the matter. In view of the complexity of the process this is not surprising.

[83] As far as the Transition Act is concerned the difficulties are these. The first is to determine whether or not the Transition Act is a law which falls to be dealt with in terms of section 235(6) of the Constitution, which identifies the laws which are subject to assignment by the President. If it is, the next question is whether it is a law "with regard to matters which fall within the functional areas specified in schedule 6". If it is not, then it did not fall within the powers of assignment given to the President under section 235(8)(a). If it is, then the last question that arises is whether it is a law which deals with "matters referred to in paragraphs (a) to (e) of section 126(3)". Such laws, too, are not subject to assignment under section 235(8)(a).

[84] The overall purpose to be achieved through the application of section 235 is a systematic allocation of the "power to exercise executive authority" in terms of each of the "old laws", to an authority within the national government or authorities within the provincial governments. Sub-section 8(b)(ii) indicates that this authority may be allocated to

provincial functionaries in respect of parts of a law and in respect of other parts of the same law, to national functionaries. To achieve this purpose the President is given the power in sub-section 8(b) to amend or adapt the laws to the extent that he considers it necessary "for the efficient carrying out of the assignment". The purpose of this power is clearly to provide a mechanism whereby a fit can be achieved between the old laws and the new order.

[85] The Transition Act was designed for the new order. It is referred to in section 245 of the Constitution as the law which will regulate the holding of the first elections for local government structures, and its provisions deal with the process to be followed from the time of its enactment (January 1994) until the elections which would only take place after the Constitution came into force. It identifies the functionaries that are to have administrative powers during the pre-constitutional phase and those who are to have such powers after the Constitution has come into force. In this respect it is materially different to other "old laws". What has to be decided is whether this takes it outside the scope of the allocation process that is to take place under section 235.

[86] Section 235(6) makes provision for the allocation scheme described in that section to apply to "laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force". No exceptions or qualifications are made in respect of laws falling within this description. The Transition Act was a law which was in force in the whole of the Republic of South Africa, including the self-governing territories [section 2 of the

Transition Act as originally enacted], prior to the coming into force of the Constitution. It did not in terms apply to the TBVC states during this period; if it had purported to do so, then according to South African law then in force, it would have been an exercise in extra-territorial jurisdiction. During the resumed argument counsel for the Applicants and the Respondents were asked whether they were aware of any legislation in the TBVC states incorporating the Transition Act by reference. Neither counsel was in a position to answer this question. Counsel were asked to make enquiries as to whether or not this was the case. On the 15th September this Court was advised in writing by Mr Gauntlett that the Department of Provincial Affairs and Constitutional Development in the government of national unity had made enquiries and to the best of their knowledge there was no such legislation. The Respondents have not sought to contradict this statement. I am not aware of any such legislation and I have dealt with the matter on the basis that prior to the coming into force of the Constitution the Transition Act was in force in part only of what is now the national territory.

[87] Section 229 provides a constitutional foundation for the continuation of the "old laws" after the coming into force of the Constitution. It is applicable to "all laws ... in force in an area which formed part of the national territory..." This would include the Transition Act. In terms, however, the continuity given by section 229 is applicable only to the areas in which such laws were in force prior to the commencement of the Constitution. This means that in terms of section 229 the Transition Act is given post-constitutional validity only in that part of the national territory which was the old Republic of South Africa.

[88] Reverting to section 235(6), the Transition Act is a law referred to in the preamble to that sub-section. It was in force prior to the commencement of the Constitution in "*any area which forms part of the national territory*" and it continued to be in force "*in terms of section 229*". The Transition Act therefore meets the two requirements specified in sub-section (6) for bringing laws within its purview. It therefore meets the qualification for assignment in terms of section 235(8).

[89] How then is the allocation to be made? Sections 235(6) deals with the power to exercise executive authority and it does so in the context of the administration of laws. The emphasis on administration of laws is repeated in sub-section (8), which also specifies as a pre-condition for any assignment to a provincial functionary, the existence of an administrative capacity within the province concerned to carry out the assignment. Public administration in the transition is dealt with in section 236. What section 235 is concerned with is the capacity of provinces to establish departments of provincial government under political functionaries answerable to the Premiers. Thus in sub-section 6(c) it is specified that the competent authorities must be functionaries designated by the Premiers. And it is to them that the power to exercise executive authority has to be assigned. They assume the political responsibility for the implementation of the laws within their provinces.

[90] The difficulty that exists in applying the criteria laid down by section 235(6) to the Transition Act, lies not only in the fact that the Act was designed to cater for the post-constitutional period, but also in the fact that section 235(6) is concerned with executive powers at the level of administration, and uses for this purpose, schedule 6 which deals

with legislative competence, and paragraphs (a) to (e) of section 126(3) which deal not with legislative competence, but with how conflicts between provincial legislation and national legislation in the realm of Schedule 6 functional areas are to be resolved.

[91] Accepting as I do that the Transition Act has to be dealt with in accordance with section 235(6), the two questions that are determinative of the allocation to be made must be addressed. First, is it a law which deals with a matter within a functional area referred to in Schedule 6. The emphasis is on functional area and not on legislative capacity. The answer to the question must be yes. The law deals with local government matters which are matters within the functional areas specified in Schedule 6.

[92] Secondly, does the law deal with matters referred to in sub-paragraphs (a) to (e) of section 126(3)? Only two of these paragraphs are relevant. They are sub-paragraphs (a) and (b).

[93] Sub-paragraph (a) refers to "a matter that cannot be regulated effectively by provincial legislation". There are such matters in the Transition Act. They are the matters dealt with by section 9(1) and section 12 of the Act which vest powers in the responsible Minister in the national government. But executive authority in respect of such matters was not assigned to provincial functionaries. The other matters dealt with in the Act could be regulated by provincial legislation. They deal with the implementation of the Act at provincial level. Under the Act in the form in which it was when it was enacted, and "continued" under section 229, the Administrator was the Executive Council of the province. It was given the power under section 10(1)(a) of the Act to make enactments

"not inconsistent with this Act with a view to the transitional regulation of any matter relating to local government". In terms of section 10(1)(b) this power included the power to amend or repeal any Act of Parliament or legislative assembly of any Self-governing Territory, and in terms of section 10(1)(c) the powers of the Administrator included the power to extend the application of such laws to local government bodies within the province and to adapt such laws for that purpose. It is not necessary to decide whether these powers are inconsistent with the Constitution or whether, because of the reference to the Transition Act in section 245, they enjoy a special status. What they demonstrate is that all the matters dealt with in the sections other than section 9(1) and 12 are to be implemented at provincial level by provincial functionaries with the power to make laws in respect of all such matters. The Act itself tells us that these matters can be regulated effectively by provincial legislation and administered by provincial functionaries and makes provision for that to be done. The fact that the provincial powers are derived from an Act of parliament and not the Constitution, does not alter the character of the matters which are made the subject of provincial legislation. If the Act is amended by a competent authority the matters could possibly be taken out of that category; but at the time the Constitution came into force that had not been done, and the matters remained matters which could be regulated effectively in terms of the Act by means of subordinate provincial legislation.

[94] Sub-paragraph (b) of section 126(3) refers to a matter "that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic." The sections of the Transition Act in respect of which

the power to exercise executive competence was assigned to provincial functionaries dealt with matters which, within the framework of the Act, did not have to be dealt with according to uniform standards. In fact, the Act makes it clear that the Administrators in the different provinces could make their own laws within the prescribed framework, and specifically empowered them to do so.

[95] We are not concerned in this case with the legislative power to amend the Transition Act; it can be assumed that only Parliament has that power. What we are concerned with is the functionaries to whom executive authority to administer the Act as drafted should be assigned. As long as the Act falls within the scope of section 235(6), and in my view it does, that power must be assigned in accordance with the provisions of that section.

[96] The assignments that were in fact made were to a functionary designated by the President as far as matters within section 9(1) and 12 were concerned and to functionaries designated by the Premiers as far as other matters were concerned. In my view this was consistent with the scheme laid down by sub-section (6). The administration of the particular matters assigned to the control of functionaries designated by the President were pre-eminently concerned with matters which belonged at national level. The administration of matters assigned to provincial functionaries were all matters which called for action to be taken at provincial level and for decisions in respect of such matters to be taken within the framework of the legislation by provincial functionaries. It was moreover consistent in broad terms with the provisions of the Act itself. The Act which had been drafted with an eye to the future required adaptation in minor respects only. It

had to be made applicable to the whole of South Africa, and this was done by Presidential proclamation in terms of section 235(8). The definition of Administrator was changed and became an authority designated by the Premier of a province, and this adaptation was also effected by Presidential proclamation. These amendments do not give rise to any conflict between section 235(8) and section 245. Section 245 refers to the Transition Act, but according to section 232(2)(a) that means the Act "as it exists from time to time after any amendment or replacement thereof by a competent authority." This would include amendments or adaptations properly made in terms of section 235(8).

[97] This detailed analysis of the relevant provisions of the Constitution and their application to the Transition Act is also relevant to the second question. Section 235(8) which empowers the President to amend Acts of Parliament must be construed in the context of the constitutional provision of which it forms part, and as giving the President no greater powers than are necessary for that purpose. *Cf., R v Secretary for Social Security, ex Parte Britnell* 1991 WLR 198 (HL). The analysis which has been made of the relevant provisions of the Constitution suggests that the power vested in the President in terms of section 235(8) was for the purpose of enabling him to amend or adapt laws to make them fit the new situation. Althought the President is given a subjective discretion in deciding what is or is not necessary, the discretion must be exercised for the purpose of "the efficient carrying out of the assignment". The purpose of the power was to enable the President to do what he considered necessary to achieve functional efficiency in the administration of the assigned laws. The legislation could be amended or adapted in so far as it was necessary for that purpose. That was the extent of the President's power. He

could not change the laws because he did not like them, or because he felt that they would be more likely with substantive amendments to achieve what *he* considered to be the objects of the legislation.

[98] In his affidavit filed in these proceedings the President states that he considered the amendments effected by the Proclamations as necessary for the efficient carrying out of the assignment of the administration of the Transition Act to competent authorities within the jurisdiction of the provinces. The "inefficiency" to which he refers was not a functional inefficiency arising out of the assignment that had been made; it was an inefficiency resulting from a weakness in the checks and balances prescribed by the Act, which enabled a Provincial Executive Council to avoid referring disputed issues of demarcation to the Special Electoral Court by the simple expedient of changing the composition of the Provincial Committee. This weakness was only discerned when the Committee of the Western Cape was reconstituted in the circumstances which have previously been described. The amendments made to the Act under the Proclamations were not necessary to make the Act fit the new Constitutional order. The inefficiency in the Act that they sought to address is not the sort of inefficiency contemplated by section 235(8). The changes which were made by the Proclamations were therefore outside the scope of the powers vested in the President by section 235(6) of the Act. In fact the President did not purport to act under section 235(8) when he made Proclamations R 58 and R 59. He acted under section 16A. If that section is invalid the powers conferred on the President under section 235(8) are not sufficiently wide to provide a source of power on which reliance can now be placed.

Declaration of Invalidity

[99] We have said previously that our role as Justices of this Court is not to "second guess" the executive or legislative branches of government or interfere with affairs that are properly their concern. We have also made it clear that we will not look at the Constitution narrowly. Our task is to give meaning to the Constitution and, where possible, to do so in ways which are consistent with its underlying purposes and are not detrimental to effective government. The issues raised in the present case are, however, of fundamental importance. They concern the powers of Parliament and how it is required to function under the Constitution. They concern also the validity of executive proclamations issued by the President which are intended to have the force of law. Constitutional control over such matters goes to the root of a democratic order. Adherence to the prescribed forms and procedures and insistence upon the executive not exceeding its powers are important safeguards in the Constitution. Section 16A was specifically authorised by Parliament and proclamations under that section were issued in consultation with and had the approval of the relevant committees of both houses of Parliament. The proclamations were tabled in Parliament and could have been invalidated by resolution, and no such resolution was passed. Yet, what was done, is inconsistent with what is required by the Constitution.

[100] Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it

was carried out. It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme. The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.

[101] Despite differences in their reasoning, the members of this Court are unanimous in their conclusion that, by virtue of their inconsistency with the Constitution, the provisions of section 16A of the Local Government Transition Act are invalid. The Court has further, by a majority of 9 to 2, come to the conclusion, though for different reasons, that Proclamations R 58 and R 59 of 1995, which were purportedly promulgated under the provisions of section 16A of the Transition Act, cannot be validated under the provisions of section 235 of the Constitution. In the result an order has to be made declaring that Section 16A of the Transition Act is inconsistent with the Constitution.

Sections 98(5) and 98(6) of the Constitution

[102] The conclusion that section 16A of the Transition Act is inconsistent with the Constitution has consequences which go far beyond the fact that the Proclamations will be invalidated. Although the other proclamations made under section 16A are not in issue in the present proceedings, this finding of invalidity cannot be ignored. The Proclamations depend on

section 16A for their validity. If section 16A is invalid, so are they. In practical terms this means that every step taken in preparation of the local government elections pursuant to those proclamations will be invalidated. Unless this can be rectified, the local government elections cannot proceed, as planned, on 1st November.[15]

[103] Sections 98 (5) and 98(6) of the Constitution provide:

> 98 (5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.
>
> 98 (6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof -
>
> a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
>
> b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.

[104] The implications of section 98(6) are that if section 16A is declared to be invalid all the proclamations issued under it and everything done pursuant to those proclamations will as a matter of constitutional law, be invalidated unless an order to the contrary is made by this Court.

[105] Section 98(6) entitles a court that declares a law to be invalid to direct that "anything" done or permitted in terms of such law shall not be invalidated. Taken literally this may

[15] We deal with this more fully in paragraph [110] below.

be wide enough to be applicable to Proclamations having the force of law, issued under a law declared to be invalid. In my view, however, there must at least be some doubt whether the section should be construed in this way. The section is capable of being construed more narrowly to refer only to acts performed, and not laws made, under an invalid law. But even if the word "anything" is given a wide meaning to encompass the giving of validity to legislation made under an invalid law, it will seldom, if ever, be appropriate to use this power to validate amendments made to Acts of Parliament. It is logically inconsistent to strike down the empowering legislation, and at the same time, to validate Proclamations made under it, which will have the result that the "things" validated -- laws which should be made only by Parliament -- will apply not only to the past, but to the future as well. This is a task for Parliament and not for the Court.

[106] Section 98 (5) permits this Court to put Parliament on terms to correct the defect in an invalid law within a prescribed time. If exercised, this power has the effect of making the declaration of invalidity subject to a resolutive condition. If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period, and the normal consequences attaching to such a declaration ensue. In the present case that would mean that Section 16A and everything done under it would be invalidated.

[107] The powers conferred on the Courts by sections 98(5) and (6) are necessary powers. When the Constitution came into force there were many old laws on the statute book which were inconsistent with the Constitution. If all of them were to have been struck down and

all action taken under them declared to be invalid there could have been a legislative vacuum and chaotic conditions. Sections 98 (5) and (6) enable the Court to regulate the impact of a declaration of invalidity and avoid such consequences. There may also be situations in which it is necessary for the Court to act to avoid or control the consequences of a declaration of invalidity of post-constitutional legislation where the result of invalidating everything done under such legislation is disproportional to the harm which would result from giving the legislation temporary validity. The need for the Courts to have such a power has been recognised in other countries. In Canada for instance where no provision is made specifically in the Constitution for such powers, the Courts have achieved this result by suspending an order invalidating a statute for sufficient time to allow Parliament to take remedial action. See, for example, *Reference re Language Rights under s 23 of Manitoba Act*, 1870 (1985) 19 DLR (4th) 1 at 21 *et seq.*; *R v Brydges* [1990] 46 CRR 236 at 258; *Schachter v Canada* 10 CRR (2d) 1 (1992) at 30.[16]

[108] Where this Court finds that laws enacted before the coming into force of the Constitution are inconsistent with the Constitution it will more readily exercise the special powers vested in it by sections 98 (5) and (6) than it will do in respect of laws passed after the coming into force of the Constitution. The former are an inheritance from the past. The latter are the actions of a legislature in a constitutional state and special circumstances must exist to justify a decision by the Court to give validity to such legislation. This

[16] For a discussion of the Canadian law, see, N Duclos and K Roach "Constitutional Remedies as Constitutional Hints." A Comment on *R v Schachter* " 36 (1991) *McGill LJ* 1-38; C Rogerson 'The Judicial Search for Appropriate Remedies under the Charter: The examples of overbreadth and vagueness in R Sharpe, *Charter Litigation* (1987: Butterworths) pp 233-306. See also, *Reform Party of Canada v Attorney General* (1993) 13 CRR (2d) 107 (Alb), which dealt with a provision in the Canada Elections Act. Moshansky J found the provision unconstitutional but suspended the declaration of invalidity for a period of 6 months.

distinction is specifically made in section 98(6) of the Constitution which assumes that things done under "old laws" which are declared to be inconsistent with the Constitution will ordinarily be validated, while things done under "new laws" which are declared to be inconsistent with the Constitution, will ordinarily be invalidated. The question then is whether special circumstances exist in the present case which would justify us in exercising our powers under sections 98(5) or 98(6).

[109] The arguments in this case were concluded a little more than six weeks before the local government elections are to be held. This judgment will be given approximately five weeks before the election date. The proclamations other than R 58 and R 59 which will be rendered invalid by the finding that section 16A is inconsistent with the Constitution make provision for matters concerned with the functioning of local government as well as matters connected with the holding of these elections. Proclamation R 54 validates all transitional councils established after the dates specified in sections 7 or 7A of the Transition Act and Proclamation R 65 establishes rural local government. The invalidation of these two proclamations could have serious adverse effects on local government. As far as the elections are concerned, a number of the Proclamations deal with important amendments to the Transition Act, covering matters such as the establishment of provincial and local government structures for elections administration and financing, addressing issues such as demarcation, polling and voter registration, devolution of power to local government coordinating committees [R 174 and R 35], voter and candidate eligibility [R 174 and R 35], dispute resolution [R 174], the establishment of, and the coordination of decision making between transitional councils and the

Administrator, which decisions would necessarily involve issues relating to elections [R 174], the establishment of forums to negotiate the creation of metropolitan/transitional councils, the legitimate authority of which *inter alia* concerning actions taken by such councils in regard to elections would be subject to challenge [R 174 and R 54] and the participation of "interest groups" in establishment of rural local government (rural and district councils), which participation on matters *inter alia* related to elections administration would also be subject to challenge [R 65]. If these proclamations are invalidated the legality of transitional structures and the arrangements made by them for services and other matters will be brought into question. It will, moreover, not be possible to hold the elections on the 1st November unless Parliament is convened as a matter of urgency to take action to validate the consequentially-invalidated Proclamations. We must take judicial cognisance of the fact that the local government elections are of national importance and that the establishment of democratic local governments is widely seen as being necessary for reconstruction and development to proceed at a grass roots level.

[110] An order which would in effect disrupt the functioning of transitional local government structures and prevent the elections from being held would not in my view be in the interests of good government. It could lead to increased tension in areas where the inhabitants are anxious to democratise their local structures and to considerable waste of expenditure bearing in mind the preparations that are already under way and the steps that have been taken to lay the groundwork for such elections. Action can no doubt be taken to ratify most of these matters, but the uncertainty that is likely to be generated in the interim by nullifying what has been done under the proclamations made in terms of sections

16A are factors that need to be taken into account in weighing up the decision to be taken by us under section 98.

[111] If an order is made in terms of Section 98(5) it would keep alive the provisions of Section 16A of the Transition Act and the Proclamations issued under it temporarily for the period allowed for the correction of the defect. If within the prescribed time the defect is corrected, or if the action taken under the defective law is validated, the transitional structures will be lawful, and elections can be held. Both the Applicants and the Respondents, through their counsel, informed us that they would prefer the elections to proceed. The Applicants' counsel said, however, that if the choice open to his clients was that the elections should go ahead or that Proclamations R 58 and R 59 should be invalidated, their choice would be to invalidate the Proclamations.

[112] Parliament is the only body which can validate the amendments to the Transition Act made in terms of proclamations issued under section 16A of the Act and the steps taken pursuant thereto. It must be given the opportunity to do so if that is considered to be necessary; it must also be given the opportunity to decide whether it wishes to take the steps necessary to permit the elections to proceed on the 1st November in those areas where they are scheduled to take place on that date. In my view Section 16A should be given continued validity for sufficient time to enable such decisions to be taken. The decisions must be taken before the election date, otherwise they could be influenced by the outcome of the elections. The prejudice to the Applicants consequent upon such an order being made is, by comparison, not substantial. No objection was taken by the Applicants to anything done

under Section 16A other than the making of Proclamations R 58 and R 59. Counsel for the Applicants made it clear that there was no objection to the validation of the other proclamations as long as this could be done without validating the Proclamations R 58 and R 59. This we cannot do in terms of section 98(5) of the Constitution. Proclamations R 58 and R 59 which are attacked seem to be relevant only to the elections in the Cape Metropolitan Area, which in any event have been postponed. If Parliament corrects the defect in the Transition Act and ratifies what has been done (including, if that be its decision, the validity of the Proclamations), the demarcation dispute which led to this litigation will be referred to the Special Electoral Court, which is the institution established for the purpose of resolving disputes of this nature. It can be assumed that that court will do its duty and that the outcome of any hearing before it, will be a just outcome. Weighing this limited potential prejudice as far as the Applicants are concerned against the much greater prejudice to local government generally, and the holding of elections in particular, which will result if the Proclamations are declared invalid with immediate effect, it seems clear that "justice and good government" requires that Parliament be given the opportunity if it wishes to do so, to remedy the situation. It will then be for Parliament to decide what, if any, action should be taken in the circumstances brought about by the declaration that Section 16A is inconsistent with the Constitution. This is preeminently a decision for Parliament and not for the Court.

[113] I have no doubt therefore that this is a case in which the Court should exercise its powers under section 98(5). It is important to make clear that when a court makes an order in terms of the proviso to section 98(5), Parliament's powers to legislate in order to address

the consequences of a declaration of invalidity are not limited in any way. Parliament may choose simply to correct the defect in the invalidated law within the period specified or, on the other hand, it may choose not to correct the defect, but take any other appropriate legislative steps to address the effect of the declaration of invalidity. In the event of the latter, the declaration of invalidity will come into effect on the specified date. Section 98(6) provides that, in the case of a law or provision enacted after the 27th April 1994, such as section 16A of the Transition Act, the effect of such declaration of invalidity will be to invalidate retrospectively everything done in terms of that law.

[114] A majority of this Court has held that the Transition Act was not assignable under section 235(8) of the Constitution. No relief was claimed by the Applicants in this regard and no order is made in regard thereto. The implications of this finding are, however, far reaching and impugn both the validity of Proclamation R 129 of 1994 and the actions taken pursuant thereto. It brings into question the validity of every step taken since July 1994 in the implementation of local government. This also calls for urgent consideration by Parliament.

[115] The matter is clearly one of great urgency and Parliament must decide without delay whether or not it wants an opportunity to correct the defect. Unfortunately, Parliament is not presently in session, but it can be called together for this purpose. In Canada, a Court allowed Parliament six months to correct a defect in electoral legislation.[17] That luxury cannot be allowed to Parliament in the present case. If the defect is to be corrected this

[17] *Reform Party of Canada v Attorney General* (1993) 13 CRR (2d) 107 (Alb)(in which elections act provisions found unconstitutional, but declaration of invalidity was suspended for 6 months).

must happen before the elections. A period between the date of this judgment and the 25th October should provide sufficient time to enable Parliament to take action if it chooses to do so. If a decision is taken to postpone the elections it will be open to the Respondents to approach this Court, on notice to the Applicants, to ask for the time within which the defect must be corrected to be extended for a period which will terminate within a reasonable time prior to the postponed election date.

Contempt

[116] One matter remains to be dealt with. On the morning of the 8th September a report appeared in *Die Burger* of a speech made the previous evening by the Third Applicant. According to the report the speech was delivered in the Sarepta Community Hall in front of an enthusiastic crowd of the Third Applicant's political supporters who had come from far afield to hear him. According to the report the following comment was made by Third Applicant in the course of his speech:

> Die Wes-Kaapse regering het 'n uitstekende kans om die saak in die Konstitusionele Hof te wen as die uitspraak nie 'n politieke een gaan wees nie, het die Wes-Kaapse LUR vir Plaaslike Bestuur, mnr Peter Marais, gisteraand gesê.

[117] On the day the report appeared in *Die Burger* the Respondents' attorney wrote to the Third Applicant's attorney referring to the passage from his speech which had been quoted in *Die Burger* and saying:

> In die lig van die implikasies wat so 'n stelling dra verneem ek namens die Respondente voor 12:00 vandag of u kliënt die berig gaan repudieer al dan nie, en indien wel of hy dit in die vorm van 'n persberig sal doen.

[118] On the same day the Third Applicant issued a press statement which read as follows:

> 'n Berig in "Die Burger" van vandag het die indruk geskep dat ek op 'n openbare vergadering in Kuilsrivier sou beweer het dat as die Wes-Kaapse Regering sy saak in die Konstitutsionele Hof sou verloor, dit 'n "politieke uitspraak" sou wees.
>
> Ek ontken uitdruklik dat dit my bedoeling was om die Konstitusionele Hof te minag of te insinueer dat party politieke oorwegings 'n invloed sal hê op die Hof se beslissing. Ek trek die stelling onvoorwaardelik terug insoverre dit so opgeneem kan word.
>
> Die posisie is die volgende: selfs al sou die Hof bevind dat die twee omstrede proklamasies ongeldig is, kan die Hof kragtens die Grondwet die proklamasies vir 'n bepaalde tyd in stand hou as die Hof dit in belang van "goeie staatsbestuur" ag. Myns insiens sou so 'n besluit dus op praktiese staatkundige/politieke gronde gebaseer moet wees. Ek het in hierdie konteks na hierdie moontlikheid verwys in die aangehaalde deel van my toespraak.

[119] Counsel for the Respondents raised this matter in their written argument which was submitted to the Court, saying "the suggestion of bias and judicial dishonesty on the part of the Court if it finds for the Respondents is plain." They drew attention in their written argument to the fact that there was no suggestion in the letter of the Third Applicant's attorneys written in response to the complaint made by the Respondents' attorneys that the report in *Die Burger* was inaccurate. They also pointed out that the Third Applicant's "endeavour to explain what he intended is neither a repudiation nor an unequivocable retraction and apology." They submitted that the reported statement constituted a serious contempt of Court, whether on the basis of a contempt tending to prejudice the outcome of a case or one scandalising the Court. In this regard they referred to Joubert (ed) *Law of South Africa*, Vol. 6 para. 200; Hunt, *S.A. Criminal Law and Procedure* Vol. II (2nd ed 1982) 199-204; and *Attorney General v Times Newspapers Ltd.* [1973] 3 AII ER 54(HL) at 60 b *et seq.*

[120] During the course of the resumed argument Mr Gauntlett specifically asked us to deal with this issue, saying that the statement attributed to the Third Applicant, which had not been denied by him, was highly prejudicial to the Respondents. It was calculated on the one hand to create the impression in the minds of the public that if the Applicants lost the case it would be the result of a political decision and on the other hand to put subtle pressure on the Court to avoid such an outcome. It goes without saying that we have not been influenced in any way by the press report, but the damage which can be done by such statements is obvious and to be deplored.

[121] Mr Potgieter made it clear that he did not dispute the sentiments expressed by Mr Gauntlett. He said that his client had not spoke from a prepared text and had not intended to impute improper motives to the Court or to bring it into contempt. If what had been said created such an implication, his instructions were to apologise to us.

[122] In my view an ordinary person attending a political gathering such as that described in *Die Burger*, and the ordinary reader of its report, would have understood the statement attributed to the Third Applicant in the manner suggested by the Respondents. It undermines not only this Court, but constitutionalism itself, of which this Court is a guardian. Having regard to the high political office held by the Third Applicant, the consequences of a statement impugning the integrity of this Court might have been particularly harmful. All citizens are free to attend Court, to listen to proceedings, to comment on them and on the judgments given and to criticize such judgments, even

vigorously, where it is appropriate to do so, but it is irresponsible to make unfounded statements which impugn the integrity of the Court. I leave the matter there.

Costs

[123] The Applicants have succeeded in having Section 16A of the Transition Act declared inconsistent with the Constitution. Although this relief was only sought at a late stage of the proceedings there is no reason to believe that the Respondents' opposition would have fallen away if that relief had been sought earlier. The Applicants have tendered to the Respondents the wasted costs occasioned by the postponement on the 16th August. They are, however, entitled to the other costs that have been incurred. The case is clearly one in which the briefing of two counsel was warranted.

The Order

[124] The following order is made

1. The Application for direct access in terms of rule 17 is granted.
2. The Application dated 30 August 1995 to amend the notice of motion is granted.
3. Subject to the provisions of paragraph 4 of this order section 16A of the Local Government Transition Act No. 209 of 1993 is

declared to be invalid by reason of its inconsistency with the Constitution, and accordingly all Proclamations made under it, including Proclamations R 58 and R 59, are also invalid.

4. In terms of the proviso to section 98(5) of the Constitution --

   (a) Parliament is required to correct the defect in Section 16A of the Local Government Transition Act, 1994 by not later than 25 October 1995; and

   (b) The said section and the Proclamations made under it shall remain in force pending the correction of the defect or the expiry of the period specified herein.

5. If all the local government elections scheduled to take place on 1 November 1995 are postponed, the Respondents may apply to this Court, on notice to the Applicants, for an order that the time within which the defect in section 16A of the Local Government Transition Act, 1994 is to be corrected, be extended to a date prior to the new election date.

6. (a) The Respondents are directed to make payment, jointly and severally, to the Applicants of the costs of this application, save for the costs referred to in sub-paragraph (b) hereof.

   (b) The Applicants are directed to make payment, jointly and severally, to the Respondents of all wasted costs occasioned by the postponement of the hearing from the 16th August to the 30th August 1995.

(c) The costs referred to in sub-paragraphs (a) and (b) are to include the costs of two Counsel.

[125] **MAHOMED DP.** I have had the advantage of reading the judgment of Chaskalson P and I am in agreement with the orders which he proposes. Generally, I am in agreement with the reasons he gives for those orders but I think it is advisable for me to set out briefly my own reasons for concluding that section 16A of the Transition Act is invalid and for concluding that Proclamations R58 and R59 which the Applicants have attacked in these proceedings cannot be saved by reliance on the provisions of section 235(8) of the Constitution.

Constitutionality of section 16A

[126] The constitutional attack on section 16A is basically premised on the proposition that it constitutes an impermissible delegation of legislative powers by Parliament to the President.

[127] The authority of Parliament to make laws is contained in section 37 of the Constitution which provides that:

> "The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution."

[128] Conceptually, it is possible to adopt different approaches to the application of this section. The first approach is to say that because legislative authority vests in Parliament, it, and it alone, must make the laws of the country, "in accordance with the Constitution" and that

it therefore cannot delegate that function to another authority, however eminent that authority may be. The second approach would contend that precisely because Parliament is the ultimate legislative authority with the power to make laws for the Republic it must have the power, in appropriate circumstances, to authorize other organs to exercise law-making powers if it considers such delegation to be necessary for the proper discharge of its own functions. The law providing for such delegation, it is emphasised, is also a law which it makes pursuant to its law-making power.

[129] Both these strains find expression in the jurisprudence dealing with this problem. A consideration of that jurisprudence suggests, however, that there is no inherently irreconcilable conflict between these strains.

[130] The American authorities emphasize the constitutional doctrine of a separation of powers between the Legislature, the Executive and the Judiciary and have repeatedly held that federal law-making power is vested in Congress alone and cannot for that reason be delegated to the Executive.[1] The federal courts in the United States have, however, appreciated that a national legislature cannot effectively make the vast network of laws necessary to regulate life and living in a complex modern civilization and for that reason have consistently upheld the constitutionality of delegations to the Executive or the Administration, subject to the proviso that what is delegated is the power to give effect to the principles and policies which are contained in the statute itself.[2] That distinction has

---

[1] *Panama Refining Co. v. Ryan,* 293 U.S. 388 at 421 (1935); *A.L.A. Schechter Poultry Corp. et al. v. United States*, 295 U.S. 495 (1935) at 529.

[2] *Panama Refining Co.* case *(supra)* at 415 and 418; *A.L.A. Schechter Poultry Corp.* case (*supra)* at 530.

been expressed as follows:-

> "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[3]

[131] The rationale for the American jurisprudence in respect of this problem is based not only on the wording of the relevant provisions of the United States Constitution but also upon two very important concerns: the first concern is that since the Constitution reposes confidence in the political judgment of those elected to Congress and in their capacity to make policies pursuant to that judgment, it would be constitutionally subversive to allow such political judgments and such policies effectively to be made by those not identified for that purpose in the Constitution[4]; the second concern is that if the law-making function vested in Congress is delegated to members of the Executive or the Administration in a manner which allows the delegatee to make political assessments and assessments of policy, the exercise of the delegated power would not be subject to adequate judicial checks; discretions and functions exercised on political grounds cannot easily be the subject of judicial review[5].

[132] Although both these concerns have been specially articulated in American jurisprudence they are of manifest relevance in all countries where the courts have to grapple with the

---

[3] *Hampton & Co. v. United States*, 276 U.S. 394 at 407 (1928) quoting from *Wilmington and Zanesville Railroad Co. v. Commissioners*,1 Ohio, St. 77 (1852).

[4] *United States v. Robel*, 389 U.S. 258 at 276 (1967).

[5] *Industrial Union Department AFL-CI0 v. American Petroleum Institute*, 448 U.S. 607 (1980).

permissible parameters of delegation by a supreme law-making body to any part of the Executive.

[133] The American approach has found substantial resonance in the Irish Courts. The test expressed by O'Higgins CJ[6] was

> "Whether what is challenged as an unauthorized delegation of Parliamentary power is more than the mere giving (of) effect to principles and policies which are contained in the statute itself. If it be, then it is not authorized; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution."

[134] The courts in the old commonwealth countries have been more benevolent in tolerating delegation of law-making functions from Parliament to the Executive. This development was historically influenced by the English doctrine of the absolute sovereignty of Parliament which carried with it the necessary consequence that Parliament could in the exercise of that sovereignty enact any law delegating law-making power to the King or his Ministers. It was also influenced by the English system of "responsible government" which permitted a greater coalescence between the legislature and the executive than was permitted by the Constitution of the United States.[7] The influence of those doctrines has impacted on much of the jurisprudence of countries such as Canada, Australia and India. But even in those countries the courts were not prepared to hold that the power of delegation was unrestrained. The Canadian Supreme Court has held that Parliament's power of delegation was not absolute and that an "abdication", "abandonment" or

---

[6] *Cityview Press Limited and another v An Chomhiarle Oiliuna and others* [1980] IR 381 at 395.

[7] *Hogg*: Constitutional Law of Canada (3d. ed. 1992) paragraph 14.2; *Shannon v Lower Mainland Dairy Products Board* (1938) A.C. 708.

"surrender" of Parliament's legislative authority to the Executive would be invalid[8]. Similarly, in *Rajnarainsingh's* case[9], decided in the Supreme Court of India, Bose J held that it was an essential characteristic of legislative power that it laid down a policy or standard and that such an essential feature could not be delegated; moreover that the modifications or restrictions which may be permitted are those which do not involve a change in such essential policy or standard and that the power to repeal a law is essentially legislative and could not be delegated.[10]

[135] In Australia the leading case is that of *The Victorian Stevedoring & General Contracting Company (Pty) Ltd v Dignan*.[11] In that case a certain statute had purported to confer power upon the Governor-General to make regulations not inconsistent with that statute "with respect to the employment of transport workers and, in particular, for regulating the engagement, service, and discharge of such workers, and the licensing of persons engaged as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers". An attack on the statute on the ground that it was an impermissible delegation of legislative powers failed, but it was made clear by the Australian High Court that it was not competent for Parliament to "abdicate its powers of legislation". At page 121, Evatt J stated:

> "This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation

---

[8] *Re Gray* (1918) 57 S.C.R. 150 at 157, 165, 171, 176.

[9] *Rajnarainsingh v Chairman Patna Administration Committee, Patna* (1955) 1 S.C.R. 290.

[10] *Rajnarainsingh's* case (*supra*) at 298-9, referring to the issues dealt with in the case of *In re the Delhi Laws Act* (1951) S.C.R. 747.

[11] 46 C.L.R. 73.

of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned."

At page 120 of the report the learned Judge deals with some of the considerations relevant for the determination of the issue.

"The following matters would appear to be material in examining the question of the validity of an Act of the Parliament of the Commonwealth Parliament which purports to give power to the Executive or some other agency to make regulations or by-laws:-

1. The fact that the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament, may be a circumstance which assists the validity of the legislation. The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be a law with respect to any of the subject matters enumerated in secs. 51 and 52 of the Constitution.
2. The scope and extent of the power of regulation-making conferred will, of course, be very important circumstances. The greater the extent of law-making power conferred, the less likely is it that the enactment will be a law with respect to any subject matter assigned to the Commonwealth Parliament.
3. The fact that Parliament can repeal or amend legislation conferring legislative power will not be a relevant matter because parliamentary power of repeal or amendment applies equally to all enactments. But all other restrictions placed by Parliament upon the exercise of power by the subordinate law-making authority will be important.
4. The circumstances existing at the time when the law conferring power is passed or is intended to operate, may be very relevant upon the question of validity. A law conferring power to regulate, in time of war or national emergency or under circumstances where it is essential to retain in some authority a continuous power of alteration or amendment of regulations, although clearly a law with respect to legislative power, might also be truly described as a law with respect to the subject matter of naval and military defence, or external affairs or another subject matter.
5. The fact that a Commonwealth statute confers power to make regulations merely for the purpose of carrying out a scheme contained in the statute itself, will not prevent the section conferring power to make regulations from being a law with respect to legislative power. But ordinarily it will also retain the character of a law with respect to the subject matter dealt with in the statute.
6. As is assumed in 5, *supra*, a Commonwealth enactment is valid if it is a law with respect to a granted subject matter, although it is also a law with respect to the exercise of legislative power.
7. The fact that the regulations made by the subordinate authority are themselves laws with respect to a subject matter enumerated in secs. 51 and 52, does not conclude the question whether the statute or enactment of the Commonwealth

> Parliament conferring power is valid. A regulation will not bind as a Commonwealth law unless both it and the statute conferring power to regulate are laws with respect to a subject matter enumerated in sec. 51 or 52. As a rule, no doubt, the regulation will answer the required description, if the statute conferring power to regulate is valid, and the regulation is not inconsistent with such statute."

[136] The competence of a democratic Parliament to delegate its law-making function cannot be determined in the abstract. It depends *inter-alia* on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally.[12] The issue as to whether section 16A constitutes a permissible delegation of the legislative powers must be examined having regard to such considerations. There are, in the present case, various considerations which are relevant both in expanding and in limiting the parameters of the powers which Parliament can legitimately delegate to the President.

1. The purported delegation is in respect of a very special kind of subject-matter. It is the subject-matter of the transition to local democratic government contained in the Transition Act. It is not a delegation of powers in respect of a very wide subject-matter such as "good government" or even "efficient local government".

[12] Cf *Baxter,* Administrative Law (Juta & Co Ltd, 1984) pg 435.

2. The authority to which the delegation is made is not some impersonal body of faceless persons whose identity and qualifications are not easily ascertainable by Parliament. It is to the President, himself.

3. The delegation is made at a special time in our constitutional evolution when the first democratic local government elections in the country are to be held and an effective transition is to be made on a local level from apartheid to democracy.

4. The circumstances which prevailed at the time when the delegation was made and when it was expected to be exercised are exceptional. There has been no previous precedent in the country for local elections on such a level and for infrastructures suitable and effective to facilitate their objectives. (This kind of factor influenced the enactment of other transition measures (albeit prior to the commencement of the present constitutional regime) such as the Transitional Executive Council Act 151 of 1993 which effectively delegated substantial legislative and executive power to an unelected body to facilitate the transition to democracy.)

5. Practical problems were anticipated pertaining to the administration and execution of the local election process and there might have been legitimate grounds for believing that some of the mechanisms structured by the Transition Act would have to be amended or adapted to accommodate

such problems.

6. Parliament itself might not have been in session when one or more of these problems might have required a practical response.

7. The President had no authority to make any proclamation under section 16A unless it "was approved by the select committees of the National Assembly and the Senate responsible for constitutional affairs."

8. Parliament had to be informed of such a proclamation within 14 days of its publication.

9. The Proclamation could be invalidated by a Parliamentary resolution of disapproval.

10. The principle that Executive proclamations may amend a Parliamentary law was accepted in section 235 of the Constitution itself.

[137] All the aforegoing considerations would appear to favour the legitimacy of conferring the powers on the President which section 16A purports to do. But they have to be balanced against other considerations which militate against that inference.

1. Section 16A does not purport to limit the Presidential powers of

amendment to those mechanisms which can legitimately be said to be of a nature which might require *ad hoc* responses while Parliament is not in session. In its terms the section purports to give to the President the power to change even the basic structures in the Transition Act and even at a time when Parliament is in session.

2. Theoretically the section puts the President into a position not only to change structures but even to change the basic policy decisions which Parliament itself had made in regard to the conduct of local elections.

3. The President is not equipped with any directives or decisional criteria within which he or she is required to operate before amending any part of the Act. The presence of such decisional criteria might have been very important in ensuring that the President does not change the basic policy of the Act or the fundamental structures Parliament identified to give effect to that policy.

4. The robust terms of section 16A carry the inherent danger that a President could theoretically make a local government transition Act wholly different in principle, in quality and in structure from the Transition Act which Parliament itself had made.

5. The wide terms of section 16A might make it possible for the President to make amendments to the Transition Act of a nature which Parliament itself could not have done without complying with the prescribed forms and procedures which are set out in sections 59, 60 and 61 of the Act.

6. The jurisprudential philosophy which informs and underpins the Constitution is based not on the doctrine of parliamentary supremacy but on the doctrine of constitutional supremacy. The Constitution has expressly sought to allocate different functions to Parliament and to the President. The law-making function is entrusted to the former; the executive function to the latter. Although the President is elected by

Parliament and the members of his Cabinet are members of Parliament, their functions remain constitutionally distinct.

Parliamentary laws which impact on the allocation of these functions carry the inherent danger of subverting the constitutional objective of ensuring that the legislative authority does not effectively surrender its true function to the Executive. Such laws must therefore be approached with great caution in order to examine their justification in the special circumstances of a particular case.

[138] These are indeed formidable considerations against the purported delegation in section

16A. In addition thereto, it has been suggested that there were two decisive legal arguments against the constitutionality of section 16A.

[139] The first legal argument advanced was that a delegation of legislative powers which permitted an amendment to another statute might in certain circumstances be permissible but, that it is constitutionally incompetent for Parliament to delegate to a functionary the power to amend the very Act under which he is given his powers of delegation. I am unable to agree with this argument in that form. There is no logical reason why a distinction should be made between a delegated power to amend a section of the law which is delegated to a delegatee and a delegated power to amend some section of some other law. There is however a logical and relevant distinction between the power to amend the section of the Act which gives to the President his power under the Act and other sections of the same Act. The former is the very source of his authority - his own domestic Constitution; he cannot constitutionally amend it. The latter is not open to that objection but may nevertheless be unconstitutional on the more general ground that it constitutes an impermissibly wide delegation of legislative authority.

[140] The second legal objection is that it is *per se* unconstitutional to authorize the President to make amendments which Parliament itself would not have been entitled to make without following the forms and procedures prescribed by sections 59, 60 and 61 of the Constitution. It is contended that for this reason it is really irrelevant whether or not the balance of the factors in favour or against the legitimacy of delegating legislative powers indeed favours the conclusion that such delegation should be upheld in a particular case.

I am unable to agree with so rigid an approach to the problem. Much would depend on the subject-matter of the delegation and the relevant circumstances which might be prevailing at the time. The degree to which the balance to which I have referred favours the necessity for such delegation is also relevant. Classically, in a situation such as war or national emergency there may be a necessary implication that the Executive can exercise such delegated powers notwithstanding the forms and procedures prescribed by sections 59, 60 and 61. But this is not because wars and national emergencies constitute, by themselves, legal exceptions to the general policy against the legitimacy of legislative delegation. They are simply examples of situations which might support a more general jurisprudential approach possibly permitting such delegation where the subject-matter of the delegation, the applicable circumstances pertaining at the time, and the degree to which the balance of the relevant factors to which I have referred, favours the legitimacy of such delegation. It is not necessary to decide on the constitutional validity of such an approach and its parameters in the present case.

[141] Returning therefore to the considerations relevant to the determination of the constitutionality of section 16A, there is arguably a case that can be made for the delegation of special legislative powers to the President to make amendments to the Transition Act in the special circumstances of our present constitutional evolution. My real difficulty is that on any approach, the section goes too far and effectively constitutes an abdication of Parliament's legislative function in terms of section 37 of the Constitution, leaving the President absolutely free to change the entire structure and policy of the Act in his or her absolute discretion as long as the approval of the relevant select committees is

obtained. Nothing in the jurisprudence of the United States or the more benevolent jurisprudence of parts of the commonwealth or the special terms of our Constitution permits so robust a devolution of legislative power.

[142] I am therefore compelled to the conclusion that section 16A in its present form is unconstitutional. This does not mean, however, that any Act of Parliament which purports to delegate to the President the power to make amendments to the Transition Act would always be unconstitutional in the special circumstances pertaining to the conduct of local government elections in our present constitutional history. I leave that issue open. Much might depend on whether the power conferred is limited to what is reasonably necessary and expedient for the efficient conduct and execution of local government in the country and on whether there are suitable directions and controls to ensure that Parliament was not effectively abdicating its law-making function in this area.

Section 235(8)

[143] Chaskalson P is clearly correct in his conclusion that Proclamations R58 and R59 cannot properly be authorized by section 235(8) of the Constitution but, in my respectful view, he is incorrect in concluding, as he does, that the power vesting in the President, in terms of that section, includes the power to assign and amend the Transition Act. My reasons for that view are substantially the reasons which Kriegler J has articulated in his judgment and in the circumstances of the present case I do not find it necessary to deal with them in any greater detail. I would, however, mention one additional problem in this regard arising

from the reliance on section 245 by Kriegler J in his judgment. It could be contended that that section must be read together with section 232(2)(a) of the Constitution which provides that any reference in the Constitution to any particular law shall be construed as a reference to that law as it exists from time to time after any amendment or replacement thereof by a competent authority. It was suggested that the effect of section 232(2)(a) was therefore to allow local government to be restructured in terms of the amendments which were made to the Transition Act by Parliament enacting section 16A and by the President making amendments pursuant thereto. If Parliament had itself made the amendments which restructured local government there might have been some substance in this argument, but it did not. It simply enacted a section authorizing the President to do so. That section was section 16A. It is a constitutionally invalid section. The amendments made by the President were therefore not amendments made by "a competent authority" within the meaning of that phrase in section 232(2)(a). Until elections have been held in terms of the Transition Act, local government must in terms of section 245, therefore be restructured in accordance with the Transition Act before its purported amendment by the President.

[144] Because I have concluded that the Transition Act is not an assignable law in terms of section 235(8), it is strictly unnecessary for me to say anything further about the other arguments upon which Chaskalson P relies for his inference that Proclamations R58 and R59 are not authorized by section 235(8). I am nevertheless of the view that his interpretation of the permissible parameters of Presidential authority to act in terms of section 235(8) (if that section was, in fact, applicable), might be too restrictive. In my view there are, in terms of section 235(8)(b)(i), only two limitations on the power of the

President to amend a law which is assigned pursuant to that section:

(1) he or she must consider such amendment to be necessary for the efficient carrying out of the assignment;

(2) the amendment must be made in order to regulate the application or interpretation of such law.

[145] As long as the President *bona fide* considers the amendment to be "necessary for the efficient carrying out of the assignment", the jurisdictional fact entitling him or her to make the amendment, is satisfied. The amendment which he or she then makes cannot be challenged as long as it is rationally capable of facilitating the efficient carrying out of the assignment and rationally capable of regulating the application or interpretation of the law. In my view, the amendments to the Transition Act which the President purported to make in terms of the impugned Proclamations cannot therefore be constitutionally assailed simply on the grounds that:-

(a) they were not objectively necessary for the efficient carrying out of the assignment; or

(b) although they were rationally capable of regulating the application or interpretation of the law, the objectives of the President could equally or even better have been achieved without any such amendments or by different amendments; or

(c) the amendments were objectively not necessary to carry out the "functional efficiency" of the assignment.

Mokgoro J concurred in the judgment of Mahomed DP.

[146] **Ackermann and O'Regan JJ:** We concur in the judgment of Kriegler J and the order proposed by Chaskalson P. We also concur in the remainder of the judgment given by Chaskalson P, save in the respects hereinafter set forth.

Section 16A of the Local Government Transition Act, No. 209 of 1993

[147] We agree that the provisions of section 16A of the said Act ("the Transition Act") are inconsistent with the Constitution and broadly with Chaskalson P's reasons for reaching this conclusion.

[148] We also agree that, as stated in paragraph [51] of his judgment, Parliament has the implicit power to pass legislation delegating legislative functions within the framework of a statute under which the delegation is made and that there is a difference between this situation and "assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made". In our view, however, it makes no difference in principle whether, in the latter case, the power to amend includes the power to amend the Act under which the delegation occurs. The great difference lies in the delegation of legislative power which is subordinate to Acts of Parliament as opposed to the delegation of legislative power to amend Acts of Parliament; it being

irrelevant, in our view, whether this power to amend applies to the Act conferring the power or to any other Act of Parliament.

[149] In paragraph [62] Chaskalson P, having referred earlier in his judgment to section 4(1) of the Constitution which contains the phrase "unless otherwise provided expressly or by necessary implication in this Constitution", states that -

> There may be exceptional circumstances such as war and emergencies in which there will be a necessary implication that laws can be made without following the forms and procedures prescribed by sections 59, 60 and 61.

In our view it is unnecessary and undesirable even to pose the question in this form. We are quite unsure whether the "necessary implication" phrase in section 4(1) applies at all to the manner and form provisions of sections 59, 60 or 61. We should like to leave the matter completely open and be able to consider the question in the future, should it arise, without any impediment as to the nature of argument which might be addressed or the solution which could be adopted.

[150] The provisions of section 34(1) of the Constitution provide for the proclamation of a state of emergency where "the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster" and if the declaration of a state of emergency is "necessary to restore peace or order". In paragraph [62], Chaskalson P poses the hypothetical possibility that "circumstances short of war or states of emergency will exist from which a necessary implication can arise that Parliament may authorise urgent action to be taken out of necessity. A national disaster as a result of floods or other forces may call for urgent action to be taken..." We would, with all due respect, desist

from any comment on such a possibility, particularly in view of the fact that no argument from necessity was addressed to us. The postulation of such a possibility, however qualified, runs the risk of causing uncertainty as to the nature of our present Constitution. There may, after all, be constitutional ways of dealing with such a situation other than implying a power in Parliament to legislate otherwise than in accordance with sections 59, 60 or 61.

[151] Chaskalson P has pointed out in paragraph [61] that the Constitution begins by stating the "need to create a new order". It is, we agree, important to stress this feature. It is also necessary to point out that in the same preamble the "new order" embodies, amongst other things, a "constitutional state". We would, at this very early stage of our constitutional jurisprudence, hold section 16A invalid on the simple basis that it purports to authorise the President to legislate in conflict with Acts of Parliament in a manner clearly inconsistent with the Constitution. To permit Parliament to do this would be to permit the making of laws for the Republic by an actor other than Parliament, in a manner not "in accordance with this Constitution" and not "subject to this Constitution" and therefore quite contrary to section 37 and the concept of the supremacy of the Constitution as embodied in section 4.

The applicability of sections 235(6)(b)(i) and (8) of the Constitution to the Transition Act

[152] We do not, with respect, agree that the Transition Act is a law which falls under subsection 6(b)(i) of section 235. Its administration could not therefore have been assigned by the President under subsection 8(a) to a competent authority within the jurisdiction of the

government of a province and the President could consequently not amend or adapt (by Proclamations R58 and R59) the law in question pursuant to the provisions of subsection 8(b). We agree, however, (for the reasons stated by Chaskalson P) that, even if its administration could be so assigned, the provisions of subsection 8(b) do not authorise the promulgation of Proclamations R58 and R59.

[153] The restructuring of local government in terms of the Transition Act is specifically dealt with in section 245(1) of the Constitution, which provides that until elections have been held in terms of the Transition Act local government shall not be restructured otherwise than in accordance with the Transition Act. It is in this context that the functional area "Local government subject to the provisions of Chapter 10" in the list of Legislative Competences of Provinces in Schedule 6 to the Constitution must be construed. Chapter 10 does not deal with transitional arrangements as such, but is concerned with the framework for local government after transition. In other words, Chapter 10 deals with the substantive permanent features and requirements of local government, not with the process of transition towards this constitutional goal. When regard is had to the fact that the Administrator (as defined in the Transition Act) is limited in his or her powers of enactment by the Transition Act, then the legislative competence of a province in the Schedule 6 area referred to above, is in our view something quite different from the area covered by the Transition Act. For this reason alone, it seems to us, the Transition Act cannot be said to fall within any functional area listed in Schedule 6 and thus not under the provisions of section 235(6)(b)(i) of the Constitution.

[154] We are further strengthened in the above conclusion by the fact that were the Transition Act

to fall within the ambit of section 235(6)(b)(i) there would be a conflict between this provision and section 245(1), which imposes a constitutional requirement that local government be restructured in terms of the Transition Act. At the time when the Constitution came into force the (for present purposes) relevant part of section 1(1)(i) of the Transition Act defined Administrator as -

> the Administrator as defined in section 1 of the Provincial Government Act, 1986 (Act No. 69 of 1986) ... Provided further that at the establishment of a provincial government for the province concerned in terms of the Constitution of the Republic of South Africa, 1993, any reference to the Administrator shall be construed as a reference to the Executive Council of that province ...

It is not clear from section 235(6) precisely what "executive authority" means. Further uncertainty is caused by the reference in section 235(8) to the "administration of a law" and not to "executive authority". Having regard to the wide powers conferred on the Administrator in terms of the Transition Act, we are of the view that the effect of the above definition, in the context of the Transition Act, is to delegate executive authority to functionaries in the provinces.

[155] If section 235(6)(b)(i) of the Constitution applied to the Transition Act the transfer of executive authority would take place quite differently. The Transition Act would -

> be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is ... assigned under sub-section (8) to a competent authority (i.e. in terms of sub-section 6(c)(ii) "an authority designated by the Premier of the province") of such province."

In terms of the Transition Act executive power passes ex lege from the Administrator (as defined) to the Executive Council immediately a provincial government is established. The provisions of section 235(6)(b)(i) therefore conflict in two ways with this provision of the Transition Act. Firstly, the President is not obliged to assign the administration of the Transition Act until requested by a premier to do so (subsection (8)). In terms of the

Transition Act, however, the Executive Council becomes the Administrator immediately a provincial government is established. Second, the President (in terms of section 235(6)(b)(i)) assigns an act to a competent authority designated in terms of section 235(6)(c)(ii) by the Premier of a province. On the other hand, in terms of the Transition Act, the successor to the Administrator is the Executive Council. Preference should be given to a reasonable construction of section 235(6)(b) which avoids such a conflict. Such a construction is the one suggested above, namely, that the Transition Act does not fall within any functional area of Schedule 6. In our view the definition of "Administrator" as it existed when the Constitution came into effect was a mechanism to delegate executive authority to the provinces as contemplated by section 144(2). This section provides that provinces may obtain executive authority from three sources: provincial legislation, assignments under section 235(8) and delegation.

[156] The provision in section 245(1) of the Constitution that until elections have been held in terms of the Transition Act local government shall not be restructured otherwise than in accordance with that Act effectively deprives provincial legislatures of the power to legislate on local government until the first elections have been held. It therefore seems plain that the Transition Act is legislation which falls within the purview of section 126(3)(a) in that it is legislation which deals with matters which cannot effectively (or indeed at all) be dealt with by provincial legislatures before the first election for local government has been held. We do not agree with Chaskalson P, who suggests at paragraph [93] of his judgment that the wide powers granted to the Administrator by section 10 of the Transition Act, including the power to make enactments amending a law in force in a

particular province (including an Act of Parliament), are an indication that provincial legislatures can legislate on the subject matter of the Transition Act. Section 10(1)(a) expressly provides that such enactments may not be inconsistent with the Transition Act. Accordingly, the Administrator's law-making powers in section 10 may not alter the provisions of the Transition Act itself. This is consistent with section 245(1): the process of local government transition as provided for in the Transition Act is not a provincial legislative matter until the first local government elections have taken place. The regulation of that process, consistent with the Transition Act, may be regulated by Administrators but no provincial variation of the procedures and mechanisms established in the Transition Act are permissible unless provided for in the Transition Act itself.

[157] It has been suggested that if the administration of the Transition Act does not fall to be assigned under section 235(8), its provisions (as they stand) do not apply to the former Transkei, Venda, Boputhatswana or Ciskei. At most this might constitute a legislative lacuna, but could be rectified by a simple amendment of the Transition Act itself. The existence of such a lacuna cannot be relevant to the question of whether section 235(8) is of application to the Transition Act at all. The purpose of section 235(8), as discussed by Chaskalson P in paragraphs [70] to [81] of his judgment, is to redirect executive authority in the light of the significant constitutional changes that were occasioned by the interim Constitution. The fact that legislative lacunae might have been created by the re-incorporation of the formerly independent bantustans is a different mischief. It may be that where section 235(8) is properly relied upon, the State President may use his powers in terms of section 235(8)(b) to regulate the application of a law by extending it to parts of

the national territory to which it did not previously apply. It cannot be concluded from this, however, that the existence of a legislative lacuna itself would render section 235(8) applicable.

The Order

[158] In paragraphs [106] to [115], Chaskalson P considers the question of whether an order should be made in terms of the proviso to section 98(5) which provides that:

> Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.

In this case, we have found section 16A to be invalid. In terms of section 98(5), therefore, two choices of remedy are available. We can declare section 16A invalid with immediate effect, or we can refer the matter to Parliament to correct the defect and keep section 16A and all proclamations under it, and administrative steps taken in terms of such proclamations, in force as provided for in subsection (5). We do not have the power in terms of section 98(5) to save only some of the proclamations promulgated under section 16A. If we had such a power, we might well have considered that there were cogent reasons to exempt R58 and R59 from an order in terms of the proviso. For the reasons suggested by Chaskalson P we also consider that, on a proper construction, section 98(6) is not applicable to legislative acts, such as the proclamations. Therefore the route of partial invalidation under section 98(6) is also not available for proclamations issued in terms of section 16A.

[159] In considering whether we should exercise our powers in terms of section 98(5), we agree with Chaskalson P that the interests of "good government" are overwhelmingly in favour of giving Parliament an opportunity to correct the situation, in order to prevent serious and far-reaching disruption to the local government elections. However, we are not as sanguine as he, that the interests of the applicant in obtaining the order that they sought are not considerably impaired by our order. Justice would generally dictate that successful litigants should obtain the relief they seek. The consequence of our order is, however, the fate of every litigant who is successful in having an Act of Parliament, or any part thereof, declared invalid but finds it maintained in force because of an order in terms of the proviso to section 98(5). In *Re Dixon and Attorney-General of British Columbia* 59 D.L.R. (4th) 247 (1989) (British Columbia Supreme Court), the Court declared invalid certain core provisions of the British Columbia legislation establishing provincial electoral districts on the grounds that the impugned provisions did not establish relative equality of voting guaranteed by section 3 of the Canadian Charter of Rights and Freedoms. In deciding to specify a temporary period during which the existing legislation remained valid the Court motivated its decision to do so as follows per

McLachlin C.J.S.C. at 282 - 283:

> The Supreme Court of Canada faced a similar dilemma in *Reference re Language Rights under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385. The petitioners there challenged the validity of all of the provincial statutes enacted by the Province of Manitoba in English only, contrary to the provisions contained in s. 23 of the *Manitoba Act, 1870*. However, after finding this legislation unconstitutional, and therefore invalid and of no force or effect, the court held that it had the jurisdiction to temporarily relieve against this finding on the basis that to render all laws in the province invalid would create a state of emergency. Accordingly, it deemed all acts of the Manitoba Legislature temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing in bilingual form.

> The absence of the machinery necessary to conduct an election in a system where in theory an election can be required at any time, qualifies as an emergency of the magnitude of suspension of all provincial legislation. In my view, it is open to this court to specify a temporary period during which the existing legislation remains valid and during which the legislation enacts and brings into force an apportionment scheme which complies with the Charter.

The situation faced by this Court is an a fortiori one. From the point of view of good government, the government's duty, to all voters in South Africa, to ensure that democratic local elections are held at the appointed time is of the highest and most compelling order. If the position in British Columbia, where no elections had been scheduled, qualified as an emergency of such magnitude as to justify suspending the order of invalidity, it ought to do so in the present case. Literally millions of citizens, previously disenfranchised, have with much anticipation been awaiting the first local government elections. These elections are an indispensable part of the transition to full democracy. They ought not to be delayed. The interest of good government in ensuring this is acute. Under all the circumstances we are therefore of the view that this Court ought to exercise its powers under the proviso to section 98(5) of the Constitution. At the same time we are strongly of the view that the elections ought not to be held under statutory provisions which are (in substance) invalid, although their temporary validity has been secured by an order under the said proviso. For this reason it is essential that the period specified in the order within which the constitutional defect in the law in question is to be corrected, should expire before the date upon which any of the elections is held.

[160] **KRIEGLER J**: I have had the benefit of studying the judgment of Chaskalson P and respectfully concur in the orders he has formulated. In respect of one aspect of my learned colleague's judgment, however, I prefer to express my views a little more forcefully. I am

referring to his discussion of the constitutionality of section 16A of the Transition Act.[1] On that aspect I agree with the views expressed by Ackermann and O'Regan JJ in their judgment.

[161] In respect of another aspect of the judgment of Chaskalson P I beg to differ. The difference of opinion relates to the question whether the Transition Act falls within the scope of the President's powers under section 235(8) of the Constitution. Chaskalson P concludes that it does.[2] But he also holds that such power did not encompass the changes to the Act purportedly made by Proclamations R 58 and R 59 of 1995.[3] In my view the President was not empowered by section 235 to assign - and hence to amend - any of the provisions of the Transition Act. Our differing views lead to the same conclusion in this case but my line of reasoning is not only significantly different, it also has an important additional implication. I am therefore obliged to set out my conclusion and reasons in some detail.

[162] By way of introduction I sketch the bare bones of my reasoning:

a. The President's power to assign executive authority under section 235(8) of the Constitution is expressly confined to the administration of laws referred to in section 235(6)(b).

b. The laws referred to in section 235(6)(b) are confined to laws which both fall

[1] The Local Government Transitional Act No. 209 of 1993.

[2] In paragraphs 83 to 96 of his judgment.

[3] In paragraphs 97 and 98 of his judgment.

within the functional areas specified in Schedule 6 and fall outside the purview of paragraphs (a) to (e) of section 126(3).

c. The Transition Act is not a law falling within the scope of Schedule 6, nor does it fall outside sections 126(3)(a) and (b).

d. That conclusion is indicated by the terms of the Transition Act itself, by its scope and purpose in the overall scheme of the negotiated transition, and by the manner in which it is dealt with in the Constitution.

e. The Transition Act was intended and drafted to govern the reconstruction of local government from A to Z. (In many areas of the country “reconstruction” was a euphemism for creation.) Its principles and terms were separately negotiated. It was then passed by the "old" Parliament as part of the statutory scaffolding agreed upon by the negotiating parties as necessary before, during and after the transition of national and provincial government.

f. The Transition Act represents a "turn-key operation", commencing with tentative negotiating forums for local councils, continuing with temporary local government structures and carrying on until new structures have been democratically elected and put in place.

g. The Transition Act accordingly makes provision within its own four corners for the executive authority needed for its administration at all stages. The definitions of "Administrator", “interim phase” and "province" in section 1 of the Act show that the transmission of executive authority *vìs-a-vìs* local government reconstruction from the old regime to the new was pre-ordained. There was no need - and indeed no room - for the assignment of such authority under section 235

of the Constitution.

h. When Schedule 6 speaks of "local government", it expressly refers to Chapter 10 which, in turn, clearly contemplates coming into operation at some stage in future in terms of provincial laws yet to be made. That would clearly be after the "interim phase" governed by the Transition Act. There is therefore no legislative competence under Schedule 6 until expiry of that "interim phase". The administration of local government at provincial level simply continues under the Transition Act.

i. Moreover, the Transition Act vests ultimate control of the reconstruction of local government in the national government.[4] Because national standards or norms and national control were necessary, section 126(3) of the Constitution comes into play.

j. Also, because of the unique and comprehensive purpose and scope of the Transition Act, the Constitution affords it special recognition in section 245. Subsections (1) and (2) of that section make plain that unless and until local government had been established in terms thereof, the Transition Act, and it alone, would govern the reconstruction of local government.

k. "Reconstructed" local government had not been established when the President purported to assign executive authority under section 235(8)of the Constitution.

l. Viewed from any one of a number of angles, therefore, the answer is the same: The President had no power of assignment under section 235(8) of the Constitution.

[4] See sections 9(1) and 12 of the Transition Act.

[163] The basic argument on behalf of the Respondents was that, irrespective of the validity of section 16A, the Proclamations[5] should not be invalidated. There are three pillars to the argument:

(i) the First Respondent could lawfully have promulgated the Proclamations under section 235(8);

(ii) the requisite jurisdictional facts existed at the time for their promulgation under section 235(8); and

(iii) therefore it mattered not that the Proclamations cited section 16A as authority for their promulgation instead of section 235(8).

[164] Logic dictates commencing with an examination of the first contention. If it fails the argument fails. Before analysing section 235(8) itself, it would be useful to consider its context and function. Section 235 forms part of Chapter 15 of the Constitution which is headed "General and Transitional Provisions". The Constitution as a whole reveals the magnitude of the transition the country undertook; but it is Chapter 15 that most vividly demonstrates the complexity of that undertaking. More specifically the transitional provisions, which make up the bulk of the Chapter, show the myriad of detailed steps that had to be organised. A veritable checkerboard of disparate political entities each with its own paraphernalia of state, its own laws and customs, its own political masters, bureaucracy and policies, its own assets and liabilities, had to be moulded, somehow, into a single state divided into nine provinces, most of whose borders cut across historical

[5] Proclamations R 58 and R 59 of 1995, the effect of which is set out in paragraph 13 of the main judgment.

boundaries.

[165] Chapter 15 aims at orderly transition in these difficult circumstances. The starting point was to retain all existing laws until their repeal or amendment (section 229). The staff of existing legislative authorities were kept on pending rationalisation (section 234), as were the staff of all public administrations (sections 236, 237 and 238). The transfer of public assets, liabilities and revenue was organised (sections 239 and 240), as was the transition of the judiciary and other key offices (sections 241, 242, 243 and 244). The two sections of Chapter 15 which are of primary importance in the current discussion are sections 235 and 245, which deal with the transitional arrangements for executive authority and local government respectively.

[166] Section 235 is headed "Transitional arrangements: Executive authorities" and comprises nine subsections. The first four deal with the continuation in office of the State President and other persons wielding executive authority until the new President assumes office. Subsection (5) then lays down the principle that upon such assumption of office, national executive authority vests in the President and provincial executive authority in provincial Premiers.[6]

---

[6] Subsection (5) reads:

(5) Upon the assumption of office by the President in terms of this Constitution—

(a) the executive authority of the Republic as contemplated in section 75 shall vest in the President acting in accordance with this Constitution; and

(b) the executive authority of a province as contemplated in section 144 shall, subject to subsections (8) and (9), vest in the Premier of that province acting in accordance with this Constitution, or while the Premier of a province has not yet assumed office, in the President acting in accordance with section 75 until the Premier assumes office.

[167] Section 235 is, of course, concerned with executive authority and not with legislative competences. But we know that the scheme of the Constitution is to circumscribe executive authority by reference to legislative competence, not only in section 235 itself but elsewhere. In sections 75 and 144(2) the executive authority of the President and a provincial Premier respectively is made dependent upon the legislative competence of Parliament and of a provincial legislature. Section 235(5) makes the allocation of executive authority in accordance with sections 75 and 144.

[168] Conformably, subsection (6) deals with the allocation of executive authority to either the national or the provincial governments and lays down the criteria for the allocation of such power.[7] Subsection (7), which is not relevant to this case,[8] provides the President the

---

[7] Subsection (6) reads:

(6) The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows:

(a) All laws with regard to matters which

(i) do not fall within the functional areas specified in Schedule 6; or

(ii) do fall within such functional areas but are matters referred to in paragraphs (a) to (e) of section 126(3) (which shall be deemed to include all policing matters until the laws in question have been assigned under subsection (8) and for the purposes of which subsection (8) shall apply *mutatis mutandis*),

shall be administered by a competent authority within the jurisdiction of the national government: Provided that any policing function which but for subparagraph (ii) would have been performed subject to the directions of a member of the Executive Council of a province in terms of section 219(1) shall be performed after consultation with the said member within that province.

(b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3) shall

(i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1)(a)

power - after consultation with provincial premiers and subject to a parliamentary veto - to make proclamations in order better to achieve the whole of section 235. Subsection (8) provides for the assignment of executive authority to provinces according to those laws identified in subsection (6)(b) and determines when and how such assignment is to take place. And finally subsection (9) provides for the situation where a provincial government is not ready to take assignment within 14 days of its establishment.

[169] We are now in a position to understand section 235(8) better in the light of the scheme of which it is an integral part. It reads as follows:

> (8)(a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the *Gazette* assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.
>
> (b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may
>
> (i) amend or adapt such law in order to regulate its application or interpretation;
>
> (ii) where the assignment does not relate to the whole of such law, repeal and re-enact,

---

> or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent authority within the jurisdiction of the government of such province; or
>
> (ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1)(c), subject to subsections (8) or (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this subparagraph shall not apply to policing matters, which shall be dealt with as contemplated in paragraph (a).

[8] Facts that could possibly trigger that subsection have not been alleged and no-one has sought to rely on the subsection.

> whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and
>
> (iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution.
>
> (c) In regard to any policing power the President may only make that assignment effective upon the rationalisation of the police service as contemplated in section 237: Provided that such assignment to a province may be made where such rationalisation has been completed in such a province.
>
> (d) Any reference in a law to the authority administering such law, shall upon the assignment of such law in terms of paragraph (a) be deemed to be a reference *mutatis mutandis* to the appropriate authority of the province concerned.

The primary purpose of the subsection is set out in paragraph (a), namely to specify when and how the executive authority allocated to a province in terms of section 235(6)(b) is to be transferred from the interim administration by the national government to the provincial government. Subsidiarily, paragraph (b) provides authority to the national government to amend or adapt a law, the administration of which has been assigned, to regulate its application. What the drafters of the Constitution had in mind here is that the transition would leave in place the numerous laws of the former legislatures which might be contradictory and would not fit the new provincial functionaries or areas, territorially or substantively. The President was therefore empowered to tailor existing laws to suit the new provincial structures.

[170] The interpretation of paragraph (a) presents a number of difficulties, as does that of paragraph (b). For the purposes of this case, fortunately, it is not necessary to grapple with most of the difficulties because this much is clear: the subsection relates - and can only

relate - to "the administration of a law referred to in subsection (6)(b)". It is therefore necessary to examine subsection 6(b) to see what laws are referred to therein.

[171] Section 235(6) specifies the criteria for the allocation of executive authority to the national and provincial governments respectively. The principal distinguishing criterion is the kind of law that has to be administered. Depending upon the nature of the matters dealt with by a law, the executive authority to administer such law falls in the one or the other category. Paragraphs (a) and (b) of section (6) make that allocation on the basis of provincial legislative competence as set out in Schedule 6 but subject to paragraphs (a) to (e) of section 126(3).

[172] Schedule 6, which is introduced by section 126(1) of the Constitution, is headed "Legislative Competences of Provinces" and lists 29 functional areas, including "Local government, subject to the provisions of Chapter 10". Chapter 10 lays down broad principles which are to apply to local government once it has been established pursuant to elections held under the Transition Act. In terms of section 126(1) provincial legislative competence with regard to matters falling within Schedule 6 is subject, *inter alia*, to section 126(3). That subsection provides that a provincial law prevails over a national law, except in so far as the national law deals with one or other of a number of matters set out in paragraphs (a) to (e). Paragraph (a) speaks of matters "that cannot be regulated effectively by provincial legislation" and paragraph (b) of matters "that, to be performed effectively [require] to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic".

[173] Returning then to section 235(6), it is important to note how the drafters use the assignment criteria. Two points need to be made at the outset of this leg of the enquiry. First, it is important to distinguish between the assignment of executive authority under section 235(8) and delegation thereof in accordance with section 144, the section defining executive power for the provincial governments. Section 144(2) of the Constitution draws a clear distinction between assignment and delegation which should be maintained in construing section 235. Section 235(8) deals with assignment, i.e. the transfer to a province of the executive authority to which it is entitled in terms of the Constitution. It is not concerned with delegation. Delegation postulates revocable transmission of subsidiary authority. The assignment contemplated by section 235 relates to the formal vesting of authority derived from the Constitution.

[174] Second, it is crucial to see that the division in section 235(6) makes the national government the residual repository of the authority to execute pre-Constitution laws. The use of the negative in subparagraphs (i) and (ii) of paragraph (a) has the effect that, unless a law can be identified as dealing with matters within the ambit of Schedule 6 and outside the ambit of paragraphs (a) to (e) of section 126(3), its administration is a national executive responsibility.

[175] Once a law meets that dual qualification it falls into paragraph (b) of section 235(6). The administration of a law that used to fall under an "old" South African national or provincial executive functionary (mentioned in sections 235(1)(a) or (b)) falls temporarily to the

national government under subparagraph 235(6)(b)(i). The administration of a law that used to fall under the authority of a black executive functionary (mentioned in section 235(1)(c)) falls to the provincial governments under subparagraph 235(6)(b)(ii), but subject to subsection (8) and (9).[9] In both cases the administration is intended to be assigned in due course to the provinces in terms of subsection (8) or (9). Section 235(6)(c) then completes the picture by providing that the President designates the competent authority in relation to a law allocated to the national government while the relevant Premier does so where the task goes to provincial governments.

[176] It would be useful to digress for a moment to observe what happens once the administration of a law has been allocated in terms of section 235(6). Section 236 keeps the whole of the public institutions of the former governments intact until rationalised under section 237. Section 237, in turn, makes provision for the allocation of the requisite human resources to provide effective administration at the national and provincial levels of government to deal with matters within their respective jurisdictions. The logical allocation of executive authority and human resources is then continued in section 239, which allocates material assets "applied or intended to be applied for or in connection with a matter" along the same lines as the allocation of authority in section 235(6). The scheme is clear and consistent. You divide laws according to their subject matter; if a law falls within a subject matter which is a competence of provinces in terms of Schedule 6 and does not deal with any of the matters mentioned in subsections (a) to (e) of section

[9] It is unclear how category (6)(b)(ii) laws can be assigned in accordance with the provisions of subsections 8 or 9 since the administration of such laws falls already to provincial governments under subsection 6(b)(ii). However, such issue is not of moment in this case.

126, the power to execute the law together with the requisite human and material resources are allocated to provinces. In that event section 235(6)(b) provides and section 237(2)(b) and section 239(1)(c) expressly envisage that the power (and requisite resources) will be temporarily administered by the national government until their assignment in terms of section 235(8).

[177] Now we are in a position to examine the Transition Act to see if its administration can be assigned in accordance with section 235(8). The first step is to see whether the Transition Act is "a law" referred to in subsection 6(b) of section 235. That, we know by now, entails establishing (i) whether it is a law with regard to a matter which falls within the ambit of provincial legislative competence delineated in Schedule 6, and, if so, (ii) whether it is a matter that cannot be regulated effectively by provincial legislation or requires to be regulated by nation-wide norms or standards for its effective performance in terms of subsections (a) to (e) of section 126(3). In order to answer these two questions, one must examine (i) the Transition Act itself, (ii) its place in the legislative pattern of the transition process and also (iii) in the context of the interim Constitution.

[178] The most salient feature of the Transition Act is, of course, that it deals with transition. That is manifest from its very name, its long title and virtually every section thereof. The statute addresses the arduous and delicate process of establishing interim local government structures throughout the country. What the Transition Act governs is a continuing metamorphosis, commencing with a "pre-interim phase"[10], through the "interim phase" and

[10] The pre-interim phase began with the commencement of the Transition Act on 2 February 1994 and is to end with the elections to be held in accordance with the Act.

ending with the implementation of final arrangements to be enacted by a legislative authority competent to do so.[11] The metamorphosis starts with the formation of local negotiating forums (in terms of part IV of the Transition Act), the first tentative step on the long road from the discriminatory past. The metamorphosis is governed by the Transition Act all the way up to the point where the democratically elected structures have taken over. Thus the Act provides for the establishment of transitional local authorities in successive phases and for them to function as local governments until they are ultimately replaced by bodies elected according to detailed rules contained in or authorised by the Transition Act.

[179] An important feature of the Transition Act is that it vests the Minister (as well as the Administrator) with extensive powers to control and promote the process.[12] In terms of sections 10 and 12 both the Administrator in his or her area of jurisdiction and the Minister in the whole country are afforded wide regulatory authority with which to execute the Act. The Minister can "make regulations concerning any matter referred to in this Act which in his or her opinion are necessary or expedient for the effective carrying out or furtherance of the provisions and objects of this Act."[13] Local government was to be restructured at the grassroots level by local role-players under the guidance and supervision of the

---

[11] Section 1(1)(iv) of the Transition Act provides:

"interim phase" means the period commencing on the day after elections are held for transitional councils as contemplated in section 9, and ending with the implementation of final arrangements to be enacted by a competent legislative authority.

[12] The definitions of Administrator and Minister were changed by amendment, but such amendment is not important in this context.

[13] Section 12 of the Transition Act provides:

12. The Minister may, after consultation with the Administrator, make regulations concerning any matter referred to in this Act which in his or her opinion are necessary or expedient for the effective carrying out or furtherance of the provisions and objects of this Act.

provincial Administrators, but the national government, through the Minister, retained control. Furthermore section 9(1) reserved the power to set the date for and call the first local government elections to the Minister.

[180] At the time when it was enacted by the then Parliament and until the advent of the Constitution, the Transition Act did not apply in Transkei, Bophuthatswana, Venda and Ciskei. However the definitions of "Administrator" and "province", by their very wording, and the Transition Act generally anticipated the formation of provincial governments and provided for the automatic transmission of authority from the old regime to the new. From the outset it applied expressly to the Self-governing Territories as explicitly stated in section 2 of the Act (as originally enacted). The original definitions of "Administrator" and "province", make plain that, once constitutional provincial governments had come into operation, they would administer the Transition Act within the whole of their territories including, of course, the areas of formerly independent states. "Administrator" is defined in the Transition Act as:

> "Administrator" means the Administrator as defined in section 1 of the Provincial Government Act, 1986 (Act No. 69 of 1986): Provided that where the Administrator is required to exercise any power in respect of any local government body which is situate within that part of the province which forms part of a Self-governing Territory, the Administrator shall act after consultation with the Chief Minister of that Self-governing Territory: Provided further that at the establishment of a provincial government for the province concerned in terms of the Constitution of the Republic of South Africa, 1993, any reference to the Administrator shall be construed as a reference to the Executive Council of that province and any reference to a province shall be construed as a reference to the corresponding province.

"Province" is defined in the Transition Act as:

> "province" means any existing province, and from the establishment of a provincial government for the province concerned in terms of the Constitution of the Republic of South Africa, 1993, the corresponding province.

To all intents and purposes the terms of the Transition Act itself manifest that it was a unique piece of legislation designed to restructure local government throughout the country according to a blueprint governing every step of a "turn-key operation".

[181] This impression is materially reinforced if one has regard to the broader context in which the Transition Act came to be adopted. The overall “transition to democracy” agreements hammered out by the negotiating parties necessitated the formulation of a number of statutory measures and their adoption by the former South African Parliament. The most important, of course, was the interim Constitution which was intended, as the postscript thereto proclaims, to bridge the transition to a final constitutional state. But there were a number of other laws that were also vital to the transition. Some of them, such as the Transitional Executive Council Act, were intended to operate only during the phase leading up to the inauguration of the new government.[14] Others, such as the Electoral Act, were intended to serve a specific short-term purpose, i.e. the conduct of the first elections for national and provincial governments.[15] The Transition Act, although negotiated in a different forum[16], was an important part of the package of negotiated statutory measures for the reconstruction of the country. It was intended to operate in its own field from the date

[14] Transitional Executive Council Act No. 151 of 1993.

[15] Electoral Act No. 202 of 1993.

[16] It is a matter of public record that the negotiation process regarding the transition of power at the national and provincial levels was conducted separately from the negotiations relating to the transformation of government at local level.

of its adoption, months before the first national and provincial elections were held (and the Constitution came into full operation). It was also intended to continue operating during those elections, through the inauguration of the new national and provincial governments, and to continue thereafter until duly reconstructed and elected local government bodies had been put in place.

[182] The third source of information regarding the nature of the Transition Act is the Constitution itself. The Constitution specifically refers to the Transition Act in section 245. That section deals expressly and solely with the transitional arrangements for local government. The section, which is titled "Transitional arrangements: Local government", reads as follows:

> 245.(1) Until elections have been held in terms of the Local Government Transition Act, 1993, local government shall not be restructured otherwise than in accordance with that Act.
>
> (2) Restructuring of local government which takes place as a result of legislation enacted by a competent authority after the elections referred to in subsection (1) have been held, shall be effected in accordance with the principles embodied in Chapter 10 and the Constitution as a whole.
>
> (3)(a) For the purposes of the first election of members of a local government after the commencement of this Constitution, the areas of jurisdiction of such local government shall be divided into wards in accordance with the Act referred to in subsection (1).
>
> (b) Forty per cent of the members of the local government shall be elected according to the system of proportional representation applicable to an election of the National Assembly and regulated specifically by or under the Act referred to in subsection (1), and sixty per cent of the members shall be elected on the basis that each such member shall represent a ward as contemplated in paragraph (a): Provided that, notwithstanding anything to the contrary contained in this Constitution, where the area of jurisdiction of the local government includes
>
> > (i) the area of jurisdiction of any institution or body as was referred to in section 84(1)(f) of the Provincial Government Act, 1961 (Act No. 32 of 1961); and

> (ii) any other area not falling within the area of jurisdiction of the institution or body referred to in subparagraph (i)
>
> no area referred to in subparagraph (i) or (ii) shall be allocated less than half of the total number of wards of the local government concerned: Provided further that an area referred to in subparagraph (i) shall be deemed not to include any area for which a local government body referred to in paragraphs (a), (b) and (c) of the definition of "local government body" in section 1(1) of the Act referred to in subsection (1) of this section (as that Act exists at the commencement of this Constitution), has been established.[17]

The provisions of subsection (1) are quite unequivocal: the restructuring of local government was to be governed exclusively by the Transition Act until elections had been held under its provisions. It is obviously significant that the negotiating parties thought it necessary to elevate the restructuring of local government to a constitutionally protected topic. That does not mean that the Transition Act as it then read was cast in stone. The Constitution does not say the Act cannot be amended and the qualification in brackets at the end of subsection (3) contemplates possible amendment thereof. But what it does mean is that only the Transition Act, amended or not, would govern the restructuring. What that means, in turn, is that the restructuring of local government was constitutionally excluded from the legislative competence of provinces.

[183] That is made even clearer by the provisions of subsection (2). Consistently with the exclusion of provincial legislative competence under subsection (1), subsection (2) dictates that, once the elections under the Transition Act have been held, the Chapter 10 principles will then govern legislation for the restructuring of local government. Chapter 10, comprising sections 174 to 180 of the Constitution, lays down a number of broad

[17] Section 245 was amended by the Constitution of the Republic of South Africa Second Amendment Act No. __ of 1995. Such amendment is not, however, relevant here.

principles to be observed by both Parliament and provincial legislatures when making laws for the establishment and conduct of local government. Within the framework of those principles and within the ambit of its legislative competence, a particular province will be at liberty to devise its own local government structures. But the basic reconstruction, up to the first elections, is to be governed by the Transition Act. In respect of local government, provincial legislative competence is clearly excluded during the operation of the Transition Act, and limited by Chapter 10 thereafter.[18]

[184] The untenability of Respondents' reliance on section 235(8) as the lawful source of the authority to promulgate the Proclamations can also be demonstrated by reference to a conundrum to which it gives rise: Postulate that the President is not satisfied under subsection (8)(a) that a particular province has the requisite administrative capacity and declines to assign the administration of the Transition Act to that province. What would then happen to the powers (essential for the continuation of local government) conferred by the Transition Act and contemplated by it to be exercised by the Administrator before, during and after the inauguration of the President?

[185] The Transition Act on its own terms applied throughout the period of transition contemplated in section 235; the executive authority it conferred and the transfer of such authority occurred automatically by virtue of the Act itself. Ultimately there was no administration under the Transition Act which could be assigned under section 235(8) of the Constitution. The Transition Act is not a law contemplated by section 235(6)(b). It

[18] Significantly, it is also limited by section 126 thereafter.

is not a law with regard to a matter falling within the functional areas specified in Schedule 6. On the contrary, it is a law which on its own terms and by reason of the suspensive provisions of section 245 of the Constitution falls outside Schedule 6. In any event it is a law with regard to a matter that cannot be regulated effectively by provincial legislation and requires nation-wide regulation and co-ordination according to uniform norms and standards. It deals with a matter covered by paragraphs (a) and (b) of section 126(3). The Act is therefore incapable of assignment under section 235(8) and therefore incapable of amendment thereunder.

[186] The agreement reached with regard to the reconstruction of local government - as embodied in the Transition Act - recognises that during the transition local government restructuring should not be left to political whim at any level of government. The hands-on management of the process requires more localised knowledge and sensitivity than a centralised authority can satisfactorily provide. That is why the Transition Act was designed to be implemented provincially and locally. But at the same time, the reconstruction was manifestly recognised as a matter of such national moment that the basic policy was fixed by a national law to be under the ultimate control of the national government through the then Minister of Local Government. Section 245 of the Constitution makes clear the national import of the reconstruction of local government. The engine provided by the Transition Act would drive the process along the agreed tracks towards a common destination. Keeping the ultimate brake in the hands of the national government[19] means that it had the final say in determining the process. That being

[19] Significantly, section 9 keeps the power to fix the date for local government elections firmly in the hands of the Minister.

so, it is unthinkable that the executive authority, or the power to exercise executive authority,[20] with regard to the Transition Act could lawfully be assigned to a province. The first pillar of the argument on behalf of the Respondents must therefore fail.

[187] The implications of the finding that executive authority with regard to the Transition Act is not assignable under section 235(8) of the Constitution are serious. It means, in the first place, that Proclamations R 58 and R 59 of 1995 cannot be saved. In the second place - and more importantly - the finding inevitably means that the other proclamations purportedly promulgated under section 16A of the Transition Act are also incapable of being saved by section 235 of the Constitution. The successful attack on the validity of Section 16A brought in its train the invalidation of the proclamations promulgated under its putative authority. That being the case, temporary preservation of Section 16A under the powers vested in us by the proviso to section 98(5) of the Constitution, warrants co-extensive validation of such proclamations. There is another proclamation, however, to which that does not apply. I deal with it in the next paragraph.

[188] By far the most important consequence of the finding is that it jeopardizes Proclamation R 129 of 1994. That Proclamation, promulgated on 15 July 1994, in a very real sense has been the basic local government charter for the last fourteen months. It was that Proclamation that ostensibly clothed the provinces with the requisite authority to administer the Transition Act within their respective areas. It was also that Proclamation that ostensibly authorised a number of vital amendments to the Transition Act. One of

[20] The wording is taken from Section 235(6) of the Constitution.

those was the amendment of the definition of "Administrator" so as to denote "a competent authority within the jurisdiction of the government of that particular province designated by the Premier ...." The Third Applicant - and his eight opposite numbers in the other provinces - have been controlling local government reconstruction at the provincial level pursuant to the assignment of executive authority under, and concomitant amendments to, the Transition Act believed to be authorised by section 235(8) of the Constitution. My conclusion that such belief was mistaken has no immediate consequences. The validity of Proclamation R 129 of 1994 has not been challenged in this case; nor is it indirectly impugned, as were the other proclamations dependent on Section 16A for their validity. That means that although Proclamation R 129 of 1994 cannot be struck down under section 98(5) of the Constitution in this case, it can also not be preserved under the proviso to that subsection.

[189] On the face of it the resultant situation is highly undesirable; a vital piece of legislation is rendered vulnerable to attack at any time and from any quarter in the run-up to countrywide elections. I therefore recommend that if steps are taken to correct the defects in Section 16A of the Transition Act and its satellite proclamations, Proclamation 129 of 1994 be rectified as well. In the interim any prospective impugner of that Proclamation should know that it is likely to enjoy the same temporary preservation under the proviso to section 98(5) of the Constitution as is being afforded to the other Proclamations.

[190] **LANGA J:** I have had the benefit of reading the different judgments of my colleagues and, as I do not deem it necessary to re-discuss the issues which have already been canvassed

in much detail, I merely record my agreement or otherwise with regard to the major issues identified.

Judgment and Order

[191] I am in substantial agreement with the judgment of Chaskalson P save in the respects specifically indicated herein. I concur fully in the order proposed by him.

Section 16A of the Local Government Transition Act, No 209 of 1993

[192] I agree with Chaskalson P's reasoning and, in particular, the conclusion that the provisions of section 16A of the Local Government Transition Act are inconsistent with the Constitution. I agree with the view that the effect of the amendment is to vest the President with extensive legislative powers which enable him to act in a manner which exceeds the competence of Parliament itself, and which circumvents the "manner and form" provisions as set out in section 61 of the Constitution. What the position might be in different circumstances is a question that does not arise and on which I express no opinion.

The Applicability of section 235 of the Constitution

[193] I do not, with respect, agree that the Local Government Transition Act is a law the administration of which was capable of being assigned by the President in terms of section

235(8). In that respect I am in full agreement with the reasoning of Kriegler J as stated in paragraphs 161 to 189 of his judgment. It follows therefore that the President could not validly "amend or adapt" that law pursuant to section 235(8)(b).

[194] Having concluded that the Local Government Transition Act was not assignable, it becomes unnecessary for me to express a view on the further interpretation of 235(8)(b). Whether the view of that taken by Chaskalson P or Mahomed DP is the better one is therefore a question on which I prefer to say nothing.

Proclamations R58 and R59

[195] I am accordingly in respectful agreement with Chaskalson P's conclusion that Proclamations R58 and R59 could not properly be authorised either on the basis of section 16A of the Local Government Transition Act or section 235(8) of the Constitution.

Didcott J concurs in the judgment of Langa J.

[196] **SACHS J**: The pressure under which we worked, the constant changes of argument and the need to produce a swift result, has made it difficult to subject the important issues before us to the research, debate and reflection they deserve. In expressing my concurrence with the order proposed by Chaskalson P., I do so subject to the comments and reservations which follow.

[197] I fully endorse the President's concern with maintaining constitutionalism, and support the overall tenor of his judgment. We have suffered far too much in the past from government by Proclamation not to look with the closest scrutiny at any attempt by Parliament to abdicate its legislative tasks and responsibilities, however well-motivated. I also agree fully with his reasoning and conclusions on the proper interpretation of Principle XXII. In broad terms, I furthermore support his approach and conclusions in relation to the 'manner and form' provisions of Sections 59, 60 and 61.

[198] I have reservations about his interpretation of Section 235(8) and feel that there is considerable merit in the arguments of Madala J. and Ngoepe J. Once an assignment of powers comes into the picture, as I think it should in this case, a literal reading of Section 235(8) would seem to authorise what the President did. A more purposive approach, however, locating the issue in the context of the general transitional arrangements for local government, tips the balance of my thought in favour of an interpretation that would narrow the scope of the President's discretion in the way mentioned by Chaskalson P.

[199] My major reservations relate to the manner in which Section 16A should be approached. In particular, without far more argument and reflection, I believe it would be dangerous to lay down rigid rules concerning fundamental questions relating to the characterization of the function and powers of Parliament. We unfortunately did not have the benefit of hearing argument from the point of view of Parliament itself, and I regard the matter as largely unexplored. I have had the benefit of reading the judgment of Mahomed DP., which in a manner that is far more elegant and rigorous than the raw notes that follow,

deals convincingly with Section 16A. I agree fully with this approach. Since my starting off point is somewhat different from his, however, and because of the importance of the subject, I will attempt to complement his judgment with some views of my own.

[200] In my opinion, the new Parliament should be seen as a dynamic and organic part of the new constitutional order. It is not merely the old Parliament 'cribbed, cabined and confined' by the new Constitution; it is a fundamental component of the new democratic dispensation ushered in by the Constitution and given its legitimacy and composition by the elections of April 27, 1994. Like the fundamental rights enshrined in Chapter 3, it is a feature of modern, democratic society, acknowledged, structured and integrated into the new constitutional order. The Constitution no more invents or creates Parliament than it invents or creates the right to life or the right to equality. It entrust the legislative authority to Parliament in an open-ended way, without seeking to define specific terms of competence. The assumption is that Parliament will do what Parliaments do, namely, make laws for the governance of the country, and find the necessary funds for their implementation.

[201] I therefore regard Parliament as an institution with powers, functions and responsibilities established and defined by the interim Constitution, rather than as its 'creature'. Parliament can, if it follows certain procedures, amend the Constitution which gave it life; its powers and competence are not expressly defined in the way that the powers of local authorities, regarded as 'creatures of statute', have been. I would therefore consider it as starting the wrong way round to say that Parliament must seek in each and every case to find express or implied textual justification for its capacity to pass laws. It cannot be

equated to a town council writ large, but should rather be regarded as the centrepiece of our constitutional democracy. My understanding of Parliament is therefore that it is a body entrusted with very broad powers and responsibilities which have to be exercised within a framework established by the Constitution. It is this framework, not the powers, that is expressly delineated; in each and every case it is necessary to enquire not whether Parliament had the power to legislate - this is given to it in an unqualified way by Section 37 - but whether it exercised such power "in accordance with the Constitution", that is within the framework established by the Constitution.

[202] This framework has four express components, all of which, taken together, articulate the transformation from a system based on Parliamentary sovereignty to one founded on Parliamentary democracy in a constitutional state. The first element of the Constitutional framework is provided by Chapter 3, which establishes fundamental rights which cannot be infringed by Parliament; this is a substantive provision which impacts on the reach of legislation. Secondly, the legislative power of Parliament is limited both substantively and procedurally in relation to the power of the provinces (Section 126 read with Schedule 6 defines principles for deciding which law prevails in the case of conflict between national and provincial legislation; Sections 61 and 62(2) impose special 'manner and form' requirements in cases where certain fundamental features of provincial government are affected, or where a national law affects one province only). Thirdly, the powers of Parliament to amend the Constitution are subject to special procedures requiring a high majority. Fourthly, in its capacity as Constitutional Assembly responsible for drafting a new Constitution, Parliament is obliged to comply with the 34 Principles contained in

Schedule 4. Fourthly, certain procedures affecting the functions of and relationship between the National Assembly and the Senate are laid down by the provisions of Sections 59, 60 and 61.

[203] As I read them, these latter sections are directed towards the manner in which 'Bills' are to be dealt with before they can become Acts of Parliament. I do not see them as purporting to prescribe the only way in which laws can be made. They simply refer to the manner in which legislation before Parliament has to be adopted, and being a constitutional prescription, they cannot be amended by Parliament itself without first amending the Constitution. I see nothing in these sections which deals directly or by necessary implication with the question of delegated legislative powers. The Act which inserted Section 16A into the Transitional Local Government Act (TLGA) was itself passed with due manner and form as an ordinary Bill of Parliament. Mr Seligson contended that because of its effect, it should have been subjected to the manner and form procedures prescribed in Sections 61 and 62(2). I am doubtful whether this proposition is correct. The provisions of Section 235 read with the TLGA relating to the power of the President to issue proclamations, clearly and directly contemplate the restructuring of government in the provinces by direct Presidential action, which as a result would appear to fall outside the matter subject to special procedural protection as envisaged by Sections 61 and 62(2).

[204] The question at issue does not seem to me to be one of the manner and form in which Parliament acted or of the extent of its powers, but rather of its capacity to delegate any authority which it undoubtedly has. The Constitution contains no express limitation on the

power of Parliament to pass a law delegating its legislative authority. If we look at the design and structure of the Constitution as a whole, however, I have no doubt that such a limit must be implied. Indeed it flows from the very majesty of Parliament, not from its impotence. Certain tasks are entrusted to it and to it alone. Parliament has not only extensive powers but heavy responsibilities; under our Constitution, it is the centrepiece of the whole governmental structure. The President is chosen by Parliament from its ranks (Section 77), and Deputy-Presidents are also selected from amongst its members (Section 84). Unlike countries where there is a strict separation of power between the executive and the legislature, members of the cabinet in South Africa are directly accountable to Parliament for the handling of their portfolios (Section 92). Even in time of war and national emergency, the Constitution ensures that Parliament will continue to have a central role (Section 34). I would be inclined to go a step further. There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.

[205] The issue in this case is therefore not whether Parliament can find the authority to do what it did, but whether it can give away the authority which the Constitution expected it to exercise. I do not feel that the answer to this question can be found in simply distinguishing in a formal way between an Act of Parliament that extends plenary power to legislate (impermissible) and an Act of Parliament which extends power to make subordinate legislation (permissible). This will frequently be a matter of degree rather than substance. I would prefer to start my enquiry by looking at the fundamental purpose that Parliament was designed to serve. The reason why full legislative authority, within the constitutional framework mentioned above, is entrusted to Parliament and Parliament alone, would seem to be that the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision-making process, the involvement of civil society in relation to committee hearings, and the pluralistic interaction between different viewpoints which Parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution. It is Parliament's function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes. It is not its duty to attend to all the details of implementation. Indeed, if it were to attempt to do so, it would not have the time to serve its primary function. Hence the need for delegated legislation, which has become a feature of Parliamentary democracies throughout the world. The power to delegate should therefore be considered as an integral part of the legislative authority; it simply cannot legislate wisely if it tries to legislate too well.

[206] At the same time, if it is not to fail to discharge the functions entrusted to it by the

Constitution, there must be some limit on the matters which it can delegate. I do not think it would be helpful to attempt to find a single formulation or criterion for deciding when delegation is permissible and when not, I feel that a complex balancing of various relevant factors has to be done, against a background of what Parliament is there for in the first case. There would seem to be a continuum between forms of delegation that are clearly impermissible at the one extreme, and those that are manifestly permissible at the other. To take tragic but telling examples from history, it would obviously be beyond the scope of Parliament to do what the Reichstag did when it entrusted supreme law making powers to Adolph Hitler, or in the manner of a Roman Emperor, to declare itself a god, and its horse a consul. At the other extreme, Parliament can, within the framework of clearly established criteria, delegate to other authorities or persons law-making power to regulate the implementation of its laws. There is however a large amount of delegation in between these two extremes that might or might not be permissible. As I have said, I do not think that any hard and fast rule or simple formula can be used to find a point on the continuum that automatically distinguishes between the two classes of case. To my mind, what would have to be considered in relation to each Act of Parliament purporting to delegate law-making authority, is whether or not it involved a shuffling-off of responsibilities which in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that Parliament has, should not be entrusted to any other agency. This will include an evaluation of factors such as the following:

a. The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;

b. The public importance and constitutional significance of the measure - the more it

touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;

c. The shortness of the time period involved;

d. The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

e. The extent to which the subject matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

f. Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.

[207] These items should in not in my view be regarded as a checklist to be counted off, but as examples of the interactive factors which have to be balanced against each other with a view to determining whether or not delegation in the circumstances was consistent with the responsibilities of Parliament. None of them, it should be emphasized, permit Parliament to infringe fundamental rights, violate protected spheres of provincial autonomy or in any other way deviate from the constitutional framework within which Parliament must function. Delegation takes place within, not outside the constitutional framework, but even within that framework it can be unconstitutional if it fails to satisfy the above criteria.

[208] Applying these criteria to the present case, I would note the following relevant factors: the special circumstances relating to the swift-moving and complex process of restructuring provincial and local government; the shortness of the time period involved, and the fact that Parliament was in recess for much of it; the fact that the delegatee was the President,

who as head of a government of national unity, was required to involve the whole Cabinet including members of the opposition parties, in the process of making his decisions; the provisions of the Constitution itself contained in Section 235, especially sub-section 7, which clearly contemplated that presidential proclamations would be issued without the necessity of following normal Parliamentary procedures; the degree to which Parliament retained control in the sense that the legislative powers to be exercised under Section 16A had to be approved of by the appropriate committees of both the National Assembly and the Senate, and that Parliament as a whole retained the power by simple resolution to nullify them.

[209] On the other hand, there is the glaring fact that Section 16A provides no clear guidelines as to how the President is to exercise his legislative powers. In the circumstance mentioned above, my view is that if Parliament had established clear guidelines structured around and not going beyond the principles contained in Section 235 read with Section 241 of the Constitution, Section 16A would comfortably have passed muster. This would have been so even if such a provision had permitted the President to repeal or alter laws including the LGTA (as Section 235 clearly contemplated) without following the manner and form requirements of a Parliamentary Bill. The exigencies, circumstances and controls would have been such that Parliament would not have been abdicating its responsibilities, but, rather, fulfilling them. The acceptable constitutional balance would have been maintained by ensuring that the extensive powers delegated could only be exercised for a short time and according to criteria laid down by Parliament and subject to Parliamentary control.

[210] Before concluding this judgment, I wish to mention a theme I have not been able to deal with, because the need for a rapid answer to the questions raised has outweighed the necessity for completeness. It relates to the topic of 'reading down'. For the reasons I have given, I feel that Section 16A could not be read down so as to make it compatible with the defence of provincial autonomy in the manner argued for by Mr Seligson. I feel, however, that we have not done full justice to his arguments in this particular regard. More particularly, I would have wished to explore whether Sections 16A could not have been read down in another way, namely so as to respect the limitations on the powers which Parliament could permissibly delegate. Reading down is not an option; if it is possible, we must do it [Section 232(3)]. Like severance it is an important mechanism of judicial restraint, which permits constitutionality to be upheld at minimum legislative and social cost. The matter was never argued in that way, so I raise the issue without attempting to decide it. I suspect that, like the debate on the powers of Parliament, the full implications of Section 232(2) will have to be considered in many future cases.

[211] **Madala J, Ngoepe AJ:** Although we agree with some of the conclusions to which Chaskalson P and some of our colleagues subscribe, we cannot agree with the conclusion that, Section 235(8)(b) of the Constitution, could not have provided a source of power for First Respondent to issue Proclamations R58 and R59 of 1995, and we deal with the matter accordingly. We are, with our colleagues, in the situation that we would have

preferred to have had more time to develop our ideas on the approach we take in this matter, but accept that time constraints militate against this being done.

[212] We proceed in this judgement on the basis that there has been no answer to the attack by the Applicants on Section 16A of the Local Government Transition Act ("Transition Act") and that, therefore, the said Section is unconstitutional by reason of its inconsistency with the Constitution.

The facts of this case appear more fully in the judgment of Chaskalson P and, consequently, we do not need to repeat them.

[213] At the resumed hearing of this matter on the 30th August, 1995, it became apparent to this Court that although the parties had presented their argument in respect of Section 235(8) and related provisions, certain aspects had not been dealt with satisfactorily either in the written or oral submissions. Counsel were, accordingly, requested to present further argument on the 14th September, 1995 on the following aspects outlined in the Registrar's directions:

> "A. Inasmuch as:
>
> i) The President's powers under Section 235(8) of the Constitution are confined to laws referred to in section 235(6)(b); and
>
> ii) The laws referred to in the latter Section are confined to laws "which fall within the functional areas specified in schedule 6 and which are not matters referred to in paragraphs (a) to (e) of Section 126(3)."
>
> Was the first respondent empowered by section 235(8) to do what he purported to do by Proclamation R58 and R59 of 1995?
>
> B: In this regard the Court requires argument, in particular, on

(a) Whether or not in the light of the specific provisions of Section 245 of the Constitution and the scope and provisions of the Local Government Transition Act, which make provision for the administration of that Act both before and after the coming into force of the Constitution, that Act can be said to be a law referred to in Section 235(6)(b)(i) of the Constitution; and

(b)(i) Whether or not in the light of the specific provisions of Section 245 of the Constitution and the scope and provisions of the Local Government Transition Act, that Act can be said to deal with a matter which falls within Schedule 6 of the Constitution, and if so

(ii) Whether or not the matter is one which falls within the purview of sub-paragraphs (a) to (e) of Section 126(3) of the Constitution.

C. If Section 235(8) of the Constitution does not apply to the Local Government Transition Act is invalid, what are the implications of this for other proclamations, including proclamation R129 of 1994, issued by the President in respect of the Local Government Transition Act. What, if any, relevance does this have to the exercise of the powers vested in this Court by Sections 98(5) (6) and (7) of the Constitution ?" (Our underlining.)

[214] It was submitted on behalf of the Applicants that Section 16A was an unconstitutional delegation of the power by Parliament to the First Respondent. In this respect it was argued that as Parliament itself was bound by Sections 61 and 62 of the Constitution (which provisions were themselves entrenched in terms of Section 62(1)), Parliament could not have delegated more authority than Parliament itself had. (See *Harris and Others v Minister of the Interior and Another* 1952(2) SA 428(A) at 456F and *Minister of the Interior v Harris* 1952(4) SA 769(A) at 779H - 781H; 784H - 785A; 790B - D; 797D.) It was further contended that because Section 16A of the Transition Act was itself an unconstitutional delegation of power by Parliament to the First Respondent, the Proclamations effected by the First Respondent under Section 16A must, *ipso facto*, also be unconstitutional and hence invalid.

This appears to be the position adopted by the majority of our colleagues. Our view, on the other hand, is that the First Respondent was empowered under Section 235(8) of the

Constitution to do what he did - promulgate Proclamations R58 and R59 of 1995. We now attempt to develop this view.

[215] Counsel for the Respondents submitted that, although First Respondent, on the face of the Proclamations, purported to have issued them in terms of Section 16A, First Respondent is entitled to rely on Section 235(8), provided the jurisdictional facts required in terms of the latter Section, are established. (See *Latib v The Administrator, Transvaal* 1969(3) SA 186 at 190F - 191A; *Avenue Delicatessen v Natal Technikon* 1986(1) SA 853(A) at 870I - J; *Klerkdorpse Stadsraad v Renswyk Slaghuis (Edms) Bpk* 1988(3) SA 850(A) at 873E - F.)

[216] We deal, herein specifically with the impact of Section 235, and we believe that any unravelling of the problem must be systematically and analytically carried out. Basically, the issue we consider hereunder is whether the Proclamations were validly promulgated under Section 235(8) of the Constitution.

[217] As a starting point in this matter, one needs to have regard to Section 75 of the Constitution, which states that the executive authority of the Republic in respect of all matters falling within the legislative competence of Parliament, shall vest in the President, who must exercise his powers and perform his functions in accordance with the Constitution.

On the other hand, the executive authority of a province vests in the Premier of the

province, who, likewise, is expected to exercise his power and perform his duties subject to and in accordance with the Constitution (Section 144(1)).

A province exercises its executive authority over:

a. all matters in respect of which it has exercised its legislative competence;

b. matters assigned to it by or under Section 235 or any law;

c. matters delegated to it by or under any law.(Section 144(2)).

[218] The proceedings before this Court were initially aimed at attacking the validity of Proclamations R58 and R59, which were promulgated by the First Respondent attempting to amend Sections 3(5) and 10 of the Transition Act; the attack was not aimed at the validity of Section 16A of the Transition Act. On the proclamations, the Applicants launched a three-pronged attack:

a. They contend that the proclamations and the legislative amendments effected in terms of those proclamations give rise to a direct assault on the Western Cape Province's legitimate provincial autonomy, and thereby violate constitutional principle XX11 in schedule 4 of the Constitution.

b. In the alternative, the Applicants contend that the proclamations and the legislative amendments effected thereby constitute an unconstitutional attempt to subvert Sections 61 and 62 of the Constitution.

c. In the third alternative, the Applicants contend that Section 16A of the Transition Act must be restrictively interpreted or "read down" in accordance with Section 232(3) of the Constitution.

It was only at a late stage in the proceedings that the Applicants sought to launch an attack against the validity of Section 16A of the Transition Act (by way of a small entry in a footnote). It was contended by the Applicants that the proclamations were promulgated in terms of what has been called a "Henry VIII" clause, this being, according to them, a provision in an act of parliament empowering someone to make regulations amending that act or another act.

[219] It was argued on behalf of the Applicants that the effect of Proclamation R58 was to withdraw the power to appoint and to dismiss members of the Provincial Committee - as happened to the Fourth and Fifth Applicants. Proclamation R59 sought to nullify the demarcation that had already been proposed. It was further argued that this had nothing to do with "the efficient carrying out of the assignment" of the administration of the Transition Act. It was on this basis contended that the President had no power to issue the Proclamations under 235(8).

[220] In considering Section 235, it must be remembered that we are here dealing with a series of transitional measures put in place to ensure that the democratic process takes place, and procedures implemented. Section 235 of the Constitution deals with "Transitional arrangements: Executive authorities". It seeks to devise a scheme through which executive powers would evolve at the commencement of the Constitution and upon the assumption of office by the President. The scheme is broadly as follows:

(a) It starts from Section 229 of the Constitution. The Section reads as follows:

> "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in <u>any area</u> which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws

by a competent authority".

(We shall return to the significance of the words we underlined).

(b) Next relevant, is section 235(5), which reads as follows :

> "Upon the assumption of office by the President in terms of this Constitution-
> (a) the executive authority of the Republic as contemplated in section 75 shall vest in the President acting in accordance with this Constitution; and
> (b) the executive authority of a province as contemplated in section 144 shall, subject to subsections (8) and (9), vest in the Premier of that province acting in accordance with this Constitution, or while the Premier of a province has not yet assumed office, in the President acting in accordance with section 75 until the premier assumes office."

(c) Next is Section 235(6) in terms of which all laws referred to in Section 235(6)(a) are to be administered by the national government. The laws referred to in Section 235 (6)(b) are further divided, for the purpose of their administration into those falling under Section 235(6)(b)(i) (which are to be administered by the national government even though they are with regard to matters within the functional areas of the provinces), and those falling under Section 235 (6)(b)(ii) which, except policing matters, are to be administered by the provinces.

(d) Next relevant, is Section 235 (8)(a):

> "The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the *Gazette* assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation."

Subsection (8)(b) deals with the measures or steps the President may take during or after the assignment of a law.

[221] Section 235(6)(b), on which First Respondent relies, states that all laws with regard to matters falling within the functional areas set out in Schedule 6 and which do not fall under Section 126(3) (a) to (e) shall be administered by a competent authority of the national government until such laws have been assigned to provinces. Section 235(6)(b)(i) reads as follows:

> "All laws with regard to matters which fall under the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3) shall-
> (i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1)(a) or (be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent Authority within the jurisdiction of the government of such province..."

[222] We interpret this Section to mean that all laws which came into operation before the Constitution (the Transition Act included), and which are matters with regard to which both central and provincial government have concurrent powers (local government included), shall vest in the President until he assigns them to the competent authorities in the provinces. For a possible successful reliance on Section 235 and, in particular Section 235 (6)(b)(i), First Respondent must, therefore, first bring the Transition Act within the group of laws referred to in Section 229 of the Constitution. The significance of the words "in any area", underlined above, is that for a law to be brought within the ambit of the Section, such law need not have been in force in the whole of what is now the national territory; it is sufficient if it was, for example, in force only in an area which constituted the "old" South Africa. The Transition Act was in fact, immediately before the commencement of the Constitution, in force in the "old" South Africa; it therefore falls within the ambit of Section 229 of the Constitution.

Section 235 (6) of the Constitution is very pertinent. It vests the President with executive power in respect of not only national functional areas [235(6)(a)] but also in respect of laws with regard to matters falling within the functional areas of the provinces [235 (6)(b)]. Such powers would vest in him upon his assumption of office [Section 235(5)]. Sections 235(6)(a) and 235(6)(b) are all inclusive, referring as they both do to "all" such laws. In our view, the words "all laws" mean exactly that. Executive power in respect of all the laws which, immediately prior to the commencement of the Constitution were in force in any area which forms part of the national territory, were collapsed into Section 235, and made to vest in the President. Therefore, executive powers in respect of the Transition Act did not escape the process, inasmuch as the Act itself must surely be included amongst "all laws".

We have already referred to the all-embracing nature of Section 235(6). Even if the Transition Act did contain its own scheme (and surely every act does contain a scheme of some kind) it (the Transition Act) must succumb (like all other acts) to the force of Section 235(6), which is a constitutional provision.

It seems as if Section 245(1) is being perceived as elevating the Transition Act to an extraordinary status. In this respect reference was made during argument to facts extraneous of that Act (and of the Section itself), such as that the Transition Act was the product of delicate and protracted negotiations. That kind of exercise can lead to speculation and one would be slow to found important decisions on that. It is one thing to refer to background material to understand an act, but, in our view, quite another thing to

accord an act an extra-ordinary status on the basis thereof. Section 245(1) is clear and straightforward: all it does is to direct that until elections referred to therein have been held, the restructuring of local government must not be done otherwise than in accordance with the Transition Act. The Transition Act can of course be amended, and Section 245(1) of the Constitution should be understood as directing that the restructuring of local government be in accordance with the Act as (duly) amended from time to time. The Section does not prescribe as to what the contents of the Transition Act should be. The purpose of the Section is therefore simply, to ensure that the restructuring be in accordance with the Transition Act, whatever the contents of the Act may be at any given time or from time to time, as long as properly amended. The fact that the Transition Act is amendable also disposes of any arguments based on possible conflicts between it on the one hand, and the provisions of Section 235 of the Constitution on the other hand, which may result from bringing it within the purview of the said Section; such conflicts will simply be removed. In fact, such conflicts or anomalies should be expected, given the plethora of laws by a number of different legislative bodies, with different constitutional status, that existed in various areas before the commencement of the Constitution. Hence the power of the President to amend, adapt etc. such laws upon assignment. It is, in our view, therefore, irrelevant, in considering whether or not the Transition Act falls under Section 235(6) of the Constitution, to take into account possible conflicts which may result.

[223] It has also been contended that the Transition Act could be some kind of a *lex specialis*, devising a scheme which should be seen as standing on its own outside of the one contained in Section 235 of the Constitution. Apparently this argument is based on the

provisions of Section 245(1) of the Constitution, which reads as follows:

> "(1) Until elections have been held in terms of the Local Government Transition Act, 1993, local government shall not be restructured otherwise that in accordance with that Act..."

We have already addressed this argument in the aforegoing paragraph.

[224] A further consideration is whether the whole Act can be said to be assignable. We do not find it necessary to express our view on this issue, for the present purpose. In our view, there is little doubt that the administration of the Sections sought to be amended by Proclamations R58 and R59, namely, Sections 3(5) and 10 respectively, is assignable. We consider, therefore, that it would be wrong to approach the matter on the basis that a law cannot be partially assignable. A reading of Section 235(8)(b)(ii) clearly contemplates such a possibility.

[225] In the present case, the First Respondent assigned only part of the Transition Act, in accordance with Section 235(8)(a). This is apparent from paragraph (a) of Proclamation R129 of 1994, which reads " ... assign ... excluding Section 9(1) and 12 ...". The Proclamation, therefore, effects the partial assignment of the administration of the Transition Act.

[226] As Proclamations R58 and R59 themselves reflect, the President did in fact "amend or adapt such law in order to regulate its application or interpretation;", having come to the conclusion, as he says in his affidavit dated 13 August, 1995, that the issuing of the said proclamation was "necessary for the efficient carrying out of the assignment" of the administration of the Sections which were assigned in terms of Proclamation R129.

[227] We differ with the conclusion, reached by Chaskalson P, that Section 235 (8)(b) of the Constitution could not have provided a source of power for the President to issue Proclamations R58 and R59, which were issued respectively on the 7th June, 1995 and the 8th June, 1995.

[228] We find the interpretation by Chaskalson P, of the words "necessary for the efficient carrying out of the assignment" too restrictive. Firstly, we think that the legislature, in inserting Sections 235 (6), 235 (7) and 235 (8), deliberately took a robust attitude towards the plethora of laws which were to be in force at the commencement of the Constitution; laws which emanated from a variety of legislative authorities with, for that matter, different constitutional status. Thus, Section 235 (8)(b) was intended to deal with problems the exact nature and scope of which could not be foreseen. A narrow interpretation would undermine its efficacy. There is another reason why we would not interpret the Section as aiming at remedying only functional inefficiencies arising out of the assignment. It is because of our reading of the words "(w)hen the President so assigns the administration of a law...". (Our underlining). We understand these words as conveying that the President can amend or adapt the law concerned already at the time of the assignment, the implication being that the powers to amend are not restricted to dealing with deficiencies arising only from the actual administration of the law concerned. In our view, therefore, the President can deal, by way of amendment, also with deficiencies which were already inherent in the law concerned before the assignment.

[229] The reasons for the President's move appear from his affidavit above - he saw the possibility of a crisis developing in the process of the restructuring of local government.

For the purpose of keeping the process on course, the President is given a variety of wide powers, intended to last for the duration of the transitional or interim phase only. In particular, Section 235 is the vehicle for the achievement of this. It must also have been envisaged by the framers of the Constitution that there might arise situations where a provincial government might not be functioning properly or was unable to assume responsibility for organising local government elections.

The vesting of these wide-ranging powers to the President is an act *sui generis* necessitated by the unique circumstances of transition which the country was or is facing and it cannot have been intended that they would be permanent. After all, are we not called upon, in interpreting the Constitution to do so purposively ?

[230] We would, therefore, not be able to strike down the Proclamations on the basis that there could not have been a valid assignment of the administration of the relevant sections of the Transition Act.

We would, accordingly, hold that Section 235(8) provided a source of power for the First Respondent to issue Proclamations R58 and R59, of the 7th and 8th June, 1995, respectively.

In the circumstances, we agree with paragraphs 1, 2, 6(b) and (c) of the order made by Chaskalson P.

For the Applicants

M Seligson SC

T D Potgieter

For the First to Third Respondents

J J Gauntlett SC

J C Heunis