CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/10
[2011] ZACC 25

In the matter between:

PREMIER: LIMPOPO PROVINCE	Applicant
and	
SPEAKER: LIMPOPO PROVINCIAL LEGISLATURE	First Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Third Respondent
MINISTER FOR FINANCE	Fourth Respondent

Heard on : 24 February 2011

Decided on : 11 August 2011

JUDGMENT

NGCOBO CJ:

Introduction

[1] This application, which has been referred to us by the Premier of the Limpopo Province (Premier) pursuant to the provisions of section 121 of the Constitution, concerns

the authority of provincial legislatures to pass legislation dealing with their own financial management.[1] Provincial legislatures have authority to pass legislation with regard to the functional areas listed in Schedule 4 and 5 to the Constitution.[2] In addition to the functional areas listed in these Schedules, they also have the power to pass legislation with regard to any matter "that is expressly assigned to [them] by national legislation",[3] or "any matter for which a provision of the Constitution envisages the enactment of provincial legislation".[4]

[2] The question presented in these proceedings is whether the Provincial Legislature of Limpopo (Provincial Legislature) has the authority to enact legislation dealing with its own financial management. It arises out of the Financial Management of the Limpopo Provincial Legislature Bill, 2009[5] (Bill), which was passed by the Provincial Legislature, but which the Premier has declined to assent to and sign.

Background

[3] On 24 November 2009 the Provincial Legislature passed the Bill and on 8 December 2009 submitted it to the Premier for his assent and signature. The Premier had reservations concerning the competence of the Provincial Legislature to pass the Bill. On

[1] The provisions of section 121 are set out in [4] below.

[2] The relevant parts of Schedules 4 and 5 are set out in n 16 and n 17 below.

[3] Section 104(1)(b)(iii) of the Constitution. The relevant provisions of section 104 are set out in [20] below.

[4] Section 104(1)(b)(iv) of the Constitution.

[5] [A06-2009].

8 January 2010 he referred the Bill to the Provincial Legislature for reconsideration in the light of his reservations.[6] On 25 February 2010, the Provincial Legislature referred the Bill back to the Premier. It indicated that it had reconsidered the Bill in the light of the Premier's reservations and was of the view that the Bill was constitutional.

[4] Acting under section 121(2)(b) of the Constitution, the Premier referred the Bill to this Court for a decision on its constitutionality. Section 121 provides:

> "(1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.
>
> (2) If, after reconsideration, a Bill fully accommodates the Premier's reservations, the Premier must assent to and sign the Bill; if not, the Premier must either—
>
> (a) assent to and sign the Bill; or
>
> (b) refer it to the Constitutional Court for a decision on its constitutionality.
>
> (3) If the Constitutional Court decides that the Bill is constitutional, the Premier must assent to and sign it."

[5] The Speaker of the National Assembly, the Chairperson of the National Council of Provinces (together referred to as Parliament) and the Minister for Finance filed affidavits contending that the Bill is unconstitutional.[7] They contend that the provisions of section

[6] The Premier's reservations are set out in [10] below.

[7] On 3 November 2010, directions were issued by this Court setting the matter down for hearing and, among other things, calling upon the Speaker of the Limpopo Provincial Legislature, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Minister for Finance to show cause why they should not be joined as parties to these proceedings. They all responded, indicating that they had no objection to an order to

3 of the Financial Management of Parliament Act[8] (FMPA), read with Schedule 1 thereto, do not expressly assign the power to pass legislation dealing with the financial management of the provincial legislatures. They also submit that provincial legislatures have no competence to pass legislation dealing with their own financial management. The Speaker of the Limpopo Provincial Legislature filed an affidavit maintaining that the Provincial Legislature has the competence to regulate its own financial management and that the Bill is therefore constitutional.

[6] The affidavits filed on behalf of Parliament[9] and the Provincial Legislature[10] were late. Condonation is sought in each case. We consider that it is in the interests of justice to grant condonation in respect of each application. In reaching this conclusion, we have

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this effect. An order joining them as the First, Second, Third and Fourth Respondents, respectively, was accordingly made and they were directed to file affidavits dealing with the constitutionality of the Bill.

On 3 November 2010, the Registrar of this Court was directed to serve the directions on the Speakers of each provincial legislature, other than the Limpopo Provincial Legislature, and each Speaker was invited to apply to be joined, if so advised. This did not evoke any response from the Speakers, notwithstanding that some of the provincial legislatures had already enacted legislation substantially similar in content to the Bill. These Acts are the Financial Management of the Eastern Cape Provincial Legislature Act 3 of 2009; the Financial Management of the Free State Provincial Legislature Act 6 of 2009; the Financial Management of the Gauteng Provincial Legislature Act 7 of 2009; the Financial Management of the Mpumalanga Provincial Legislature Act 3 of 2010; and the North West Provincial Legislature Management Act 3 of 2007. Subsequent to the hearing, the Court issued directions inviting the political parties in the Provincial Legislature to submit written argument on whether the political parties represented in the Provincial Legislature should be afforded the opportunity to make written submissions on the constitutionality of the Bill in the light of rule 14(3) of the rules of this Court. None of the political parties represented in the Provincial Legislature submitted written submissions.

[8] Act 10 of 2009.

[9] The affidavits on behalf of Parliament were filed two days late. The Speaker of the National Assembly has provided the Court with a full explanation for the delay. The delay was caused largely by the fact that he was out of the country on parliamentary business and, upon his return, had to consult with the Chairperson of the National Council of Provinces and the parliamentary legal advisors on the position to be taken on the Bill. The explanation for the delay is satisfactory.

[10] The affidavit on behalf of the Provincial Legislature was late by some six days. The explanation for the delay is the late briefing of counsel and the unavailability of counsel. The period of delay has not been fully explained and the explanation that has been tendered is not entirely satisfactory. However, the period of delay is minimal and the questions presented in these proceedings are of considerable importance to the Provincial Legislature.

had regard to: the absence of prejudice to, and opposition by, other parties; and the minimal period of delay involved in each case as well as the explanations therefor. More importantly, the questions presented in this case are of considerable importance to Parliament and the Provincial Legislature and it is undesirable to consider these questions without their participation.

The Bill

[7] The stated purpose of the Bill, as set out in its long title, is—

> "[t]o regulate the financial management of the legislature in a manner consistent with its status in terms of the Constitution; to ensure that all revenue, expenditure, assets and liabilities of the legislature are managed efficiently, effectively and transparently; to provide for the responsibilities of persons entrusted with financial management in the legislature; and to provide for matters connected therewith."

[8] Save for a reference in the long title of the FMPA to "financial management norms and standards for provincial legislatures",[11] the purpose of the Bill is drafted in terms identical to that of the FMPA, which regulates the financial management of Parliament. In addition, the substantive provisions of the Bill are drafted in terms substantially similar to those contained in the FMPA. It is therefore plain from its declared purpose, as well as from its substantive provisions, that the Bill regulates the financial management of the Provincial Legislature.

[11] Sections 2(e) and 3 of the FMPA are set out, in relevant part, below at [27] and [28].

[9] What are the Premier's reservations about the Bill?

The Premier's reservations

[10] The Premier's reservations about the constitutionality of the Bill are contained in his letter of 8 January 2010 referring the Bill to the Provincial Legislature for reconsideration. The letter reads as follows:

> "**1. BACKGROUND**
>
> The Limpopo Provincial Legislature referred the above-mentioned Bill to the Premier to assent to and sign in terms of section 121 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as 'the Constitution'). The Premier has reservations regarding the constitutionality of the Bill, as explained in paragraph 2, and therefore refers the Bill back to the Legislature for reconsideration in terms of section 121(1) of the Constitution.
>
> **2. LEGAL ANALYSIS**
>
> 2.1 A Provincial legislature derives its power to pass legislation from **section 104** of the Constitution.
>
> a. Section 104(1)(b) provides—
>
> *'The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power—*
>
> *(a)* . . . .
>
> *(b) to pass legislation for its province with regard to—*
>
> *(i) any matter within a functional area listed in Schedule 4;*
>
> *(ii) any matter within a functional area listed in Schedule 5;*
>
> *(iii) any matter outside those functional areas and that is expressly assigned to the province by national legislation;*
>
> *(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and*

(c) to assign any of its legislative powers to a Municipal Council in that province.'

b. Section 104(5) provides—

'A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature or in respect of which an Act of Parliament prevails over a provincial law.'

2.2 A scrutiny of Schedules 4 and 5 of the Constitution reveals that neither of the Schedules confers powers on a provincial legislature to legislate in respect of financial management of legislatures. In order to have the power to legislate on financial matters that power must be expressly assigned to the province by national legislation or it must be a matter for which a provision of the Constitution envisages the enactment of provincial legislation. The question arises whether section 3 of the Financial Management of Parliament Act, 2009 (Act No. 10 of 2009) assigns the power in question to a provincial legislature. Section 3 provides that *'provincial legislatures must adhere to the norms and standards for financial management set out in Schedule 1'*. In our view the wording used in section 3 read with Schedule 1 which provides '*Legislation enacted by a provincial legislature to regulate its financial management must promote accountable, transparent and sound financial management . . .*' the Financial Management of Parliament Act, 2009 does not assign a power, at best it can be argued that it is assumed in the wording that the provinces have the relevant power.

2.3 Chapter 13, sections 213 to 222 of the Constitution provides for financial matters. This chapter of the Constitution provides for **national legislation** that must be enacted by parliament to provide for measures to ensure both transparency and expenditure control. It provides that national treasury must enforce compliance of the legislation.

2.4 National legislation that provides for the measures outlined in the Constitution was passed in the form of the Public Finance Management Act, 1999 (Act No. 1

of 1999) [hereinafter referred to as 'the PFMA']. The **PFMA is applicable to provincial legislatures** and this is confirmed in section 3(1) of the Act that provides—

'(1) (d) This Act, to the extent indicated in the Act, applies to a provincial legislature, subject to subsection (2).

(2) To the extent that a provision of this Act applies to a provincial legislature, any controlling and supervisory functions of the National Treasury and a provincial treasury in terms of that provision are performed by the Speaker of the provincial legislature.'

The PFMA subscribes to the principle of separation of powers. Section 3 provides that any controlling or supervisory powers in terms of the provisions of the Act are performed by the Speaker in respect of a provincial legislature.

2.5 The Financial Management of Parliament Act, 2009 (Act No. 10 of 2009) repealed sections in the PFMA relevant to parliament but did not repeal the provisions of the PFMA applicable to provincial legislatures. The provincial legislature does not have the legislative competency to repeal the sections of the PFMA applicable to provincial legislatures and passing new provincial legislation dealing with financial management of the legislature will result in conflicting provincial and national legislation.

3. CONCLUSION

In terms of section 121 of the Constitution, we respectfully refer the Financial Management of the Limpopo Legislature Bill, 2009 back to the legislature for reconsideration." (Emphasis original.)

[11] As this letter indicates, the Premier's reservations concern the authority of the Provincial Legislature to pass legislation dealing with financial management. He contended that: first, neither Schedule 4 nor Schedule 5 to the Constitution confers powers on a provincial legislature to legislate in respect of financial management;

second, section 3 of the FMPA, read with Schedule 1 thereto, does not assign to the Provincial Legislature the power to legislate in respect of financial management as contemplated in section 104(1)(b)(iii); and third, Chapter 13 (sections 213-222) of the Constitution that deals with financial matters requires that national legislation provide for measures ensuring transparency and expenditure controls, but does not envisage the enactment of provincial legislation as contemplated in section 104(1)(b)(iv).

[12] In the course of considering this judgment, a question arose as to whether the provisions of section 104(1)(b)(iv) read with sections 195, 215 and 216 formed part of the Premier's reservations. Further directions were issued calling upon the parties to address this issue, among others. Upon review of the Premier's reservations, we are satisfied that these provisions form part of the Premier's reservations.

[13] The Premier required the Provincial Legislature to reconsider the Bill in the light of these reservations.

The contentions of the parties in this Court

[14] Parliament and the Minister for Finance have joined the Premier in challenging the constitutionality of the Bill. Like the Premier, they contend that financial management is a matter that falls outside the functional areas listed in Schedules 4 and 5. They also maintain that financial management of provincial legislatures is not a matter that has been

expressly assigned to the provinces by the FMPA in terms of section 104(1)(b)(iii) of the Constitution.

[15] For its part, the Provincial Legislature accepts that financial management is a matter that falls outside the functional areas listed in Schedules 4 and 5. During oral argument, it also conceded that the regulation of financial management of the provincial legislatures is not a matter that has been expressly assigned to the provinces under section 104(1)(b)(iii). The Provincial Legislature, nevertheless, seeks to rely on the provisions of section 104(1)(b)(iv), read with sections 195, 215 and 216 of the Constitution as sources of the authority to enact legislation dealing with financial management. Section 104(1)(b)(iv) empowers a provincial legislature to pass legislation with regard to "any matter for which a provision of the Constitution envisages the enactment of provincial legislation". It is contended that sections 195, 215 and 216 are the provisions of the Constitution that envisage the enactment of provincial legislation.

[16] The Minister for Finance joined issue with the Provincial Legislature on the provisions of section 104(1)(b)(iv) and contended that none of the provisions of the Constitution relied upon by the Provincial Legislature envisage the enactment of provincial legislation.

Jurisdiction

[17] In terms of section 167(4)(b)[12] of the Constitution, only this Court may decide on the constitutionality of any provincial Bill, and it must do so only in the circumstances contemplated in section 121.[13] Section 121 requires a Premier first to refer the Bill to the provincial legislature and articulate his or her reservations about the constitutionality of the Bill. A Premier may refer a Bill to this Court only after the provincial legislature has unavailingly reconsidered it in the light of his or her reservations.[14] As we held in *Mpumalanga Petitions Bill*, the provision envisages "consideration by this Court of a Bill that has gone through a number of steps, which include communication by the Premier of his or her reservations to the legislature and its reconsideration of the Bill in the light of those reservations."[15]

[18] As the background to these proceedings makes plain, the Bill has gone through the steps envisaged in section 121. None of the parties contended otherwise.

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[12] Section 167(4)(b) of the Constitution provides:

> "Only the Constitutional Court may—
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> . . . .
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121".

[13] See *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) (*Liquor Bill*) at para 12 (dealing with section 79 of the Constitution, which applies to Parliamentary Bills). See also *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 43; 2006 (12) BCLR 1399 (CC) at 1419A-C.

[14] *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* [2001] ZACC 10; 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (CC) (*Mpumalanga Petitions Bill*) at para 9 and *Liquor Bill* above n 13 at para 19.

[15] *Mpumalanga Petitions Bill* above n 14 at para 9.

[19] The Premier's reservations and the parties' contentions must therefore be evaluated and considered in the light of the legislative authority of provincial legislatures, the provisions of the Constitution dealing with financial management, and the national legislation that regulates financial management in the national and provincial governments.

The legislative authority of provinces

[20] The legislative authority of provinces is governed by section 104 of the Constitution. It provides:

> "(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—
>
> (a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;
>
> (b) to pass legislation for its province with regard to—
>
> (i) any matter within a functional area listed in Schedule 4;
>
> (ii) any matter within a functional area listed in Schedule 5;
>
> (iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation;
>
> (iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and
>
> (c) to assign any of its legislative powers to a Municipal Council in that province."

[21] Unlike Parliament, which enjoys plenary legislative power within the bounds of the Constitution, the legislative authority of provinces is circumscribed. Part A of Schedule 4 lists functional areas with regard to which both Parliament and the provincial legislatures have legislative competence.[16] Part A of Schedule 5 lists functional areas

[16] Part A of Schedule 4 of the Constitution provides:

> "FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE
>
> PART A
>
> Administration of indigenous forests
> Agriculture
> Airports other than international and national airports
> Animal control and diseases
> Casinos, racing, gambling and wagering, excluding lotteries and sports pools
> Consumer protection
> Cultural matters
> Disaster management
> Education at all levels, excluding tertiary education
> Environment
> Health services
> Housing
> Indigenous law and customary law, subject to Chapter 12 of the Constitution
> Industrial promotion
> Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
> Media services directly controlled or provided by the provincial government, subject to section 192
> Nature conservation, excluding national parks, national botanical gardens and marine resources
> Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
> Pollution control
> Population development
> Property transfer fees
> Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
> Public transport
> Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
> Regional planning and development
> Road traffic regulation
> Soil conservation
> Tourism
> Trade
> Traditional leadership, subject to Chapter 12 of the Constitution
> Urban and rural development
> Vehicle licensing

with regard to which provincial legislatures have exclusive legislative competence.[17] Provinces have no power to legislate on a matter falling outside Schedules 4 and 5 unless it is a matter "that is expressly assigned to the province by national legislation"[18] or is a "matter for which a provision of the Constitution envisages the enactment of provincial legislation".[19]

[22] Parliament has plenary legislative powers outside the functional areas that are exclusively reserved for provincial legislatures. Parliament may legislate on "any matter",[20] including a matter within the functional areas listed in Schedule 4 and, subject

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Welfare services".

[17] Part A of Schedule 5 of the Constitution provides:

"FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

PART A

Abattoirs
Ambulance services
Archives other than national archives
Libraries other than national libraries
Liquor licences
Museums other than national museums
Provincial planning
Provincial cultural matters
Provincial recreation and amenities
Provincial sport
Provincial roads and traffic
Veterinary services, excluding regulation of the profession".

[18] Section 104(1)(b)(iii) of the Constitution.

[19] Section 104(1)(b)(iv) of the Constitution.

[20] Section 44(1)(a) and (b) of the Constitution provides:

"The national legislative authority as vested in Parliament—
(a) confers on the National Assembly the power—
(i) to amend the Constitution;
(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

to certain specified circumstances,[21] a matter within the functional areas listed in Schedule 5. It follows that any matter that falls outside those functional areas with regard to which the provinces have legislative competence falls within the exclusive legislative competence of Parliament, unless Parliament has expressly assigned legislative power over such matter to provincial legislatures or the Constitution envisages provincial legislation with respect to such matter.

[23] In view of the plenary nature of the legislative powers of Parliament, they are not listed in the Constitution. By contrast, the legislative powers of the provinces are limited and they are therefore enumerated in Schedules 4 and 5. They are thus easily identifiable because those that are not listed in Schedules 4 and 5 must either be "expressly assigned to the province by national legislation"[22] or a provision in the Constitution must envisage

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(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power—

(i) to participate in amending the Constitution in accordance with section 74;

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly."

[21] Section 44(2) of the Constitution provides:

"Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

[22] Section 104(1)(b)(iii) of the Constitution.

the enactment of provincial legislation with regard to that matter.[23] This is intended to remove any doubt about the nature and the extent of the powers of the provinces.

[24] The defining feature of our constitutional scheme for the allocation of legislative powers between Parliament and the provinces is that the legislative powers of the provinces are enumerated and clearly defined, while those of Parliament are not. The plenary power that resides in Parliament is therefore contrasted with the limited powers that have been given to provincial legislatures.

Constitutional provisions dealing with financial matters

[25] Chapter 13 of the Constitution deals with general financial matters in sections 213-219. Section 213 establishes the National Revenue Fund; section 214 deals with, among other things, "the equitable division of revenue raised nationally among the national, provincial and local spheres of government"; section 215 deals with national, provincial and municipal budgets, and requires national legislation, among other things, to prescribe the form of the budgets and when they should be tabled;[24] and section 216, which deals

[23] Section 104(1)(b)(iv) of the Constitution.

[24] Section 215 of the Constitution provides:

> "(1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.
> (2) National legislation must prescribe—
> (a) the form of national, provincial and municipal budgets;
> (b) when national and provincial budgets must be tabled; and
> (c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.
> (3) Budgets in each sphere of government must contain—

with treasury control, requires legislation to "establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government" by introducing, among other things, "generally recognised accounting practice" and "uniform treasury norms and standards."[25] Sections 217, 218 and 219 deal with procurement, government guarantees and remuneration of persons holding public office, respectively.

National legislation dealing with financial management

[26] The national legislation that deals with public finance is the Public Finance Management Act[26] (PFMA). Its declared purpose is "[t]o regulate financial management in the national government and provincial governments". It provides for the establishment of the National Treasury;[27] the National Revenue Fund;[28] provincial

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(a) estimates of revenue and expenditure, differentiating between capital and current expenditure;
(b) proposals for financing any anticipated deficit for the period to which they apply; and
(c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year."

[25] Section 216(1) and (2) of the Constitution provides:

"(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—
(a) generally recognised accounting practice;
(b) uniform expenditure classifications; and
(c) uniform treasury norms and standards.
(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures."

[26] Act 1 of 1999.

[27] Sections 5-10 of the PFMA.

[28] Sections 11-16 of the PFMA.

treasuries and provincial revenue funds;[29] and deals with national and provincial budgets[30] and other matters dealt with in Chapter 13 of the Constitution. To the extent that the PFMA applies to a provincial legislature, supervisory functions of the provincial treasury are performed by the Speaker of the provincial legislature.[31] Until April 2009, the PFMA also applied to Parliament.[32]

[27] As its title indicates, the FMPA is the statute that regulates the financial management of Parliament. Its purpose includes ensuring "that all revenue, expenditure, assets and liabilities of Parliament are managed efficiently, effectively and transparently". As stated in the long title, it was also enacted "to provide financial management norms and standards for provincial legislatures". This is echoed in section 2(e) of the FMPA, which states that one of its objects is "to establish norms and standards for managing the financial affairs of provincial legislatures."

[28] Section 3 of the FMPA provides that "[p]rovincial legislatures must adhere to the norms and standards for financial management set out in Schedule 1." Schedule 1 provides:

> "NORMS AND STANDARDS FOR PROVINCIAL LEGISLATURES

[29] Chapter 3 of the PFMA.

[30] Chapter 4 of the PFMA.

[31] Section 3(2)(b) of the PFMA.

[32] Section 72(b) of the FMPA.

Legislation enacted by a provincial legislature to regulate its financial management must promote accountable, transparent and sound financial management and to this end must—

(a) identify an individual or body as the executive authority responsible for controlling the revenue, expenditure, assets and liabilities of the legislature;

(b) provide for the accountability of that executive authority to the legislature;

(c) provide for an accounting officer and set out the responsibilities of the accounting officer;

(d) provide for appropriate measures to ensure that the legislature has adequate financial management capacity;

(e) require budgetary and financial planning processes to be co-ordinated with the processes of the relevant executive organs of state;

(f) stipulate arrangements concerning the management of revenue, expenditure, assets and liabilities;

(g) require the administration of the legislature to put in place a supply chain management framework which is fair, equitable, transparent, competitive, cost-effective;

(h) require the preparation of annual financial statements in accordance with the norms and standards prescribed in the Public Finance Management Act;

(i) establish internal control and risk management arrangements including internal audit and an independent audit committee;

(j) require the internal and external auditing of financial statements;

(k) require financial statements to be submitted to the legislature and made accessible to the public; and

(l) require the legislature to comply with the standards of generally recognized accounting practice."

[29] It is within this constitutional scheme and legislative framework that the reservations of the Premier must be understood and evaluated, and the constitutionality of the Bill considered.

Issues for determination

[30] Financial management of provincial legislatures is a matter that is listed neither in Schedule 4 nor in Schedule 5 to the Constitution. It follows, therefore, that it is a matter that falls within the legislative competence of Parliament unless it is a matter that has been expressly assigned to the provinces by national legislation[33] or is a matter for which a provision in the Constitution envisages provincial legislation.[34]

[31] As pointed out above, during oral argument, counsel for the Provincial Legislature conceded that the provisions of section 3 of the FMPA, read with Schedule 1 thereto, do not expressly assign the power in question.[35] This issue is of considerable importance to the Provincial Legislature and it is too important to be disposed of on the basis of a concession made by counsel in argument. It is still necessary for this Court to determine whether in fact the legislative authority initially asserted by the Provincial Legislature has been expressly assigned by section 3 of the FMPA, read with Schedule 1 thereto, in accordance with section 104(1)(b)(iii) of Constitution.

[33] Section 104(1)(b)(iii) of the Constitution.

[34] Section 104(1)(b)(iv) of the Constitution.

[35] See [15] above.

[32] Accordingly, the following main issues fall to be determined in these proceedings:

1. Whether sections 2(e) and 3 of the FMPA, read with Schedule 1 thereto, expressly assign to provincial legislatures the power to regulate their own financial management; and
2. Whether financial management of provincial legislatures is a matter for which the Constitution envisages the enactment of provincial legislation.

Has the power to regulate their financial management been expressly assigned to provincial legislatures?

[33] The question whether sections 2(e) and 3 of the FMPA, read with Schedule 1 thereto, expressly assign to provincial legislatures the power to regulate their own financial management depends, in the first place, on the proper meaning of the phrase "expressly assigned" in section 104(1)(b)(iii), and, in the second place, on the proper meaning of the provisions of sections 2(e) and 3 of the FMPA, read with Schedule 1 thereto.

Meaning of "expressly assigned"

[34] When the word "expressly" is used in legislation, it is used in contrast to the word "implied". Courts have previously considered the meaning of "expressly" in the context

of statutes and contracts. In *Commissioner for Inland Revenue v Dunn*,[36] the Court observed, correctly in my view, that "[t]he words are stringent, and there are many cases illustrating the strong force of the words 'express' and 'expressly'."[37] Equally true, as the court went on to observe, "there are cases in which it has been held that 'express' does not mean 'by special reference' or 'in identical words', but only 'with reasonable clearness' or 'as a necessary consequence'."[38] This nevertheless is stronger than implication.

[35] While the meaning that courts have given to the words "expressly" and "express" in other contexts provides a useful guide, the meaning that a word has in the Constitution or legislation is generally coloured by the context in which it occurs.[39] The word "expressly" occurs in the context of defining the legislative authority of provinces. The constitutional scheme shows that the legislative authority of the provinces must be conveyed in clear terms. Provincial legislative powers are listed in Schedules 4 and 5, "expressly assigned" by legislation, or are clearly envisaged by the Constitution.[40] What is common in all these sources of provincial legislative authority is that they ensure that the legislative authority of the provinces is clearly identifiable.

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[36] 1928 EDL 184.

[37] Id at 195.

[38] Id.

[39] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 90-2.

[40] See [53]-[54] below.

[36] In the context of our Constitution, the word "expressly" must be given a meaning that is consistent with this scheme. The assignment of legislative powers pursuant to section 104(1)(b)(iii) must leave no doubt about the act of assigning and the nature and the scope of the powers assigned. It is a requirement of the rule of law, one of the foundational values of our constitutional democracy,[41] that when Parliament assigns its legislative powers to the provinces it must do so in a manner that creates certainty about the nature and extent of the powers assigned. This will enable the provinces to exercise those powers in accordance with, and within the limits of, the terms of assignment.

[37] This approach is also consistent with the provisions of Chapter 3 of the Constitution, which requires institutions "not [to] assume any power or function except those conferred on them in terms of the Constitution" and to "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere".[42] The public should be left with no doubt about which sphere of government has legislative competence with regard to the matter concerned. This is to preclude any dispute about whether the provinces have legislative competence with regard to the matter concerned.

[38] It must be apparent from the empowering legislation and its provisions that the purpose is to assign legislative authority with regard to a matter that falls outside the

[41] Section 1 of the Constitution.

[42] Section 41(1)(f) and (g) of the Constitution.

functional areas listed in Schedules 4 and 5. The ideal way to achieve this, and a method that is generally followed by the legislature, is to declare, in the preamble of the legislation, that its purpose is to make an assignment; or to say so in the provisions that set out the objects of the legislation.

[39] What is required is that the legislation conveys, in clear terms, that a power with regard to a specified matter is being assigned to the provinces so as to render it unnecessary to imply the power from the language used by the statute. For, it seems to me, if the act of assignment can be determined only by way of implication, it is not an assignment contemplated by section 104(1)(b)(iii).

[40] The Constitution makes a deliberate choice in the formulation of section 104(1)(b)(iii). Instead of merely requiring that powers be "assigned", it qualifies the assignment by specifying that it must be "expressly" made. The deliberate use of the qualifier "expressly", in section 104(1)(b)(iii), stands in stark contrast to the absence of such qualifier, in section 156(1), where the Constitution refers to matters over which municipalities have executive and administrative authority.[43] Section 156(1)(a) provides that municipalities have executive authority in respect of, and the right to administer, "the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5".

[43] Section 156(1) provides:

> "A municipality has executive authority in respect of, and has the right to administer—
>
> (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
>
> (b) any other matter assigned to it by national or provincial legislation."

Section 156(1)(b) further confers an executive authority on municipalities to administer "any other matter assigned to [them] by national or provincial legislation."

[41] The choice of language adopted by the Constitution in section 104(1)(b)(iii) must be given appropriate weight. It means that the assignment to provinces of a matter that is outside the functional areas listed in the Schedules must be conveyed in clear terms. It follows that where the assignment is implied, it does not meet the requirements of section 104(1)(b)(iii).

[42] It now remains to consider whether sections 2(e) and 3 of the FMPA, read with Schedule 1 thereto, clearly assign to provinces the legislative authority to pass legislation with regard to the financial management of provincial legislatures.

Do sections 2(e) and 3, read with Schedule 1, expressly assign the power in question?

[43] The starting point in construing the purpose of the FMPA is its long title, which declares one of its purposes: "to provide financial management norms and standards for provincial legislatures". It does not state, however, that one of its objectives is to assign legislative authority for this purpose. The next provision to consider is section 2, which sets out the objects of the FMPA. One of the objects of the FMPA is "to establish norms and standards for managing the financial affairs of provincial legislatures."[44] Section 3 requires provincial legislatures to "adhere to the norms and standards for financial

[44] Section 2(e) of the FMPA.

management" and directs them to Schedule 1, where these norms and standards are to be found. Schedule 1 lists those norms and standards consistently with the purpose and object of the FMPA.

[44] The heading of Schedule 1 suggests that its contents are keeping the promise made in section 3, namely, to set out norms and standards foreshadowed in that section. It therefore appears to be disjointed from the overall scheme of the statute when the opening phrase of Schedule 1 suddenly refers to "*[l]egislation enacted by a provincial legislature* to regulate its financial management". (Emphasis added.) There is no prior reference to the power of provinces to enact legislation to regulate their financial management. As counsel for the Minister for Finance correctly submitted, it is only when this opening phrase of Schedule 1 is read in isolation that ambiguity as to the proper understanding of the FMPA is introduced.

[45] That the manifest purpose and object of the FMPA, in relation to provincial legislatures, is to establish norms and standards for managing financial affairs of the provincial legislatures cannot be gainsaid. This purpose and object is consistent with section 216(1)(c) of the Constitution, which requires national legislation to establish uniform treasury norms and standards. The question is how we are to understand the opening phrase in Schedule 1. The phrase, itself, is not free from ambiguity.

[46] It is capable of at least three constructions, none of which conveys an express assignment of financial management. The first construction suggests that it is legislating in anticipation of a power yet to be assigned. On this construction of the provision, there is clearly no assignment and it can hardly be said to be assigning any power. The second construction is one that assumes that the provincial legislatures already enjoy the power. This construction simply begs the question, what is the source of that power? But even on this construction of the phrase, it can hardly be contended that there is an assignment. No prior legislation assigning the power in question has been drawn to our attention. The third possible construction is that the Schedule, itself, intends to assign the legislative power to regulate financial management to the provinces. This construction can only come about by implication, however, and would therefore fail to meet the requirement of express assignment under section 104(1)(b)(iii).

[47] There was some debate, in the course of the hearing, that focused on a possible construction of Schedule 1 as an instruction to provincial legislatures to enact legislation on financial management. This argument suffers from the same defect that the argument relating to an implied conferral of power suffers from. There is a gap between the instruction to enact legislation and the legislative act of expressly assigning the power. For the existence of an assignment, this argument must, of necessity, imply assignment from the instruction. Therein lies its difficulty. Once the power to legislate exists by implication, then it is no longer the express assignment that is required by section 104(1)(b)(iii). Otherwise, the instruction assumes that the power to legislate on financial

management exists. The problem, however, is that this assumes the very legislative power that the Constitution requires to be expressly assigned.

[48] At any rate, it seems odd to convey the assignment for the first time in a Schedule, without any prior reference to the purpose of the legislation being to assign the power in question. It is a marked departure from the legislative practice of stating the purpose of the legislation in the preamble, or in the provisions dealing with the objects of the legislation, or of stipulating the provisions of the Constitution under which the legislation is being enacted. All this inevitably leads to the conclusion that the provisions of sections 2(e) and 3 of the FMPA, read with Schedule 1 thereto, do not convey with reasonable clarity the assignment of the power to regulate financial management of provincial legislatures to the provinces.

[49] In the event, we conclude that sections 2(e) and 3 of the FMPA, read with Schedule 1 thereto, do not expressly assign to the provinces the power to legislate on financial management matters of provincial legislatures within the meaning of section 104(1)(b)(iii).

[50] It remains to consider the argument that the provisions of sections 195, 215 and 216 of the Constitution envisage provincial legislation that would empower provinces to pass legislation regulating their financial management under section 104(1)(b)(iv).

Is financial management of provincial legislatures a matter for which the Constitution envisages the enactment of provincial legislation?

[51] The contention that sections 195, 215 and 216 of the Constitution envisage the enactment of provincial legislation relates to section 104(1)(b)(iv). Section 104(1)(b)(iv) confers a power on the provinces to pass legislation with regard to any matter for which a provision in the Constitution envisages the enactment of provincial legislation. It must be understood in the context of the broader scheme for the allocation of powers between Parliament and the provincial legislatures. As pointed out above, the defining feature of this scheme is that matters in respect of which provincial legislatures have legislative powers must be enumerated in Schedules 4 and 5, or be "expressly assigned", or a provision in the Constitution must envisage the enactment of provincial legislation in respect of those matters.

[52] Consistent with this scheme, it seems to me that only those provisions of the Constitution which, in clear terms, provide for the enactment of provincial legislation, must be held to fall under section 104(1)(b)(iv). Our constitutional scheme does not permit legislative powers of the provincial legislatures to be implied. Were it to be otherwise, the constitutional scheme for the allocation of legislative power would be undermined. The careful delineation between the legislative competence of Parliament and that of provincial legislatures would be blurred. This may very well result in uncertainty about the limits of the legislative powers of the provinces. In the light of the plenary legislative powers of Parliament, it would result in the provinces having

concurrent legislative competence with Parliament in respect of many matters. This is not what the drafters of our Constitution had in mind.

[53] Happily, and consistent with the constitutional principle of conveying in clear terms the legislative powers given to the provinces, the Constitution furnishes us with examples where provincial legislation is envisaged, and it is against these examples that we can test the present argument relating to section 104(1)(b)(iv). One example that immediately comes to mind is section 155(5), which provides that "[p]rovincial legislation must determine the different types of municipality to be established in the province." Determining the different types of municipality to be established is neither listed in Schedules 4 or 5, nor is it a matter with respect to which provinces have been expressly assigned legislative authority in accordance with section 104(1)(b)(iii). It is nevertheless a matter with respect to which the Constitution envisages provinces enacting legislation, as section 155(5) makes clear.

[54] Another example is section 120(3) of the Constitution, which provides that "[a] provincial Act must provide for a procedure by which the province's legislature may amend a money Bill." As with section 155(5), legislative action at the provincial level is envisaged by section 120(3). In fact, it is not just envisaged – it is required. There are

also other examples.[45] These examples show that when the Constitution envisages the enactment of provincial legislation, it does so in clear and unmistakeable terms.

[55] In contending that section 195 envisages the enactment of provincial legislation, reliance was placed on section 195(1)(b), which requires "[e]fficient, economic and effective use of resources".[46] Section 195 sets out the democratic values and principles

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[45] Other examples in the Constitution are:

Section 115(c), which provides:

> "A provincial legislature or any of its committees may—
>
> . . .
>
> (c) compel, in terms of provincial legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b)".

Section 140(4), which provides:

> "Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—
>
> (a) tabled in the provincial legislature; and
>
> (b) approved by the provincial legislature."

Section 154(2), which provides:

> "Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation."

Section 155(6), which provides:

> "Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—
>
> (a) provide for the monitoring and support of local government in the province; and
>
> (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs."

[46] Section 195 provides, in relevant part:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.

that should govern public administration in all spheres of government. Significantly, subsection (3) requires national legislation to be enacted to "ensure the promotion of the values and principles listed in subsection (1)." Nothing in the provision indicates that it envisages that provincial legislation would be enacted to promote the values and principles set out in section 195(1). I should have thought that this would be a matter for national legislation, to ensure uniformity in the values and principles that should govern public administration at all levels.

[56] The same is true for the provisions of sections 215 and 216. They do not envisage the enactment of provincial legislation in the manner that the Constitution does when it envisages the enactment of provincial legislation to regulate the matters referred to above. On the contrary, these provisions expressly envisage the enactment of national legislation.[47] It is significant that the Constitution spells out what national legislation, required by sections 215 and 216, must address. It is equally significant that no analogous reference to provincial legislation is made in either section.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—
(a) administration in every sphere of government".

[47] See above n 24 and n 25.

[57] The difficulty confronting the argument that relies on sections 195, 215 and 216 as envisaging provincial legislation is that these provisions do not envisage provincial legislation in similarly clear terms to those we have cited above. The argument must therefore rely on the proposition that these provisions envisage provincial legislation by implication. But this proposition runs afoul of the scheme of the Constitution, which requires the matters in respect of which the provincial legislatures have legislative competence to be conveyed in clear terms. On the argument based on sections 195, 215 and 216, legislative competence will have to be implied.

[58] If the legislative powers of the provincial legislatures are to be implied beyond those expressly set out in the Constitution, this would, in my view, diminish, through an expansive reading of the Constitution, the residual legislative powers of Parliament. This would be inconsistent with the scheme of the Constitution, by which the provincial legislatures are given specific powers under the Constitution and Parliament is assigned the rest. In my view, the plenary legislative powers granted to Parliament are not to be diminished by implying legislative powers of provincial legislatures not expressly stated in the Constitution. The assignment of powers to the provinces must be expressed in clear and unequivocal language.

[59] It follows that the argument based on section 104(1)(b)(iv) cannot be upheld.

[60] I conclude, therefore, that the Bill is unconstitutional because the Provincial Legislature does not have the legislative authority to pass legislation with respect to its own financial management. But that is not the end of the matter.

The fate of provincial statutes dealing with financial management

[61] As noted above, there are five other provincial legislatures which have passed legislation substantially similar in content to the Bill.[48] These provinces were invited to join in the proceedings, if they were so inclined.[49] This was done in order to hear their views on the constitutionality of the Bill and, in the event of a finding that the Bill is unconstitutional, to hear them on the fate of their legislation. This was also intended to avoid a second hearing that would involve costs and unnecessary expenditure of limited judicial resources. As it turned out, none of these provincial legislatures responded to the invitation, not even to indicate that they had decided not to intervene. This was unfortunate indeed.

[62] The order of invalidity of the Bill will no doubt affect their legislation. The question is whether we should reach these provincial statutes.

[48] See above n 7.
[49] Id.

Does this Court have the power to reach the other provincial legislation?

[63] This Court has the power to raise, on its own, the need to determine the constitutional validity of statutes substantially similar to legislation before it. This power is rooted in the supremacy of the Constitution and the rule of law, as well as the duty of this Court to uphold and protect the Constitution.[50]

[64] There is a further consideration that weighs in favour of this Court reaching the other provincial statutes concerned. As I have pointed out above, their contents are substantially similar to the Bill and their declared purpose is to regulate financial management, a matter with regard to which they have no legislative competence. Unless we consider them, grave doubt about their constitutional validity will hang over them. This will place those who are subject to these statutes in the invidious position of having to choose whether to contravene these statutes or risk engaging in conduct that is unconstitutional. It is undesirable to create a state of uncertainty. In these circumstances, it is in the public interest that we should reach them.

[65] Despite the fact that the provincial legislatures that have enacted legislation similar to the Bill were afforded the opportunity to join the proceedings and chose not to, they must, nevertheless, be afforded another opportunity to be heard. These statutes regulate

[50] See *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 68; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at paras 33-43; and *S v Thunzi and Another (Minister for Justice and Constitutional Development, joined)* [2010] ZACC 12; 2011 (3) BCLR 281 (CC) at paras 68-70.

rights and obligations that stand to be affected by an order of this Court declaring these statutes unconstitutional. In addition, the views of the Speaker of the National Assembly and the Chairperson of the National Council of Provinces cannot be ignored. They have indicated that Parliament's view is that the provinces must have the power to regulate their financial management for them to effectively exercise their oversight powers. If Parliament persists in this view, and we were assured by counsel at the hearing that it does, then it may well be able to inform the Court what steps, if any, it intends to take to give effect to this view. And this may well have an impact on the ultimate fate of the Bill and those provincial statutes.

[66] In all the circumstances, I consider that an order should be made joining the Speakers of the provincial legislatures of the Eastern Cape, the Free State, Gauteng, Mpumalanga and the North West as parties to these proceedings and calling upon the provincial legislatures affected to show cause why their respective statutes should not be declared unconstitutional. In addition, Parliament and the Minister for Finance should be required to file affidavits dealing with the constitutionality of the provincial legislation concerned.

[67] This is not a case in which an order for costs should be made. None of the parties contends otherwise.

The order

[68] In the event, the following order is made:

1. It is declared that the Financial Management of the Limpopo Provincial Legislature Bill, 2009 [A06-2009] is unconstitutional.

2. The constitutional validity of the following provincial statutes is set down for hearing on Tuesday, 8 November 2011:

    (a) the Financial Management of the Eastern Cape Provincial Legislature Act 3 of 2009;

    (b) the Financial Management of the Free State Provincial Legislature Act 6 of 2009;

    (c) the Financial Management of the Gauteng Provincial Legislature Act 7 of 2009;

    (d) the Financial Management of the Mpumalanga Provincial Legislature Act 3 of 2010; and

    (e) the North West Provincial Legislature Management Act 3 of 2007.

3. The Speakers of the following Provincial Legislatures are hereby joined in these proceedings as the Fifth, Sixth, Seventh, Eighth and Ninth Respondents, respectively:

    (a) the Eastern Cape Provincial Legislature;

    (b) the Free State Provincial Legislature;

    (c) the Gauteng Provincial Legislature;

(d) the Mpumalanga Provincial Legislature; and

(e) the North West Provincial Legislature.

4. The Members of the Executive Council responsible for financial matters in the following Provinces are joined as the Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Respondents, respectively:

(a) the Eastern Cape;

(b) the Free State;

(c) Gauteng;

(d) Mpumalanga; and

(e) the North West.

5. The Fifth to Fourteenth Respondents must file affidavits, if any, not later than Friday, 9 September 2011, setting out:

(a) why the provincial statutes enacted by the respective provincial legislatures should not be declared unconstitutional; and

(b) if they are found to be unconstitutional, the appropriate remedy.

6. The Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Minister for Finance must file affidavits, if any, not later than Friday, 16 September 2011, dealing with the constitutional validity of this provincial legislation and the appropriate

remedy if the provincial legislation concerned is found to be unconstitutional

7. The record, properly paginated and indexed, shall be prepared jointly by the Fifth to Ninth Respondents.

8. The record must consist, without duplication, only of the provincial statutes referred to in paragraph 2(a)-(e) of this order and the affidavits referred to in paragraphs 5 and 6 above.

9. Written argument, if any, must be lodged by:

    (a) the Fifth to Fourteenth Respondents, on or before Friday, 30 September 2011; and

    (b) the Second to Fourth Respondents, on or before Friday, 14 October 2011.

10. Directions may be issued to regulate the further conduct of this matter.

Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Mogoeng J, Mthiyane AJ, Nkabinde J and Van der Westhuizen J concur in the judgment of Ngcobo CJ.

YACOOB J:

Introduction

[69] The important question to be answered in this case is whether the Constitution read as a whole, empowers a provincial legislature to pass a law to look after and control its own assets and liabilities as well as expenditure.

[70] The Premier of the Limpopo Province (Premier) had reservations about whether the Constitution empowers provincial legislatures to legislate on the matters contained in the Financial Management of the Limpopo Provincial Legislature Bill, 2009 (Bill). He accordingly refused to assent to the Bill and referred it to the provincial legislature for reconsideration in the light of certain expressed reservations, but to no avail. After the Bill was returned without amendment, the Premier referred it to this Court for a decision on its constitutionality in terms of section 121 of the Constitution.

[71] The Premier's reservations must be understood in the light of section 104(1) of the Constitution which, to the extent relevant, reads:

> "The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—
>
> (a) . . . .
>
> (b) to pass legislation for its province with regard to—
>
> (i) any matter within a functional area listed in Schedule 4;
>
> (ii) any matter within a functional area listed in Schedule 5;

(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and

(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation".

[72] The letter containing the reservations says:

"2. LEGAL ANALYSIS

2.1 A Provincial legislature derives its power to pass legislation from **section 104** of the Constitution.

a. Section 104(1)(b) provides—

'The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power—

(a) . . . .

(b) *to pass legislation for its province with regard to—*

(i) *any matter within a functional area listed in Schedule 4;*

(ii) *any matter within a functional area listed in Schedule 5;*

(iii) *any matter outside those functional areas, and that is expressly assigned to the province by national legislation;*

(iv) *any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and*

(c) *to assign any of its legislative powers to a Municipal Council in that province.'*

b. Section 104(5) provides—

'A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature or in respect of which an Act of Parliament prevails over a provincial law.'

2.2 A scrutiny of Schedules 4 and 5 of the Constitution reveals that neither of the Schedules confers powers on a provincial legislature to legislate in respect of financial management of legislatures. In order to have the power to legislate on financial matters that power must be expressly assigned to the province by national legislation or it must be a matter for which a provision of the Constitution envisages the enactment of provincial legislation. The question arises whether section 3 of the Financial Management of Parliament Act, 2009 (Act No. 10 of 2009) assigns the power in question to a provincial legislature. Section 3 provides that *'provincial legislatures must adhere to the norms and standards for financial management set out in Schedule 1'*. In our view the wording used in section 3 read with Schedule 1 which provides *'Legislation enacted by a provincial legislature to regulate its financial management must promote accountable, transparent and sound financial management . . .'* the Financial Management of Parliament Act, 2009 does not assign a power, at best it can be argued that it is assumed in the wording that the province has the relevant power.

2.3 Chapter 13, sections 213 to 222 of the Constitution provides for financial matters. This chapter of the Constitution provides for **national legislation** that must be enacted by parliament to provide for measures to ensure both transparency and expenditure control. It provides that national treasury must enforce compliance of the legislation.

2.4 National legislation that provides for the measures outlined in the Constitution was passed in the form of the Public Finance Management Act, 1999 (Act No. 1 of 1999) [hereinafter referred to as 'the PFMA']. The **PFMA is applicable to provincial legislatures** and this is confirmed in section 3(1) of the Act that provides—

'(1) (d) This Act, to the extent indicated in the Act, applies to a provincial legislature, subject to subsection (2).

(2) To the extent that a provision of this Act applies to a provincial legislature, any controlling and supervisory functions of the National

> *Treasury and a provincial treasury in terms of that provision are performed by the Speaker of the provincial legislature.'*
>
> The PFMA subscribes to the principle of separation of powers. Section 3 provides that any controlling or supervisory powers in terms of the provisions of the Act are performed by the Speaker in respect of a provincial legislature.
>
> 2.5 The Financial Management of Parliament Act, 2009 (Act No. 10 of 2009) repealed sections in the PFMA relevant to parliament but did not repeal the provisions of the PFMA applicable to provincial legislatures. The provincial legislature does not have the legislative competency to repeal the sections of the PFMA applicable to provincial legislatures and passing new provincial legislation dealing with financial management of the legislature will result in conflicting provincial and national legislation."

[73] The assumption underlying the reservations of the Premier is that the contents of the Bill fall into a functional area creatively styled by him by reference to the title of the Bill as "the financial management of legislatures". On this hypothesis:

1. The starting point of the argument is that the province can legislate in relation to this so-called functional area if the power to legislate on the financial management of the provincial legislature has been conferred on the legislature by Schedules 4 or 5, has been expressly assigned to the province by national legislation or is concerned with a matter for which a provision of the Constitution envisages the enactment of provincial legislation.[1]

[1] [72] above at reservation 2.1.

2. The Premier then contends that the functional area of financial management, created by him, was neither conferred on the provincial legislature by Schedule 4 or 5,[2] nor was it expressly assigned to the provincial legislature[3] by the Financial Management of Parliament Act.[4]
3. Finally, the Premier concludes with the proposition that chapter 13 of the Constitution provides for national legislation that must be enacted by Parliament to provide for measures to ensure both transparency and expenditure control,[5] that the Public Finance Management Act[6] makes provision for the financial management of the provincial legislature and that the Public Finance Management Act and the Bill conflict.

[74] I have read the judgment of the Chief Justice (the main judgment) with much interest. Subject to what is set out below concerning functional areas,[7] I agree that the power to legislate on the matters that are the subject of the Bill have not been conferred upon provincial legislatures by Schedules 4 or 5, nor have they been expressly assigned to these legislatures by the Financial Management of Parliament Act. I conclude, unlike the main judgment, that chapter 13 of the Constitution envisages the exercise of the power to pass the Bill.

[2] Schedules 4 and 5 are provided in n 16 and n 17 of the main judgment, respectively.

[3] [72] above at reservation 2.2.

[4] Act 10 of 2009.

[5] [72] above at reservation 2.3.

[6] Act 1 of 1999.

[7] [77] to [80] below.

[75] This judgment is about:

1. the correctness of the approach adopted by the Premier in the reservations;
2. whether chapter 13 of the Constitution read in its context envisages the exercise by the provincial legislature of the power to pass the Bill; and
3. whether the Bill and the Public Finance Management Act conflict.

The approach of the Premier

[76] The approach of the Premier is:

1. first to create the functional area within which the power exercised by the provincial legislature in enacting the Bill falls;
2. then to assess if this functional area is one of those mentioned in Schedules 4 or 5; and if not,
3. to submit that the functional area concerned has not been expressly assigned to the provincial legislature by the Financial Management of Parliament Act; and
4. to contend that the power to legislate on this functional area has been constitutionally allocated to and exercised by the national legislative arm.

[77] I have some difficulty with this approach which appears to be inconsistent with the overall constitutional scheme of the allocation of power. It is true that the Constitution uses a design that encapsulates functional areas as a convenient mechanism through

which legislative powers are conferred on provincial legislatures in Schedules 4 and 5. This does not mean that the Constitution has conferred the power on any other entity to invent functional areas and give to these functional areas a name of their choice for the purpose of determining whether the functional area created by the entity concerned is contained in Schedule 4 or 5 of the Constitution. And what is more, section 104 of the Constitution does not require this.

[78] It will have been noticed that section 104(1) refers to functional areas only when it is concerned with Schedule 4[8] and Schedule 5.[9] The rest of section 104(1) does not concern itself with functional areas except where it refers to matters falling outside the Schedule 4 and 5 functional areas. The power of a provincial legislature to legislate outside the functional areas listed in Schedules 4 and 5 has nothing to do with functional areas. Thus section 104(1), to the extent that it confers powers outside Schedules 4 and 5 upon provincial legislatures, confers on those legislatures the power "to pass legislation for its province" in two categories. The first is "with regard to . . . any matter . . . that is expressly assigned to the province by national legislation".[10] The second is "with regard to . . . any matter for which a provision of the Constitution envisages the enactment of provincial legislation".[11]

[8] Section 104(1)(b)(i) of the Constitution.

[9] Section 104(1)(b)(ii) of the Constitution.

[10] Section 104(1)(b)(iii) of the Constitution.

[11] Section 104(1)(b)(iv) of the Constitution.

[79] The question to be answered is therefore not whether the *functional area* within which the power falls is contained in Schedule 4 or 5 and, if not, whether that functional area has been expressly assigned to the legislature or is envisaged in the Constitution. Rather, the essential question to be asked is whether the *power* to legislate on the matters with which the Bill is concerned is covered by Schedule 4 or 5 and, if not, whether the power to pass legislation on those matters has been expressly assigned to the provincial legislature and, if not, is envisaged in the Constitution.

[80] Hence the qualification referred to earlier.[12] The correct approach, in my view, is not to engage in a functional area comparison. We must look at the matters the Bill deals with and see whether the provincial legislature has the power to legislate on those matters. And the power could arise by reason of Schedule 4 or 5, or because the power has been expressly assigned to the provincial legislatures by Parliament or, if not, on account of the fact that the power to legislate on these matters is envisaged. I proceed with that evaluation.

[81] A cursory glance at the Bill shows that the power to enact legislation on the matters with which the Bill is concerned is neither covered by Schedule 4 or 5 nor has authority been expressly assigned to provincial legislatures by the Financial Management of Parliament Act. As I show later, the Bill represents an effort to ensure compliance with the norms and standards mandated by the Financial Management of Parliament Act.

[12] [74] above.

The Bill has no external effect and is concerned only with the provincial legislature and only with its very own business. It deals with:

1. the oversight committee;[13]
2. the responsibilities of the accounting officer in relation to the money of the provincial legislature;[14]
3. planning and budgeting in relation to the provincial legislature's own business;[15]
4. the way in which cash belonging to the legislature is managed and invested;[16]
5. the way in which the assets and liabilities of the legislature, its revenue, debtors and expenditure are to be managed;[17]
6. supply chain management in relation to acquisition by the provincial legislature itself;[18]
7. internal reporting and auditing functions of the legislature;[19] and
8. how to deal with the financial misconduct of its own employees.[20]

[13] Section 3 of the Bill.

[14] Sections 5 to 11 of the Bill.

[15] Chapter 3 of the Bill.

[16] Chapter 4 of the Bill.

[17] Chapter 5 of the Bill.

[18] Chapter 6 of the Bill.

[19] Chapters 7 and 8 of the Bill.

[20] Chapter 10 of the Bill.

Is the Bill inconsistent with the Constitution?

[82] In support of the proposition that the Bill is inconsistent with the Constitution, the Premier contends that:

1. chapter 13 of the Constitution provides for national legislation that must be enacted by Parliament, not legislation enacted by a province, to provide for measures to ensure both transparency and expenditure control;[21] and
2. the Public Finance Management Act makes provision for the financial management of provincial legislatures and the Bill is in conflict with this legislation.[22]

Although the word "envisages"[23] is not used in the Premier's reservations, the proposition that the Constitution "provides for **national legislation**" to prescribe "measures to ensure both transparency and expenditure control" must mean that the Constitution envisages that Parliament should legislate on these matters. And if the Constitution envisages that Parliament must legislate on these subjects, it must follow that the Constitution does not and cannot envisage that provincial legislatures pass laws on the same matters.

[21] [72] above at reservation 2.3.

[22] Id at reservation 2.4.

[23] Except when section 104(1)(b) is directly referred to.

[83] The Premier also contends in effect that this power has been expressly conferred upon Parliament and that Parliament has indeed exercised the power to provide for expenditure control within provincial legislatures in the Public Finance Management Act. It is therefore necessary to determine whether these reservations of the Premier justify scrutiny and whether they would result in the unconstitutionality of the Bill. In particular, in my view—

1. chapter 13 of the Constitution envisages the exercise by a provincial legislature of detailed powers on expenditure control;
2. the national legislature, on a proper understanding of the Constitution provides norms and standards for the exercise of these powers in the Financial Management of Parliament Act; and
3. the Public Finance Management Act does not provide in any detail for expenditure control by a provincial legislature concerning its very own resources and there is therefore no conflict between the Bill and the Public Finance Management Act.

The meaning of "envisages"

[84] The first question with which we must grapple is the meaning of the word "envisages" as contained in the Constitution.[24] This term must be distinguished from the term "expressly assigned", used to define the way in which Parliament can confer a

[24] Section 104(1)(b)(iv) of the Constitution.

power to legislate on matters outside the functional areas listed in Schedules 4 and 5.[25] Simply put the Constitution must "envisage" the power to legislate on matters outside Schedules 4 and 5. The fact that the Constitution expressly and deliberately deploys two distinct and separate standards, one for Parliament and one for the Constitution itself, means that the Constitution could not have contemplated that the different phrases, used so close together, should have an identical meaning. Otherwise exactly the same term would have been used twice. Nor can it be said that the use of differing terminology shows an inclination to engage in linguistic variety.

[85] The word "envisages" means something different from "expressly assigned". In my view, "envisages" means something less, but not much less. It must appear that the relevant provisions of the Constitution read in context lead to no conclusion but that the Constitution contemplates the exercise of the power by the provincial legislature and that the Constitution could mean nothing else. The question whether the Constitution envisages the power for provincial legislatures within the meaning given to this term here must be considered. Before doing so, however, it must be pointed out that the examples in the main judgment[26] presuppose that the Constitution must in express terms either require or authorise provincial legislation. This is to stretch the meaning of the word "envisage" too far. Indeed, the constitutional provisions cited as examples can readily be seen to have expressly assigned the powers concerned.

[25] Section 104(1)(b)(iii) of the Constitution.

[26] [53] to [54] of the main judgment.

What does the Constitution envisage?

[86] We determine what the Constitution envisages by looking at the provisions relating to budgetary processes, transparency and expenditure control and supply chain management. The Premier's answer to the question whether chapter 13 of the Constitution envisages the passing of the Bill is in the negative. Indeed, the Premier expressly says that chapter 13 "provides for [envisages] national legislation that must be enacted by Parliament to provide for measures to ensure both transparency and expenditure control." Is this statement a correct reflection of chapter 13?

Budgetary processes

[87] Section 215(1) of the Constitution requires provincial budgetary processes to promote transparency, accountability and effective financial management of the economy, debt and the public sector.[27] The section then provides that national legislation must prescribe certain pre-requisites that must be complied with by provincial entities[28]

[27] Section 215(1) of the Constitution provides:

> "National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector."

[28] Section 215(2) provides:

> "National legislation must prescribe—
>
> (a) the form of national, provincial and municipal budgets;
> (b) when national and provincial budgets must be tabled; and
> (c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation."

and prescribes what budgets in each sphere of government should contain.[29] It cannot be gainsaid that a provincial legislature is a public entity within the province that spends public funds. In other words, that it is an organ of state within the provincial sphere of government that spends money. Its members must be paid; equipment, goods and services acquired; and its staff employed. The provincial legislature, like every other public entity must have a budget and it is obliged in budgeting for its expenditure to have budgetary processes. The question is whether a provincial legislature has the power to determine its own budgetary processes. The answer to this must be yes.

[88] Any suggestion that the provincial executive should determine the budgetary processes by which the provincial legislature produces its budget cannot be justified. There are three reasons for this. In the first place, the doctrine of the separation of powers would militate against this. Moreover the powers of the provincial executive set out in the Constitution do not include the power to determine budgetary processes for provincial legislatures.[30] Finally, the budgetary processes adopted by the provincial

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[29] Section 215(3) provides:

> "Budgets in each sphere of government must contain—
>
> (a) estimates of revenue and expenditure, differentiating between capital and current expenditure;
> (b) proposals for financing any anticipated deficit for the period to which they apply; and
> (c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year."

[30] Section 125(2) provides:

> "The Premier exercises the executive authority, together with the other members of the Executive Council, by—
>
> (a) implementing provincial legislation in the province;

legislature concern its internal arrangements, proceedings and procedures, which the provincial legislature is expressly empowered by the Constitution to "determine and control". [31]

[89] It cannot be suggested that the provincial legislature would not be empowered to make rules by which its budgetary procedures must be determined. Nor can it be contended that this power could be exercised by a provincial legislature only by making and administering rules. The relevant provision of the Constitution[32] provides that a "provincial legislature may (a) determine and control its internal arrangements,

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(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
(d) developing and implementing provincial policy;
(e) co-ordinating the functions of the provincial administration and its departments;
(f) preparing and initiating provincial legislation; and
(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament."

[31] Section 116 provides:

"(1) A provincial legislature may—
(a) determine and control its internal arrangements, proceedings and procedures; and
(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
(2) The rules and orders of a provincial legislature must provide for—
(a) the establishment, composition, powers, functions, procedures and duration of its committees;
(b) the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;
(c) financial and administrative assistance to each party represented in the legislature, in proportion to its representation, to enable the party and its leader to perform their functions in the legislature effectively; and
(d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition."

[32] Id.

proceedings and procedures; and (b) make rules and orders concerning its business," having regard to certain precepts. It is evident that the power to determine and control its own internal arrangements is a power separate and distinct from the power to make rules. The Constitution therefore requires all provincial entities of government that spend money, including provincial legislatures, to have budgetary processes in compliance with the Constitution and the Public Finance Management Act. The Constitution furthermore envisages that these processes can be decided by provincial legislatures in any way they choose: by provincial legislation or rules.

[90] The budgetary process powers are exercised by the provincial legislature under the chapter of the Bill named "Planning and budgeting".[33] It deals with the preparation of strategic plans, annual performance plans and budgets,[34] the annual budget,[35] annual appropriations and approvals[36] and similar matters. The Constitution could not conceivably envisage the exercise of these powers and the performance of these constitutional duties to be determined by any entity other than the provincial legislature itself. Nor does the Constitution insist that the provincial legislature must do so by rules alone. It follows that the Constitution envisages that the power and duty to determine budgetary processes that comply with the relevant national legislation are that of the provincial legislature alone. Whether this power is exercised by rules or by legislation is

[33] Chapter 3 of the Bill.

[34] Sections 12 to 14 of the Bill.

[35] Sections 15 and 16 of the Bill.

[36] Section 17 of the Bill.

for the provincial legislature to decide and, in any event, of no moment in the circumstances of this case.

Transparency and expenditure control

[91] An investigation as to whether a provincial legislature has the power and duty to control its own expenditure must start on the basis that it is the national legislature that is given the power and duty to "prescribe measures to ensure both transparency and expenditure control" in the province,

> "by introducing—
>
> (a) generally recognised accounting practice;
>
> (b) uniform expenditure classifications; and
>
> (c) uniform treasury norms and standards."[37]

[92] It must be understood that the powers of the national legislature here are limited indeed. National legislation cannot determine the minutiae of control or the system of control. The details are left to the provincial entity concerned. The power of the national legislature is simply to introduce the matters referred to in paragraphs (a), (b) and (c) of section 216(1) and no more. The Premier is incorrect that the "Constitution provides for **national legislation**" to prescribe "measures to ensure both transparency and expenditure control." The statement implies that the national legislation must prescribe all the measures to the exclusion of the provincial legislature, yet the powers of Parliament to

[37] Section 216(1) of the Constitution.

legislate are limited to introducing three, and only three elements: generally recognised accounting practice, uniform expenditure classifications and uniform treasury norms and standards.

[93] It follows that every organ of state in every sphere of government including the provincial legislature is obliged to comply with nationally legislated measures concerned with the three aspects mentioned earlier, and the treasury is obliged to "enforce compliance with [these] measures".[38] In this regard I agree with the main judgment:

> "That the manifest purpose and object of the FMPA, in relation to provincial legislatures, is to establish norms and standards for managing financial affairs of the provincial legislatures cannot be gainsaid. This purpose and object is consistent with section 216(1)(c) of the Constitution, which requires national legislation to establish uniform treasury norms and standards."[39]

[94] It was unnecessary for national legislation to expressly confer any duty or power to comply with the norms and standards it set. The Constitution envisages that the provincial legislature has the power and duty to engage in expenditure control transparently and in accordance with the norms and standards prescribed by it. And Parliament was correct in interpreting the Constitution in this way. Indeed, the Constitution goes further and creates a dire penalty if a province does not comply with

[38] Section 216(2) of the Constitution.

[39] [45] above of the main judgment.

these norms and standards: a decision to stop the transfer of funds due to a province may be taken in the event of non-compliance.[40]

[95] The provincial legislature is an organ of state within the provincial sphere of government. It is obliged by the Constitution to ensure expenditure control in relation to the money it spends. In other words, the provincial legislature is obliged to ensure that it complies with the norms and standards set by national legislation in compliance with the Constitution. Now the same question that arose in relation to budgetary processes arises here. Does the legislature have the power to determine its own methods of expenditure control and its own methods of complying with the norms and standards set in the Financial Management of Parliament Act, or is the provincial executive empowered to do so? The same reasoning is therefore applicable in answer to this question. The Constitution could never have contemplated that the provincial executive perform this function; the provincial legislature could without doubt have made rules to comply. Nothing precludes the provincial legislature from ensuring compliance by passing legislation that has the same binding effect as rules.

Supply chain management

[96] I have already pointed out that the part of the Bill concerned with supply chain management is justified on the basis of the obligations of the provincial legislature to comply with norms and standards. But the Constitution also concerns itself with

[40] Sections 216(2) and (3) of the Constitution.

procurement.[41] It obliges a provincial legislature (an organ of state in the provincial sphere of government) to contract for goods and services according to a fair, equitable, transparent and cost-effective system. The provincial legislature is obliged to comply with this requirement. It has chosen, as it is entitled to do, to effect compliance by passing legislation binding on those responsible for acquiring goods and services in the provincial legislature.

[97] I therefore conclude that the Constitution envisages the power to pass the Bill.

Does the Bill comply with treasury norms and standards?

[98] We must now look at the Bill to see whether any of its provisions is an effort to ensure compliance with the norms and standards set by the Financial Management of Parliament Act as required by the Constitution. They undoubtedly are. The norms and standards are reproduced here once again for convenience:

> "NORMS AND STANDARDS FOR PROVINCIAL LEGISLATURES
>
> Legislation enacted by a provincial legislature to regulate its financial management must promote accountable, transparent and sound financial management and to this end must—

[41] Section 217(1) provides:

> "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

(a) identify an individual or body as the executive authority responsible for controlling the revenue, expenditure, assets and liabilities of the legislature;
(b) provide for the accountability of that executive authority to the legislature;
(c) provide for an accounting officer and set out the responsibilities of the accounting officer;
(d) provide for appropriate measures to ensure that the legislature has adequate financial management capacity;
(e) require budgetary and financial planning processes to be co-ordinated with the processes of the relevant executive organs of state;
(f) stipulate arrangements concerning the management of revenue, expenditure, assets and liabilities;
(g) require the administration of the legislature to put in place a supply chain management framework which is fair, equitable, transparent, competitive, cost-effective;
(h) require the preparation of annual financial statements in accordance with the norms and standards prescribed in the Public Finance Management Act;
(i) establish internal control and risk management arrangements including internal audit and an independent audit committee;
(j) require the internal and external auditing of financial statements;
(k) require financial statements to be submitted to the legislature and made accessible to the public; and
(l) require the legislature to comply with the standards of generally recogni[s]ed accounting practice."[42]

[99] The Bill is concerned with administration, the appointment, powers, duties and other matters relating to accounting officers,[43] cash and financial management,[44] supply

[42] Schedule 1 of the Financial Management of Parliament Act.

[43] Sections 5 to 11 of the Bill which are an effort to comply with Item (c) of Schedule 1.

[44] Chapters 4 and 5 of the Bill in compliance with Item (f) of Schedule 1.

chain management,[45] internal audits and an independent audit committee,[46] and the consequences of financial misconduct in provincial legislatures.[47]

[100] To sum up on this issue, the Constitution requires national legislation to prescribe uniform treasury norms and standards. National legislation does so, and obliges provincial legislatures to comply with them. The Bill in fact does so.

[101] That, however, is not the end of the matter. As indicated earlier,[48] the Premier also relied on the ground that a conflict between the Public Finance Management Act and the Bill was an additional reason for its unconstitutionality. In addition it will be recalled that the Premier pointed out that the Financial Management of Parliament Act repealed sections of the Public Finance Management Act relevant to Parliament but did not repeal those applicable to the provincial legislatures. Since provincial legislatures do not have the power to repeal the national legislation, he concluded that they do not have the power to pass provincial legislation dealing with financial management of the legislature.

[102] The issues that must be determined in this part of the judgment are whether:

[45] Chapter 6 of the Bill which complies with Item (g) of Schedule 1.

[46] Chapters 7 and 8 of the Bill seek to obey Items (i) and (j) of Schedule 1.

[47] Chapter 10 of the Bill.

[48] [73] above.

1. the Public Finance Management Act provides for measures relating to expenditure control that are applicable to provincial legislatures, in other words whether there is any conflict between the Public Finance Management Act and the Bill; and
2. there is any significance in the fact that the Financial Management of Parliament Act, while removing Parliament from the ambit of the Public Finance Management Act, left the applicability of the Act last mentioned to provincial legislatures.

Is there a conflict between the Public Finance Management Act and the Bill?

[103] The Premier submits in effect that the Public Finance Management Act provides for measures relating to expenditure control that are applicable to provincial legislatures. The Premier relies for this on the circumstance that this legislation is expressly rendered applicable to the provincial legislatures.[49] It is also submitted that the Financial Management of Parliament Act effectively amended the Public Finance Management Act to render that Act inapplicable to Parliament and deliberately left in place its applicability to the provincial legislatures.[50] This results, so the reservations contend, in "provincial legislation dealing with financial management of the legislature . . . [and in] conflicting provincial and national legislation."[51] The Financial Management of Parliament Act did

[49] [72] above at reservation 2.4.

[50] Section 72 of the Financial Management of Parliament Act.

[51] [72] above at reservation 2.5.

amend the Public Finance Management Act so as to exclude Parliament and did indeed leave the situation where the provisions of the latter Act were applicable to provincial legislatures unchanged.[52]

Does the Public Finance Management Act prescribe expenditure control measures for provincial legislatures?

[104] The Public Finance Management Act does indeed provide detailed measures applicable to departments and constitutional institutions,[53] public entities,[54] and executive authorities.[55] None of these entities includes provincial legislatures. This is quite apart from provisions concerning the provincial treasuries and provincial revenue funds[56] and provincial budgets[57] which I discuss later.

[105] Departments and constitutional institutions do not include provincial legislatures as is apparent from the definitions below:

1. A department is defined as "a national or provincial department or a national or provincial government component".[58]
2. A department can be national or provincial.[59]

[52] Section 3 of the Financial Management of Parliament Act.

[53] Chapter 5 of the Public Finance Management Act.

[54] Chapter 6 of the Public Finance Management Act.

[55] Chapter 7 of the Public Finance Management Act.

[56] Chapter 3 of the Public Finance Management Act.

[57] Chapter 4 of the Public Finance Management Act.

[58] Section 1 of the Public Finance Management Act.

3. A national department is defined as:

> "a department listed in Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), but excluding the Office of a Premier".[60]

4. A provincial department is:

> "(a) the Office of a Premier listed in Schedule 1 to the Public Service Act, 1994;
>
> (b) a provincial department listed in Schedule 2 to the Public Service Act, 1994."[61]

5. A constitutional institution is:

> "an institution listed in Schedule 1".[62]

None of these include provincial legislatures.

A provincial legislature is neither a public entity[63] nor an Executive Authority.[64] A public entity is "a national or provincial public entity".[65] A national public entity is:

> "(a) a national government business enterprise; or
>
> (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is—
>
> (i) established in terms of national legislation;
>
> (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and

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[59] Id.

[60] Id.

[61] Id.

[62] Id.

[63] Chapter 6 of the Public Finance Management Act.

[64] Chapter 1 of the Public Finance Management Act.

[65] Section 1 of the Public Finance Management Act.

(iii) accountable to Parliament".

A provincial public entity is:

> "(a) a provincial government business enterprise; or
>
> (b) a board, commission, company, corporation, fund or other entity (other than a provincial government business enterprise) which is—
>
> (i) established in terms of legislation or a provincial constitution;
>
> (ii) fully or substantially funded either from a Provincial Revenue Fund or by way of a tax, levy or other money imposed in terms of legislation; and
>
> (iii) accountable to a provincial legislature".

[106] This does not mean, however, that the Public Finance Management Act does not place obligations on the provincial legislature. It does, but in a limited way concerning the preparation and submission of provincial annual consolidated financial statements[66] and provincial budgets.[67] Provincial annual consolidated financial statements must be presented to the provincial legislature while provincial budgets must ultimately be approved by the provincial legislature. It is of importance, however, that none of the provisions of the Public Finance Management Act refers to the annual financial statements of the provincial legislature (as distinct from the provincial annual consolidated financial statements, or the budgets of the provincial legislatures themselves as distinct from provincial budgets).

[66] Section 19 of the Public Finance Management Act. Quoted in full at n 70 below.

[67] Sections 27(2) and (3) of the Public Finance Management Act.

[107] The Bill concerns, amongst other things, the annual financial statements[68] and budgets[69] of the provincial legislature alone. Quite obviously, the annual financial statement of the provincial legislature will be part of the provincial annual consolidated financial statement while the budget of the provincial legislature will become part of the budget of the province overall. And the provisions of the Bill in relation to the annual financial statement and budget of the provincial legislature dovetail completely with the provisions in the Public Finance Management Act concerning the provincial annual consolidated financial statements and the provincial budgets.

[108] The provision in the Public Finance Management Act concerning provincial annual consolidated financial statements[70] is that these—

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[68] Section 55 of the Bill.

[69] Section 15 of the Bill.

[70] Section 19 provides:

> "(1) A provincial treasury must—
>
> (a) prepare consolidated financial statements, in accordance with generally recognised accounting practice, for each financial year in respect of—
>
> (i) provincial departments in the province;
>
> (ii) public entities under the ownership control of the provincial executive of the province; and
>
> (iii) the provincial legislature in the province; and
>
> (b) submit those statements to the Auditor-General within three months after the end of that financial year.
>
> (2) The Auditor-General must audit the consolidated financial statements and submit an audit report on the statements to the provincial treasury of the province concerned within three months of receipt of the statements.
>
> (3) The MEC for finance in a province must submit the consolidated financial statements and the audit report, within one month of receiving the report from the Auditor-General, to the provincial legislature for tabling in the legislature.
>
> (4) The consolidated financial statements must be made public when submitted to the provincial legislature.

1. must be prepared by the provincial treasury;[71]
2. must include the financial statements concerning the provincial legislature in the province;[72]
3. must be submitted to the Auditor-General within three months after financial year-end;[73]
4. must be audited by the Auditor-General who must submit an audit report on them to the provincial treasury concerned within three months of their receipt;[74] and
5. must be submitted together with the report for tabling in the provincial legislature by the provincial MEC for Finance within one month of their receipt.[75]

[109] The Bill speaks to the preparation and submission of financial statements in respect of the provincial legislature,[76] not consolidated financial statements for the province as a whole. These statements—

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(5) If the MEC for finance fails to submit the consolidated financial statements and the Auditor-General's audit report on those statements to the provincial legislature within seven months after the end of the financial year to which those statements relate—

(a) the MEC must submit to the legislature a written explanation setting out the reasons why they were not submitted; and

(b) the Auditor-General may issue a special report on the delay."

[71] Section 19(1)(a) of the Public Finance Management Act.

[72] Section 19(1)(a)(iii) of the Public Finance Management Act.

[73] Section 19(1)(b) of the Public Finance Management Act.

[74] Section 19(2) of the Public Finance Management Act.

[75] Section 19(3) of the Public Finance Management Act.

1. must be prepared by the accounting officer of the provincial legislature;[77] and
2. must be submitted to the Auditor-General for auditing and to the provincial treasury for inclusion in the provincial annual consolidated statements within two months of the financial year-end.[78]

[110] The coalescence is apparent. The accounting officer of the provincial legislature prepares a financial statement in relation to the expenditure of that legislature and submits it to the provincial treasury within two months of the financial year-end. This presumably to facilitate inclusion of these financial statements into the annual consolidated financial statements of the province within one month of their receipt.

[111] The Bill and the Public Finance Management Act do not conflict. They coalesce. More than this, the Bill ensures compliance with an obligation necessarily implied by the Public Finance Management Act. The provision[79] requires that financial statements of the provincial legislature must be included in the provincial annual consolidated financial statements. The financial statements of the provincial legislature cannot be included in

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[76] Sections 55 and 56 of the Bill.

[77] Section 55(1) of the Bill provides:

> "The accounting officer must, for each financial year, prepare annual financial statements in accordance with the standards of general recogni[s]ed accounting practice and, in the absence of an applicable standard, in accordance with standards prescribed by the Executive Authority for the purpose of maintaining consistency with other organs of state."

[78] Section 56(1) of the Bill.

[79] Section 19(1)(a)(iii) of the Public Finance Management Act.

the provincial annual consolidated financial statements unless the provincial legislature or some other entity prepares them. There is no justification for any finding that an entity like the executive should prepare the financial statements of the provincial legislature. In any event, a provision that the executive should prepare the financial statements of the provincial legislature would be a breach of the separation of powers and would imperil practicality. The only inference that can be drawn is that the provincial legislature is obliged to ensure preparation of its own annual financial statements. And this is precisely what the Bill does.[80]

[112] The same applies to the Public Finance Management Act and those provisions of the Bill concerning provincial budgets. The Public Finance Management Act requires the MEC for Finance in a province ordinarily to table the provincial annual budget for a financial year in the provincial legislature within two weeks of the tabling of the national annual budget.[81] I emphasise that while the expenditure of the provincial legislature must be included in the provincial budget, the Public Finance Management Act says nothing about the preparation of a budget for the provincial legislature for inclusion in the budget of the province as a whole. This gap is covered by the Bill.[82] The accounting officer of

[80] [110] above.

[81] Section 27(2) provides:

> "The MEC for finance in a province must table the provincial annual budget for a financial year in the provincial legislature not later than two weeks after the tabling of the national annual budget, but the Minister may approve an extension of time for the tabling of a provincial budget."

[82] Sections 15 and 16 of the Bill.

the province must prepare a draft budget[83] and present it to the Executive Authority (the Speaker) at least ten months before the start of the financial year to which that draft relates.[84] The Speaker is required to table the draft budget in the provincial legislature at least one month before the draft budget for the province as a whole is to be submitted to the provincial treasury.[85] There is nothing inconsistent between the provisions of the Public Finance Management Act and those of the Bill.

[113] It is unnecessary to take this comparison any further because the Premier has failed to refer us to specific conflicts between the Bill and the legislation. Suffice it to say that the Bill is concerned with matters not dealt with in the Public Finance Management Act and I have not been able to find any conflict.

[114] I may point out however that money appropriated by the provincial legislature, in terms of an appropriation act, in respect of its own expenditure may be withdrawn by the legislature from the Provincial Revenue Fund.[86] There is in addition a provision which exempts the provincial legislature from depositing money received by it into the Provincial Revenue Fund.[87] This means that the provincial legislature will have money on hand and it is necessary for the control of this money to make provision for

[83] Containing the details prescribed in section 15(2) of the Bill.

[84] Section 15(1) of the Bill.

[85] Section 16(1)(a) of the Bill.

[86] Section 21(1)(b)(i) of the Public Finance Management Act.

[87] Section 22(1)(a) of the Public Finance Management Act.

management and control of accounting officers, banking accounts and such things. This is because neither the Public Finance Management Act nor any other law that I have been able to discover is concerned with these vital aspects.

[115] The inevitable conclusion is that the Public Finance Management Act does not concern itself with the matters dealt with in the Bill. There is neither overlap nor conflict.

The significance of the Public Finance Management Act continuing to apply to provincial legislatures and not to Parliament

[116] It follows from this analysis that there is no significance in the fact that the Public Finance Management Act was amended so as to exclude its application to Parliament by the Financial Management of Parliament Act which retained the applicability of the Public Finance Management Act to the provincial legislature. The Act applies to the legislature only to the extent that it does. The Bill does not trespass on these provisions in the least.

[117] For these reasons, I am satisfied that the Bill is constitutional and would hold accordingly.

Cameron J concurs in the judgment of Yacoob J.

CAMERON J:

[118] In view of the difference between the main judgment and the dissenting judgment of my colleague Yacoob J, I add a few paragraphs to explain why I concur in the latter.

[119] My starting point is that I agree with the dissenting judgment that "expressly assigned by legislation" and "the Constitution envisages" in section 104(1)(b) of the Constitution[1] cannot and should not be equated. "Envisages" means something less than, albeit not much less than, "expressly assigned".[2]

[120] That there is a difference comes from the Constitution itself, which creates a plain contrast between the two ways in which provincial legislative power may be conferred. Hence, to say that the constitutional scheme requires the removal of "any doubt"[3] regarding provincial legislative competence, and that only those constitutional provisions that provide in the clearest terms for enactment of provincial legislation can be said to "envisage" legislation,[4] is in my respectful view to assume the premise in dispute. The question is whether "envisages" imports a different standard of power-conferral, and that

[1] The relevant provisions of section 104 are set out in [20] of the main judgment.

[2] See dissenting judgment (per Yacoob J) at [84]-[85].

[3] See main judgment at [23].

[4] Id at [52].

question cannot be answered by presuming the premise that only the clearest provisions meet it.

[121] That there are unmistakably clear instances of constitutional conferral of provincial legislative power[5] does not help to show that less clear instances are not also envisaged. Indeed, the goal of complete clarity may be a chimera, as our judgments on the scheduled powers show.[6] The supposition that it can be attained should not therefore dominate our approach to "expressly assigned" versus "envisages".

[122] It is the Constitution itself that creates the difference. It should in my view be given effect. And it is a difference that has a sound basis. When Parliament assigns provincial legislative power, its assignment should be, for the reasons the main judgment gives, express.[7] There should be no lack of clarity.

[123] It is different when the Constitution itself is the source of the legislative competence. It is the founding source of all power, legislative and otherwise. It is quite proper to conclude that it can itself confer provincial legislative power in ways that are less express than it authorises Parliament to do through legislation. For this reason, I

[5] Id at [53]-[56].

[6] See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC); *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC); and *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC).

[7] See main judgment at [34]-[41].

agree with the approach of Yacoob J that one must start by inquiring, free from preconception, whether the legislative power is accorded in the Schedules, is expressly assigned by legislation, or is envisaged by the Constitution.[8]

[124] Second, as a matter of fundamental outlook, it would seem to me surprising if the Constitution did not envisage that provinces may legislate for the financial management of their own legislatures. This is the premise that informs the dissent, and it seems correct to me.

[125] So approached, the conclusion that the Constitution envisages legislation by the provinces to regulate the financial dealings of their own legislatures is persuasive. In particular, and in addition to the reasoning set out in the dissent, this conclusion seems to me to flow from section 116(1)[9] of the Constitution. That provision empowers a provincial legislature to "determine and control its internal arrangements". This in my view envisages legislation by the provinces to regulate the financial management of their legislatures.

[8] See dissenting judgment at [79].

[9] Section 116(1) provides:

> "A provincial legislature may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

[126] Section 116(2)[10] in addition obliges provincial legislatures to adopt rules regarding committees, opposition parties and the like. The express constitutional imprimatur for provincial legislative rules does not detract from the inference that subsection (1) envisages provincial legislation on internal financial arrangements.

[127] For these reasons, I concur in the dissent.

[10] Section 116(2) provides:

> "The rules and orders of a provincial legislature must provide for—
>
> (a) the establishment, composition, powers, functions, procedures and duration of its committees;
>
> (b) the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;
>
> (c) financial and administrative assistance to each party represented in the legislature, in proportion to its representation, to enable the party and its leader to perform their functions in the legislature effectively; and
>
> (d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition."

FRONEMAN J:

I agree with the reasoning of Yacoob J that chapter 13 of the Constitution envisages that provincial legislatures should have their own budgetary processes. I am less sure that section 116 of the Constitution envisages that this must be done by way of legislation.[1]

[128] Whatever the correct standard conveyed by the different formulations in the Constitution is for the competence of provincial legislatures to pass legislation, it seems to me that it must be a necessary consequence of each of the formulations that provincial legislation is allowed. Yacoob J concedes that the internal budgetary processes, transparency and expenditure control, and supply chain management may be done by rules and procedures under section 116 of the Constitution, as well as by way of legislation. Once section 116 expressly allows these processes by means other than legislation, I do not consider it to be a necessary consequence that the provincial legislature may also pass legislation for that purpose.

For these reasons I concur in the outcome and order set out in the judgment of Ngcobo CJ.

[1] See dissenting judgment (per Cameron J) at [125].

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