CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/10
[2012] ZACC 3

In the matter between:

PREMIER: LIMPOPO PROVINCE	Applicant
and	
SPEAKER OF THE 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
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Fifth Respondent
SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Sixth Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Seventh Respondent
SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Eighth Respondent
SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE	Ninth Respondent
MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR FINANCIAL MATTERS: EASTERN CAPE PROVINCE	Tenth Respondent

MEMBER OF THE EXECUTIVE COUNCIL
RESPONSIBLE FOR FINANCIAL MATTERS:
FREE STATE PROVINCE — Eleventh Respondent

MEMBER OF THE EXECUTIVE COUNCIL
RESPONSIBLE FOR FINANCIAL MATTERS:
GAUTENG PROVINCE — Twelfth Respondent

MEMBER OF THE EXECUTIVE COUNCIL
RESPONSIBLE FOR FINANCIAL MATTERS:
MPUMALANGA PROVINCE — Thirteenth Respondent

MEMBER OF THE EXECUTIVE COUNCIL
RESPONSIBLE FOR FINANCIAL MATTERS:
NORTH WEST PROVINCE — Fourteenth Respondent

Heard on : 8 November 2011

Decided on : 22 March 2012

JUDGMENT

KHAMPEPE J:

Introduction

[1] This matter concerns the constitutionality of five pieces of legislation that authorise certain provincial legislatures to manage their financial affairs. It arises from the decision of this Court on 11 August 2011 in *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government and Others*[1] (*Limpopo I*). In that case, the Premier of Limpopo Province had referred the Financial Management of the

[1] [2011] ZACC 25; 2011 (6) SA 396 (CC); 2011 (11) BCLR 1181 (CC).

Limpopo Provincial Legislature Bill[2] (Limpopo Bill) to this Court for a decision on its constitutionality after expressing doubts about the competence of the Provincial Legislature to pass a Bill dealing with its own financial management.

[2] This Court observed that while Parliament has plenary legislative powers, the legislative powers of the provinces are circumscribed and are set out in section 104 of the Constitution.[3] The financial management of provincial legislatures is a matter that is listed neither in Schedule 4 nor in Schedule 5. A provincial legislature may therefore be competent to legislate on its own financial management only if this is a matter that has been expressly assigned to it by national legislation or is a matter for which a provision of the Constitution envisages the enactment of provincial legislation.[4]

[3] In *Limpopo I*, the majority held, per Ngcobo CJ, that provinces do not have the authority to pass legislation with respect to their own financial management. This was

---

[2] [A06-2009].

[3] *Limpopo I* above n 1 at paras 20-2. Section 104(1) provides:

> "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; and
>
> (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."

[4] *Limpopo I* above n 1 at para 30.

because sections 2(e) and 3 of the Financial Management of Parliament Act[5] (FMPA) read with Schedule 1 had *not* expressly assigned this power to them.[6] Nor did any provision in the Constitution "envisage" the enactment of this legislation.[7] The Limpopo Bill was accordingly declared unconstitutional.

[4] The Court raised the need to determine the constitutional validity of similar financial management legislation that had been enacted by five other provincial legislatures, namely: the Financial Management of the Eastern Cape Provincial Legislature Act[8] (Eastern Cape Act); the Financial Management of the Free State Provincial Legislature Act[9] (Free State Act); the Financial Management of Gauteng Provincial Legislature Act[10] (Gauteng Act); the Financial Management of Mpumalanga Provincial Legislature Act[11] (Mpumalanga Act); and the North West Provincial Legislature Management Act[12] (North West Act) (referred to jointly as the provincial financial management legislation). The relevant provincial legislatures had been invited in *Limpopo I* to express their views on the constitutionality of the Limpopo Bill and, in the event of a finding that that Bill was unconstitutional, on the fate of their own legislation.[13] The invitation was also extended to avoid the costs

[5] Act 10 of 2009.

[6] *Limpopo I* above n 1 at paras 43-9.

[7] Id at paras 51-9.

[8] Act 3 of 2009.

[9] Act 6 of 2009.

[10] Act 7 of 2009.

[11] Act 3 of 2010.

[12] Act 3 of 2007.

[13] *Limpopo I* above n 1 at para 61.

associated with holding a second hearing.[14] None of the parties, however, responded to this invitation.

[5] This Court held that it nonetheless had the power to reach these statutes that were substantially similar to the legislation before it.[15] This power is rooted in the supremacy of the Constitution and the rule of law as well as the Court's duty to uphold and protect the Constitution.[16] Furthermore, it was in the public interest that certainty be reached as to the constitutionality of the legislation concerned without undue delay.[17]

[6] Despite the fact that none of the provincial legislatures responded to the initial invitation, this Court granted the provinces a further opportunity to be heard because of the rights and obligations that stand to be affected by a declaration of invalidity.[18] The Speakers of the provincial legislatures responsible for the legislation, as well as the Members of the Executive Council (MECs) responsible for financial matters in each of the provinces concerned, were accordingly joined and ordered to file papers, if any, and to make submissions setting out: (i) why the provincial legislation enacted by the respective provincial legislatures should not be declared unconstitutional; and (ii) if they are found to be unconstitutional, the appropriate remedy. [19] The Speaker of the

[14] Id.

[15] Id at para 63.

[16] Id.

[17] Id at para 64.

[18] Id at para 65.

[19] In relevant part, the order in *Limpopo I* above n 1 at para 68 reads as follows:

National Assembly and the Chairperson of the National Council of Provinces (NCOP) (jointly referred to as the parliamentary representatives), as well as the Minister for Finance (Minister), were also directed to make submissions, if any, dealing with the constitutionality of these pieces of legislation and the question of remedy.[20]

[7] The essential issues to be determined are the following:

(i) Are the statutes unconstitutional?

"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."

[20] Id.

(ii) If the North West Act goes beyond dealing with the financial management of the Provincial Legislature, are the unconstitutional provisions capable of being severed from the Act? And;

(iii) If the statutes are found to be unconstitutional, should an order of invalidity be suspended?

The adoption of the legislation

[8] Before dealing with each of these issues, it is apposite to sketch briefly the background to the adoption of the provincial financial management legislation.

[9] Parliament and the nine provincial legislatures had long recognised the need to act as a collective in a coordinated fashion on matters of common interest. To this end, a Speakers' Forum was established.[21] The Secretaries' Association of the Legislatures of South Africa (SALSA) was also established as an implementing arm of the Speakers' Forum and is accountable to it.[22] On 17 March 2010, the National Assembly, the NCOP and the nine provincial legislatures signed a Memorandum of Understanding (MOU). The manifest purpose of the MOU was to establish a legislative sector that would facilitate consultation on matters of mutual interest, although most of the legislation at issue preceded its adoption.

[21] The Speakers' Forum is a voluntary association made up of all the Speakers and Deputy Speakers of both the national and provincial legislatures and the Chairperson and Deputy Chairperson of the NCOP.

[22] The SALSA is a voluntary association made up of the Secretary to Parliament, his or her Deputy, Secretaries to the National Assembly and the NCOP, and Secretaries to the provincial legislatures.

[10] The concern that Parliament and the provincial legislatures could not hold their respective executives to account under the then-legislative regime led to the development of the Financial Management of Parliament and Provincial Legislatures Bill.[23] The aim of the Bill was to remove Parliament and the provincial legislatures from the reach of the Public Finance Management Act[24] (PFMA) and to regulate them under a separate piece of legislation. The development of this Bill was overseen by the Speakers' Forum.

[11] It soon became apparent that one Bill could not accommodate the nuanced peculiarities of each provincial legislature. Consequently, the provisions dealing with the provincial legislatures were severed from the Bill and Parliament went on to enact what remained as the FMPA.

[12] A generic Bill was then developed, under the supervision of the Speakers' Forum, for all nine provincial legislatures to customise according to their own needs. After the generic Bill was finalised at the Sector Legal Advisors Forum, it was endorsed by the Speakers' Forum and the SALSA as the two governing structures in the Sector. This process culminated in the adoption of the fifth to eighth respondents' Acts.

[23] The parties directed us to this Bill but no reference or citation was provided. We have been unable to locate a gazetted version of the Bill.

[24] Act 1 of 1999.

[13] The aim of the legislation is evident from the paragraph at the beginning of each of the Acts, which is substantially the same. It refers to the purpose of the legislation and reads as follows:

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

[14] The first four Acts before us are largely similar[25] as each legislature used a generic template to draft its own version.

[15] The North West Act has a different history. The North West had legislation regulating the general management of its Legislature from 1997.[26] A decision was taken in 2005 to repeal this earlier legislation as it had failed effectively to promote good governance. After this decision, the Legislature, relying on section 116 of the Constitution, passed the North West Act. After the development of the generic financial management Bill, the North West Legislature resolved to amend this Act to accommodate certain aspects of the Bill which resulted in the passing of the North West Provincial Legislature Management Amendment Act.[27]

[25] This legislation provides inter alia for mechanisms controlling the monitoring of compliance with legislation, oversight and accountability. It sets out the fiduciary duties of the accounting officer, disciplinary mechanisms, supply chain management, planning and budgeting mechanisms, requirements for the appropriation and approval of funds, banking and control of bank accounts, and the general management of finances.

[26] North West Provincial Legislature Service Act 8 of 1997.

[27] Act 5 of 2010.

Constitutional validity of the legislation

[16] All of the parties that made submissions to this Court – the parliamentary representatives, the Minister, and the Speakers of the five provincial legislatures concerned – agreed that, save for the North West Act,[28] the provincial financial management legislation must be declared unconstitutional, without more, as a result of this Court's decision in *Limpopo I*.

[17] In view of the parties' attitude, we need not say much on the issue. It is pellucid that the statutes before us, barring the North West Act, are all substantially similar to the Limpopo Bill in regard to their declared purpose and structure. They are worded in almost identical terms and they all seek to regulate the financial management of the provincial legislatures. They all represent adaptations of the generic Bill developed by the Speakers' Forum. Therefore, it suffices to state that, for the same reasons cited in *Limpopo I*, we find these statutes to be unconstitutional.

[18] Following this finding, the issue that warrants determination is the appropriate remedy. This raises two issues: the first is whether the unconstitutional provisions in the North West Act are capable of being severed; and the second is whether the declarations of invalidity should be suspended.

[28] See [19] to [28] below.

Severance

[19] As pointed out above, the North West Act is different from the other legislation before us. It covers wider ground and goes beyond the financial management of the Legislature, and includes provisions that regulate the internal arrangements, proceedings and procedures of the Legislature. Examples of these provisions include: creating a Legislature Service, the principal duties of which are to provide administrative services to the Executive Authority and other Members of the Legislature;[29] defining the roles, functions and responsibilities of the Speaker,[30] the Members,[31] and the Secretary;[32] and establishing a framework for the administration of the Legislature in general.[33]

[20] Section 172(1) of the Constitution provides in relevant part:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency . . .".

[21] This requires us to declare invalid only those parts of a law that are unconstitutional. We have been urged by the Minister and the parliamentary representatives to heed this injunction, in relation to the North West Act, by severing only those parts of the Act dealing with financial management and allowing the rest of

[29] Section 5 of the North West Act.

[30] Id at section 6.

[31] Id at section 9.

[32] Id at section 7.

[33] See id at Chapter 5.

the Act to stand. They highlight a plethora of provisions that would need to be struck down as unconstitutional and severed from the Act.[34] The parliamentary representatives further, and rather faintly in my view, requested the Court to effect amendments to certain provisions of the Act in Chapter 13 so as to bring them in line with the Constitution.[35] I am simply not persuaded by these submissions.

[22] This Court laid out the test for severance in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*[36] (*Coetzee*):

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[37] (Footnote omitted.)

[23] The argument for severance in this case runs into several difficulties. We must assess whether it is in fact possible to sever the unconstitutional provisions. For the

[34] The Minister has listed the following for severance: section 2(1)(a) and (b); section 6(4); section 7(1); section 7(3)(1)(d); section 8; section 10; Chapter 6; Chapter 7; Chapter 8; Chapter 9; Chapter 10; Chapter 11; section 69(1)(b)-(q); the words "financial or" in section 69(1)(r); the words "a provision of this Act or" in section 70(1)(a); section 72(1) and (3); section 74(2); and Schedules 2 and 3.

The parliamentary representatives have listed the following for severance: section 2(1)(a) and (b); section 6(4); section 7(1); the reference to "the financial management of the institution" in section 7(3)(d); section 8(b) and (c); section 10(1)(c); Chapter 6; Chapter 7; Chapter 8; Chapter 9; Chapter 10; Chapter 11; section 70(1)(b)-(q); the words "financial or" in section 70(1)(r); the word "financial" from "financial misconduct" in Chapter 13; all references after "section 8" in section 73(1)(a)(i); section 73(1)(a)(ii); section 73(1)(c); the reference to "or Auditor-General" in section 73(1)(d) and (e); section 73(3); and Schedule 1.

[35] See above n 34.

[36] [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

[37] Id at para 16.

following fundamental reasons, the textual surgery we are asked to undertake is so fraught with complications that severance is impracticable.[38]

[24] The extent of the requested severance is vast. And what we are required to sever is not clear.[39] The parties who have made submissions on this issue are not entirely on the same page as to what should be severed and some of the submissions were vague. The vagueness is illustrated by one of the submissions of the parliamentary representatives that "some" of the definitions in section 1 of the North West Act will no longer find application after the deletions and amendments. It cannot be over-emphasised that severance should be reserved for cases where it is clear from the outset exactly which parts of the statute need to be excised to cure the constitutional deficiency.

[25] Even if it were possible to sever the unconstitutional provisions, the conclusion that severance is undesirable in this case is inescapable when we examine the second leg of the test in order to assess whether the remainder of the Act would give effect to the purpose of the legislative scheme. The paragraph at the beginning of the North West Act reads as follows:

> "To provide for the repeal of the North West Provincial Legislature Service Act 8 of 1997; to provide for the establishment of a Service of the Legislature; to clearly define the roles, functions, and responsibilities of Executive Authority of the Legislature, Members of the Legislature, and the Accounting Officer to the

[38] See *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (AD) at 822E.

[39] This was further complicated by the fact that the parliamentary representatives made reference to an incorrect version of the North West Act in their submissions.

> Legislature; to establish a framework for the administration of the Legislature; to 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 and effectively; to define the responsibilities of officials in the Legislature, and in particular, persons entrusted with financial management responsibilities in the Legislature; and to provide for matters connected therewith."

[26] The statute was enacted with a dual purpose – to regulate the general management of the Provincial Legislature and to regulate its financial management. We are asked simply to excise those objects of the Act that deal with financial management.[40] In my view, this would dramatically alter the purpose for which the statute was enacted and it cannot be said that what would remain would continue to give effect to the purpose of the legislative scheme.

[27] This Court has on several occasions, in the context of severance, raised the concern that the granting of a remedy should not infringe upon the doctrine of separation of powers, or usurp the power of the legislature to legislate.[41] The sheer breadth of the severance that we are asked to undertake raises this concern, and one practical example will serve to illustrate the problem clearly. The parliamentary representatives propose that the references to "financial misconduct" in Chapter 13 be amended to refer generally to "misconduct". This would amount to drafting an

[40] Section 2(1)(a) and (b) of the North West Act.

[41] *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] ZACC 13; 2010 (6) SA 1 (CC); 2010 (11) BCLR 1116 (CC) at para 47; *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another* [2000] ZACC 9; 2000 (3) SA 626 (CC); 2000 (8) BCLR 876 (CC) at para 15; *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) (*Case*) at para 73; and *Coetzee* above n 36 at para 17.

entirely new Chapter in the Act "that bears only accidental resemblance to that enacted by [the legislature]."[42] This new Chapter would govern "misconduct" generally. This goes far beyond merely curing the Act's constitutional deficiency.

[28] Accordingly, the North West Act must be declared unconstitutional in its entirety.

Suspension

[29] Ordinarily, orders of constitutional invalidity will take effect immediately. However, section 172(1) of the Constitution specifically empowers this Court to make any just and equitable order including "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."[43]

[30] The Speakers of the provincial legislatures, the parliamentary representatives, and the MEC responsible for financial matters in Gauteng (Gauteng MEC) posit that any declaration of invalidity should be suspended. The Minister, however, argues that no suspension order is necessary and that the legislation should be declared invalid immediately.

[31] The Speakers of the provincial legislatures argue that there are compelling interests of good government that require granting a suspension order for 18 months.

[42] *Case* above n 41 at para 72.

[43] Section 172(1)(b)(ii).

They provide the following grounds as justification for a suspension order. If not suspended—

(i) the order would lead to the dissolution of structures created by the legislation like the audit and advisory committees;

(ii) there will be interruptions and confusion in the audit processes currently underway;

(iii) the provincial legislatures would be deprived of a tool to deal with financial misconduct;

(iv) the provincial legislatures are uncertain as to the adequacy of the PFMA to deal with their financial management; and

(v) there will be an erosion of the doctrine of separation of powers because the provincial financial management legislation has achieved an equitable distribution of funds that ensures optimal oversight of the provincial executives by the provincial legislatures.

[32] The parliamentary representatives similarly request that a suspension order of 18 months be granted in order to allow Parliament to make appropriate legislative provision to substitute for the provincial financial management legislation. While Parliament had initially indicated during the challenge to the Limpopo Bill that it would make an assignment of this power to the provinces, it stated that the intention was no longer to make the assignment, but rather to legislate for the financial management of the provincial legislatures itself. Parliament has not, however, decided whether it will enact a new statute or amend the FMPA. Both of these

options will require it to make policy choices and will necessitate the amendment of existing statutes.

[33] The Gauteng MEC, the only MEC to file an affidavit in this matter,[44] also motivated for a suspension of 18 months to be granted to give the provincial legislatures and Parliament time to rectify the situation. His concern is that, at all times, there should be measures in place that ensure adherence to the National Treasury Norms and Standards.[45] He submits that the Gauteng Act currently fulfils this purpose. Without it, the financial stability of the Legislature would be placed at risk and the Legislature would be unable to comply with the relevant regulatory framework. Failure to adhere to these standards could have dire consequences for the provincial legislature, including the cessation of transfers of funds to it.

[34] The Minister by contrast argued that none of the circumstances that would ordinarily necessitate the suspension of an order of invalidity were present. He submitted that the PFMA adequately addresses the financial management of the provincial legislatures and that a finding of unconstitutionality would not result in a lacuna but would merely require the provincial legislatures to regulate their affairs under this statute. He also submitted that he was the competent authority to remedy the defect, as he was responsible for initiating any remedial legislation, and had no intention of doing so. Any suspension order would therefore not achieve the desired outcome of putting in place new legislation to cure the unconstitutionality.

[44] The MEC responsible for Financial Matters in the Eastern Cape filed a notice to abide.

[45] Schedule 1 of the FMPA.

[35] This submission was, however, significantly watered down in oral argument when Counsel for the Minister rightly acknowledged that the Minister's refusal to initiate legislation was not an absolute bar because Parliament could initiate remedial legislation, provided it did not constitute a "Money Bill".[46] Counsel for the Minister also indicated that the Minister intended to consult with all relevant parties and explore the range of possible alternatives to remedy the defect.

[36] The first case in which this Court considered the option of suspension was *Coetzee*,[47] which dealt with the power of suspension under the interim Constitution.[48] Sachs J gave an indication of when granting a suspension order would be appropriate:

> "The words 'in the interests of justice and good government' are widely phrased and, in my view, it would not be appropriate, particularly at this early stage, to attempt a precise definition of their ambit. They clearly indicate the existence of something substantially more than the mere inconvenience which will almost invariably accompany any declaration of invalidity, but do not go so far as to require the threat of total breakdown of government. Within these wide parameters the Court will have to make an assessment on a case-by-case basis as to whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate

[46] Section 77(1) of the Constitution provides:

> "A Bill is a money Bill if it—
>
> (a) appropriates money;
>
> (b) imposes national taxes, levies, duties or surcharges;
>
> (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
>
> (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges."

[47] Above n 36.

[48] Constitution of the Republic of South Africa Act 200 of 1993.

> effect than would be the case if the measure were kept functional pending rectification. No hard-and-fast rules can be applied."[49]

[37] We are called upon to consider the effect of granting immediate constitutional relief and the disruption to the administration of justice that would result from this.[50] Justice and equity warrant the suspension of the order of invalidity. There are important factors that inform this conclusion. A legislative lacuna will result from an immediate invalidation and this would have a negative impact on the interests of good government. And all the parties before us indicated that they require time to consult and formulate a means of remedying the defect. This conclusion is buttressed by the fact that no countervailing considerations of hardship or harm have been identified by any of the parties that would result from the continued operation of the statutes. It is to these factors that I now turn.

(i) Lacuna

[38] This Court has cited a resulting lacuna to justify granting a suspension order on several occasions.[51] Claims that a lacuna would result if an immediate declaration of

---

[49] *Coetzee* above n 36 at para 76. Although this case dealt with section 98(5) of the interim Constitution, which allowed for an order to be granted "in the interests of justice and good government", similar considerations apply to assessing whether it is "just and equitable" to grant an order.

[50] *J and Another v Director General, Department of Home Affairs, and Others* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) at para 21:

> "In such cases, the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna. If the Court is persuaded upon a consideration of these conflicting concerns that it is appropriate to suspend the order made, it will do so in order to afford the Legislature an opportunity 'to correct the defect'. It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants." (Footnote omitted.)

[51] *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC); *South African National Defence Union v Minister of Defence and Another*

invalidity is given will, however, be closely scrutinised and this Court has refused a suspension order in cases where the remaining legislation or regulations adequately deal with a particular issue.[52]

[39] While the PFMA does in places regulate provincial legislatures, the extent to which it does so is not comparable with that of the provincial statutes. It cannot be said that they cover the same ground such that the PFMA would fill the gap created by the immediate invalidation of the statutes.[53]

[40] There were two further objections raised to the proposition that a legislative or regulatory lacuna would result:

(i) the PFMA was in force for eight years without any provincial legislation being enacted; and

---

[1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC); and *S v Ntuli* [1995] ZACC 14; 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC).

[52] See *Case* above n 41 at paras 83-5.

[53] The following observations made in the dissent of Yacoob J in *Limpopo I* above n 1 indicate that the PFMA does not adequately cover the internal financial management of the provincial legislatures:

(i) The PFMA provides detailed measures applicable to "departments", "constitutional institutions", "public entities", and "executive authorities", but provincial legislatures do not fall into any of these categories (para 104).

(ii) While the PFMA does place obligations on the provincial legislatures, they are minimal. The Limpopo Bill coalesced with the provincial legislature's obligations under this Act and even helped to ensure compliance with the obligations implied by it – for example, the PFMA requires that the financial statements of the provincial legislature be included in the provincial annual consolidated financial statements. This implies that the provincial legislature prepare its own financial statements – something which is provided for in the Limpopo Bill, but is not provided for in the PFMA or elsewhere (paras 106-11).

(iii) Moreover, the PFMA exempts the provincial legislature from depositing money received by it into the Provincial Revenue Fund, which means it will have money on hand. This necessarily requires a degree of management and control of, amongst other things, accounting officers and banking accounts within the provincial legislature, which is not provided for in the PFMA or any other legislation but was provided for in the Limpopo Bill (para 114).

(ii) there are provinces without legislation of this kind that are regulating their financial management affairs.

[41] Neither of these objections, however, presents an absolute bar to the finding that a lacuna would result if the statutes were immediately invalidated. There is no evidence of how these other provinces arrange their affairs. The provinces before us have regulated their internal financial management under the provincial financial management legislation and the immediate removal of the structures and processes set up under these Acts would undoubtedly, for them, create a regulatory lacuna which the PFMA will not adequately fill.

[42] There is in my view a strong possibility that this lacuna will impact negatively on the interests of good provincial government.

(ii) The need for consultation

[43] As already indicated, counsel for the Minister, in oral argument, conceded that there is no bar to the introduction of remedial legislation by Parliament. Parliament has this competency and, more importantly, has indicated that it has three basic options open to it, one of which will be implemented.[54]

[54] It will: (a) assign the power to enact legislation concerning the financial management of provincial legislatures to the provinces; (b) enact national legislation to regulate the financial management of the provincial legislatures; or (c) amend the FMPA to make provision for the regulation and control of the financial management of the provincial legislatures.

[44] Counsel for the Minister further acknowledged that the intention was for all of the relevant parties to consult so as to develop a compromise solution. The background to the adoption of the provincial financial management legislation, detailed above, shows that there has been an ongoing consultative process among the legislatures for quite some time.

[45] The Court should therefore allow the parties time to consult, as they have indicated that they intend to do, without causing any undue administrative disruption in the interim.

(iii) Period of suspension

[46] Various factors must be taken into account in determining the period of suspension, including: the government's previous conduct; whether there is any legislation in the pipeline; and the nature and severity of the continuing infringement.[55]

[47] Here, the government's conduct cannot be faulted. The background to the adoption of the provincial financial management legislation indicates that the government has known for some time that the regime governing the financial management of provincial legislatures is problematic. It has tried to address this in several ways – most recently through the introduction of provincial legislation – and it

[55] *S v Steyn* [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at para 46 and *Mistry v Interim Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC) at para 37; 1998 (7) BCLR 880 (CC) at para 30. See also Bishop "Remedies" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd., Cape Town 2009) at 9–126.

cannot be said to be dragging its heels. Furthermore, while there is no legislation in the pipeline, all the parties have agreed that they will consult in order to reach a compromise solution, which will inevitably entail the consideration of several policy choices and possibly the introduction of new, or the amendment of old, legislation.

[48] It is proper for this Court to endorse the unanimous agreement of the legislatures that 18 months is an appropriate period for a solution to be devised.

[49] In the result, the following order is made:

1. The Financial Management of the Eastern Cape Provincial Legislature Act 3 of 2009 is declared inconsistent with the Constitution and invalid.
2. The Financial Management of the Free State Provincial Legislature Act 6 of 2009 is declared inconsistent with the Constitution and invalid.
3. The Financial Management of the Gauteng Provincial Legislature Act 7 of 2009 is declared inconsistent with the Constitution and invalid.
4. The Financial Management of the Mpumalanga Provincial Legislature Act 3 of 2010 is declared inconsistent with the Constitution and invalid.
5. The North West Provincial Legislature Management Act 3 of 2007 is declared inconsistent with the Constitution and invalid.
6. The declarations of invalidity made in 1-5 are suspended for 18 months from the date of this judgment.
7. The parties are ordered to file a report by Monday 9 September 2013 informing the Court what steps have been taken to remedy the defect.

8. There is no order as to costs.

Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Khampepe J.

For the Second and Third Respondents:	Advocate JC Heunis SC and Advocate GA Oliver instructed by the State Attorney.
For the Fourth Respondent:	Advocate G Marcus SC and Advocate N Rajab-Budlender instructed by the State Attorney.
For the Fifth to Ninth Respondents:	Advocate V Maleka SC, Advocate TJB Bokaba SC and Advocate GS Hinda instructed by Ntanga Kganane Nkuhlu Incorporated.
For the Twelfth Respondent:	Advocate T Motau SC and Advocate K Pillay instructed by the State Attorney.