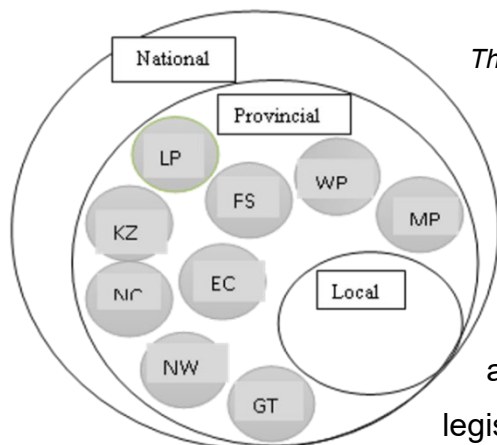
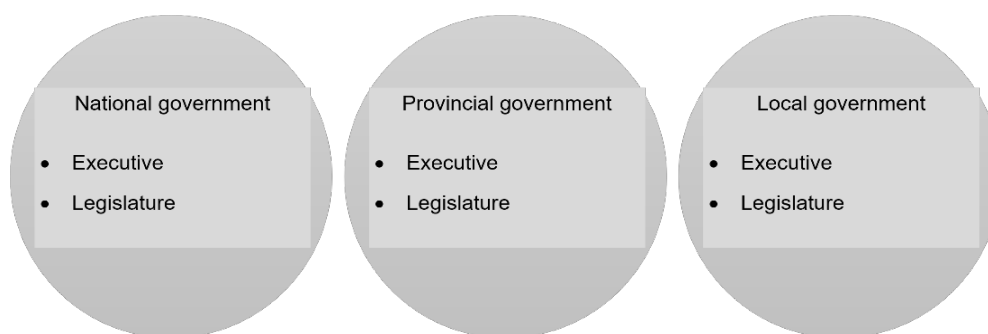


# CHAPTER 3: MULTI-LEVEL GOVERNMENT

Abigail Stander

## 1. INTRODUCTION

The first section of the Constitution describes South Africa as one sovereign, democratic state.<sup>1</sup> An important democratic principle in the Constitution is the doctrine of separation of powers, according to which governmental power is divided between three branches: the executive, the legislature and the judiciary.<sup>2</sup> The Constitution also divides power between different levels of government. Accordingly, power is delineated into three spheres or levels of government: national, provincial and local.<sup>3</sup>



*The three spheres of government and their respective authorities.*

Each level of government has its own executive and legislative authorities. At the national level, one legislature and executive represent South Africa as a whole.

<sup>1</sup> S1The Constitution of the Republic of South Africa, 1996.

<sup>2</sup> See *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

<sup>3</sup> Ibid.

At the provincial level, there are nine provincial legislatures and executive councils for each of the nine provinces. At a local level, there are 278 municipalities within the provinces that have legislative and executive powers.

National, provincial and local governments derive their status and powers from the Constitution. These powers refer to both legislative (law-making) powers as well as executive powers.<sup>4</sup> Additionally, national, provincial and local governments are independently elected. Despite this multi-level system of government, the boundaries between each of these spheres' functions are not strict or rigid, true to the Constitutional commitment to South Africa being one sovereign state.<sup>5</sup> Thus, rather than simply dividing functions between the spheres of government, many functions are shared between them, particularly legislative functions.<sup>6</sup> In schedule 4 of the Constitution, a list of functional areas is set out over which the national and provincial legislatures have 'concurrent legislative competence'.<sup>7</sup> This means that for any matters listed in that schedule, a provincial legislature or the national legislature can make laws thereon. Schedule 5 lists matters over which the provincial legislature has exclusive legislative competence. The list is not long, and it largely concerns less important issues. The national sphere may not legislate over these matters except in certain listed circumstances (discussed later).<sup>8</sup>

The Constitutional Court remains the final arbiter over conflicts between spheres of government,<sup>9</sup> guided by the principles of co-operative government set out in the Constitution which govern the relations between the spheres.<sup>10</sup> This chapter

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<sup>4</sup> Simeon and Murray 'Multi-Sphere Governance in South Africa: An Interim Assessment' (2001) 31 *Publius: the Journal of Federalism* 65.

<sup>5</sup> Christina Murray and Richard Simeon "'Tagging" bills in Parliament: Section 75 or section 76?' (2006) 123 *SALJ* 232.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra* note 1 at Schedule 4.

<sup>8</sup> *Ibid* at s 44(2).

<sup>9</sup> *Op cit* note 4 at 65.

<sup>10</sup> *Supra* note 1 at chapter 3.

will set out the constitutional provisions that govern each sphere of government and their respective functions and powers. Specific attention will be paid to the legislative functions of the spheres. Most importantly, this chapter will set out how the spheres co-ordinate with one another and how conflicts in their legislative powers are dealt with.

## **2. BACKGROUND & OVERVIEW**

The name for the structure of government in which governmental power is divided into different levels of government is known as federalism. This refers to a combined system of government that consists of a general government and other lower level governments. Thus, a centralised concentration of power is avoided.<sup>11</sup> Whether or not to adopt a system of federalism has formed the subject of many international debates, particularly in South Africa during the negotiation process for the final Constitution.<sup>12</sup>

The ANC was particularly wary of adopting a federal system as they wanted to avoid a constitutional dispensation that could further entrench ethnic differences between people. Additionally, for effective transformation to occur, a strong central government was needed. A unitary system would help the ANC secure a majority which they felt was necessary for the kind of changes it wanted to affect. The outgoing apartheid regime and the Inkatha Freedom Party (IFP) sought a federalist approach to restrain the soon-to-be majority.<sup>13</sup> It would also help regional and ethnicity-based parties gain some independence in their provinces. In addition, it would be more accommodating for diversity by allowing a degree of autonomy for different cultures, languages and ethnicities within the provinces. The diversity and differences within South Africa notionally made federalism a desirable option to give each province its own political space, promoting a closer relationship between

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<sup>11</sup> Dawid van Wyk 'Looking at the New South Africa: Thoughts about Federation and Federalism' (1991) Open Access African Journal Archive at 99.

<sup>12</sup> See Derek Powell 'Fudging federalism: Devolution and peace-making in South Africa's transition from apartheid to a constitutional democratic state', in Nico Steytler and Yash Pal Ghai (eds) (2015) Kenya-South Africa Dialogue on Devolution Juta 32-55.

<sup>13</sup> Op cit at note 4 at 68.

citizens and their elected government and creating a system in which policies were more effectively responsive to local needs with greater accountability and transparency.

The benefits of a federalist system were hard to ignore. As a result, South Africa ended up with a multi-level government as a result of a bargained process. The need for national unity is balanced with some regional powers. The advantages of this are additional checks and balances, empowering citizens at a local level and more efficient service delivery at a local level.

Although the Constitution avoids the use of the term 'federal', it displays the federalist characteristic of a multi-level system of government, but it remains unitary in spirit. In other words, national government retains the most power and influence over policies and laws. We say South Africa has adopted a 'quasi-federal' system of government. Section 40 of the Constitution states that:

(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

In a federal or quasi-federal system, the division of power between different spheres of government may be based either on a divided model of federalism or an integrated model of federalisation.

<b>DIVIDED MODEL</b>	<b>INTEGRATED MODEL</b>
Subject matter of policy and law-making powers are strictly divided between the levels of government	Subject matter of policy and law-making powers are not strictly divided between the levels of government
Each sphere has its own exclusive powers with very few concurrent powers (if any)	Some subject matters are allocated exclusively to one sphere, but most are concurrent
Policies and laws made by each sphere will also be implemented and administered by their own services	Framework policies and laws made by central government may be complimented by provincial or local policies and laws are implemented and administrated by the provincial or local spheres
Examples: Australia, Canada, United States	Examples: Germany and South Africa

Due to the fact that South Africa broadly adheres to an integrated model of federalism, many powers to make laws and policies between the different spheres of government overlap. This can often lead to conflicts in laws or policies over concurrent powers. For this reason, the Constitution sets out principles of co-operative government and how to solve these conflicts if and when they arise. Section 41 of the Constitution requires all spheres and organs to

- (a) preserve the peace, national unity and the indivisibility of the Republic;
- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) be loyal to the Constitution, the Republic and its people;
- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution;
- (g) 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; and
- (h) co-operate with one another in mutual trust and good faith by—
  - (i) fostering friendly relations;

- (ii) assisting and supporting one another;
- (iii) informing one another of, and consulting one another on, matters of common interest;
- (iv) coordinating their actions and legislation with one another;
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings against one another.

Section 41(2) envisages the enactment of legislation to govern intergovernmental relations.<sup>14</sup> This legislation came to be the Intergovernmental Relations Framework Act (hereafter ‘IGRFA’).<sup>15</sup> This Act is primarily relevant to the executive activities of each sphere. Section 41(3) states that in the presence of an intergovernmental dispute, an organ of state must exhaust all other mechanisms of resolving the dispute before approaching the court. Thus, the IGRFA would be the first port of call. It is important to note that the IGRFA does not apply to legislative disputes between the spheres of government. These disputes are resolved in accordance with other Constitutional provisions discussed further below.

The remainder of this chapter will discuss the legislative and executive functions of each sphere, with particular focus on the legislative functions. The bodies responsible for these functions are broadly shown as follows:

	<b>EXECUTIVE</b>	<b>LEGISLATURE</b>
<b>NATIONAL</b>	President + Cabinet	NA + NCOP
<b>PROVINCIAL</b>	Premier + Executive Council	Provincial Legislature
<b>LOCAL</b>	Mayor + Municipal Councils	Municipal Councils

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<sup>14</sup> Section 41(2) states that: (2) An Act of Parliament must— (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

<sup>15</sup> The Intergovernmental Relations Framework Act No 13 of 2005.

### 3. NATIONAL SPHERE

#### (a) National Executive

The executive authority at national level vests in the President, the Deputy President and his Cabinet.<sup>16</sup> The President acts as both the head of state and the head of the national executive.<sup>17</sup> The President is responsible for *inter alia*, various position appointments, appointing commissions of inquiry and assenting to and signing Bills passed by Parliament.<sup>18</sup> The Deputy President is assigned powers and functions by the President and otherwise assists the President in running government.<sup>19</sup> Besides the President and Deputy President, the Cabinet consists of various Ministers appointed by the President.<sup>20</sup> Their specific responsibilities are assigned to them by the President and are known as 'portfolios'. Each Minister and his teams are responsible for developing and implementing policy and laws.

#### (b) National Legislature

The national legislature consists of two 'houses': The National Assembly and the National Council of Provinces.<sup>21</sup> When Bills are introduced in the national legislature they have to be sent to both houses of parliament. The nature of the Bill will determine how much say the NCOP has and the procedure the Bill must follow before becoming law. The purpose of the NCOP is to ensure provincial interests are represented at a national level. This is

NATIONAL LEGISLATURE / PARLIAMENT	
NA	NCOP

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<sup>16</sup> Supra note 1 at s85.

<sup>17</sup> Ibid at s83(a).

<sup>18</sup> Ibid at s84(2).

<sup>19</sup> Ibid at s91(5).

<sup>20</sup> Ibid at s91(1).

<sup>21</sup> Ibid at s42(1).

done through participation in the national legislative process and by providing a national forum for consideration of issues affecting provinces.<sup>22</sup>

The National Assembly represents national government in the national legislature. It consists of between 350 and 400 members who are elected by voters for a period of five years. Their function is to consider, pass, amend or initiate legislation as well as oversee the national executive.<sup>23</sup>

**NB:** The National Council of Provinces (NCOP) is made up of representatives selected from the provincial legislature to represent their province at a **NATIONAL LEVEL**. In other words, the NCOP is acting in the national sphere and not the provincial sphere.

Each of the nine provincial legislatures sends one **delegation** to the NCOP. Each delegation consists of 10 people known as delegates. The NCOP thus consists of nine delegations and 90 delegates in total.

<b>NCOP: Nine delegations (one from each province)</b>	
<b>Each delegation consists of:</b>	
Four special delegates	Six permanent delegates
Includes Premier/representative Identity of delegates may change	Cease to be members of the provincial legislature

***i. Introducing Bills in the National Legislature***

Before a Bill can become law, it must be considered by both houses of Parliament (NA and NCOP). The Constitution describes four kinds of Bills:<sup>24</sup>

1. Section 74 Bills for Constitutional amendments;
2. Section 75 Bills or ‘ordinary Bills not affecting the provinces’;
3. Section 76 Bills or ‘ordinary Bills affecting the provinces’;

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<sup>22</sup> Ibid. at s72.

<sup>23</sup> Ibid. at s55.

<sup>24</sup> Ibid. at s73, s74, s75, s76, s77.



4. Section 77 Bills or money bills (these can only be introduced by the Minister of Finance in the NA).

The process of classifying a Bill into one of these categories is known as 'tagging'. This informs the procedure the Bill has to follow to become law. For example, certain Bills can only be introduced by the National Assembly and even though Bills have to pass through both houses of Parliament, the type of Bill determines the amount of power the NCOP has in the process.

The Bills are classified or 'tagged' by the Joint Tagging Mechanism (JTM) consisting of the Speaker, the Deputy Speaker of the National Assembly and the Chairperson and Deputy Chairperson of the NCOP.<sup>25</sup> Bills are classified by consensus. If this is not achieved, then the JTM must obtain a second legal opinion, preferably from a constitutional expert.<sup>26</sup>

#### ***ii. Section 75 Ordinary Bills not affecting provinces***

Section 75 Bills can only be introduced in the NA. Once passed by the NA, they are sent to the NCOP. For these Bills, delegates in the NCOP vote individually as opposed to a collective vote for the province (90 possible votes from the NCOP). If the NCOP votes and does not pass the Bill, they can either pass with proposed amendments or completely reject the Bill. Then it returns to the NA which may pass the Bill notwithstanding the NCOP's rejection, and may pass it with or without the proposed amendments (if any). Thus, the NCOP's power in respect of section 75 Bills is more of a delaying one. It can delay these Bills but cannot prevent them from being passed.

#### ***iii. Section 76: Ordinary Bills affecting the provinces***

These Bills may be introduced in either the NA or the NCOP. Members of the NCOP vote as a collective unit in their respective provincial delegations. Each delegation from each province gets one vote (nine votes in total). The Bill in question

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<sup>25</sup> Joint Rules of Parliament Code of Conduct, South Africa 1998 at part 18.

<sup>26</sup> Ibid at 153(3).

is usually considered by a committee in the province which may receive comments from the public. The committee then advises the provincial legislature which then decides its position and mandates its delegation to the NCOP accordingly. The NCOP can either pass, amend or reject the Bill. If the Bill was introduced in the NA, then the NA can override the NCOP's decision with a two thirds majority vote from its members. If the NA introduces a section 76 Bill:

***iv. The NA votes on the Bill. If passed:***

Bill is referred to the NCOP.

The NCOP can pass the Bill, pass it with amendments or reject the Bill.

- If passed with no amendments: Bill goes to the President for his assent.
- If passed with amendments: Bill is referred back to the NA. If the NA accepts the amendments, the Bill then goes to the President. If the NA rejects the amendments, the Bill is referred to the Mediation Committee.
- If rejected: the Bill is referred to the Mediation Committee.

The Mediation Committee acts as an arbiter. If a Bill is referred to it, it can decide to do one of the following:

**1. Pass the NA's version of the Bill**

- Bill is then referred again to the NCOP and if passed, the Bill goes to the President. If the NCOP still refuses to pass the Bill, the Bill lapses unless the NA can pass the Bill with a supporting two thirds majority vote.

**2. Pass the amended version of the Bill**

- Bill is sent to the NA and if passed, it goes to the President; or

**3. Pass any other version of the Bill**

- This version must be referred to both houses. If passed by both, it is submitted to the President.

If the committee fails to reach a decision within 30 days, the Bill lapses UNLESS the NA passes the Bill with a supporting vote of two thirds majority.<sup>27</sup>

#### **4. PROVINCIAL SPHERE**

The main purpose of the provincial legislatures is to provide a close link between voters and the government to ensure the government is aware of particular needs and concerns. They are also tasked with implementing national policies to ensure efficient service delivery. Lastly, they oversee the running of local government within the province.

##### **(a) Provincial Executive**

The executive authority of a province vests in the Premier of that province and his or her Executive Council (Exco).<sup>28</sup> The Premier makes all appointments to the Exco and accordingly has the power to dismiss members. A Premier's role is analogous to that of the President's at a national level. A Premier does not, however, have head-of-state powers. The provincial legislature chooses its Premier and can remove him or her for a serious violation of law, serious misconduct or an inability to perform required functions,<sup>29</sup> or a vote of no confidence.<sup>30</sup> Section 125(2) of the Constitution appears to oblige the Premier to consult his or her Exco in the exercise of executive authority before action is taken. Individual members of the council (Exco) are normally conferred their powers by legislation and their responsibilities usually assigned by the Premier or ministers in the national cabinet.

Provincial executive authority includes implementing provincial legislation, implementing national legislation that falls within a functional area in schedule 4 or 5, administering national legislation where an Act of Parliament has so assigned, developing and implementing provincial policy, preparing and initiating provincial

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<sup>27</sup> Supra note 1 at s76(2)(e).

<sup>28</sup> Ibid at s132.

<sup>29</sup> Ibid at s130(3).

<sup>30</sup> Ibid at s141.

legislation and any other function assigned to them in terms of the Constitution or an Act of Parliament.<sup>31</sup>

## **(b) Provincial Legislature**

Provincial legislatures do not enjoy plenary legislative powers as possessed by the national legislature. Instead they have limited powers.<sup>32</sup> This means that provincial legislatures can only legislate on matters specifically mentioned in schedule 4 and 5 while the national legislature can legislate on schedule 4 matters as well as anything not specifically mentioned in the schedules. The provincial legislature has the power to pass legislation for its province regarding the following:

- Any matter listed in schedule 4. The national and provincial legislatures have concurrent jurisdiction to legislate over these matters.
- Any matter listed in schedule 5. The provincial legislature has exclusive jurisdiction to legislate over these matters.
- Any matter outside these schedules but *expressly assigned* to the province by national legislation.
- Any matter for which the Constitution *envisages* the enactment of provincial legislation.
- Any matter *reasonably necessary for or incidental to* the effective exercise of a power concerning any matter listed in schedule 4 or 5.

Additionally, provinces have the power to enact their own constitutions by resolution of a majority of at least two-thirds of all of its members.<sup>33</sup> These constitutions cannot give the province more power or deviate from the basic structure of governance set out in the national Constitution.<sup>34</sup> Although legislative and executive structures and procedures may differ in a provincial constitution, their

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<sup>31</sup> Ibid. at s125(2).

<sup>32</sup> Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others (CCT 94/10) [2012] ZACC 3; 2012 (4) SA 58 (CC); 2012 (6) BCLR 583 (CC) (22 March 2012) at para 2.

<sup>33</sup> Supra note 1 at s104(1)(a).

<sup>34</sup> Ibid at s143(2)(b)(ii).

fundamental nature and substance set out in the national Constitution cannot be changed.<sup>35</sup> Additionally, these provincial constitutions cannot give the provinces more power than conferred upon them by the Constitution or change the province's status within the republic.<sup>36</sup> Chapter 6 of the Constitution lays out a detailed blueprint for the provinces of provincial structures, processes and powers that apply in the absence of an enacted provincial constitution. Only two provinces have taken up the challenge: KwaZulu-Natal and the Western Cape. However, the Constitutional Court must certify a province's constitution before it is valid and only the Western Cape was successful in this regard.<sup>37</sup> The provincial legislature can also assign any of its legislative powers to municipal councils in their local spheres of government.<sup>38</sup> A province can change its name through a resolution with a supporting vote of two thirds of its members requesting Parliament to make the change.<sup>39</sup>

The same electoral process used to elect members of the NA is used to elect members of the provincial legislature.<sup>40</sup> The size of each province's legislature is determined by a formula set by national legislation which relates to the population of the province. The legislature must consist of between 30-80 members who are elected for a term of five years.<sup>41</sup> It is important to note that whereas the national legislature consists of both the NA and NCOP, provincial legislatures consist only of one chamber or house. As stated earlier, a province's permanent delegates to the NCOP are no longer members of the provincial legislature. But they may attend and speak in their provincial legislature and its committees but are not allowed to vote.<sup>42</sup>

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<sup>35</sup> Certification of the Kwazulu-Natal Constitution (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996) at para 5.

<sup>36</sup> Ibid at para 14.

<sup>37</sup> The Constitution of the Western Cape, 1998.

<sup>38</sup> Supra note 1 at s104(1)(c).

<sup>39</sup> Ibid at s104(2).

<sup>40</sup> Ibid. at s105.

<sup>41</sup> Ibid. at s105(2) and s108(1).

<sup>42</sup> Ibid. at s113.

Provincial legislatures have the power to pass, reject or amend any Bill before them and initiate legislation. In addition, they have an oversight function over the provincial executive.

<b>NATIONAL LEGISLATURE</b>	<b>PROVINCIAL LEGISLATURE</b>
Two chambers: NA + NCOP	One chamber
NA: 350-400 members NCOP: 90 delegates	30-80 members
Plenary legislative powers	Has limited legislative powers (only matters listed in schedule 4 or 5)
Maintains oversight over national executive	Maintains oversight over provincial executive

***Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and others<sup>43</sup>***

This case highlights the difference between the powers of the provincial sphere and national sphere when it comes to legislative powers.

**The main takeaway point:** The Constitution gives clearly defined, limited legislative powers to the provincial legislatures and gives plenary powers to the national legislature.

***Facts:***

The case concerned the Premier of the Limpopo province’s reservations regarding a Bill passed in the Limpopo provincial legislature.<sup>44</sup> Once a provincial legislature passes a Bill, it must get sent to the relevant Premier who must sign off on and approve the Bill. In this case, Limpopo’s provincial legislature had passed a Bill

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<sup>43</sup> Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others (CCT 94/10) [2011] ZACC 25; 2011 (11) BCLR 1181 (CC); 2011 (6) SA 396 (CC) (11 August 2011).

<sup>44</sup> Financial Management of the Limpopo Provincial Legislature Bill [A06-2009].

that was intended to regulate the financial management of the Limpopo provincial legislature. The Premier refused to assent to it and referred it back to the provincial legislature. He had reservations concerning the province's competence to pass a Bill dealing with its own financial affairs. Financial management was not listed in either Schedule 4 or 5 of the Constitution. After the provincial legislature failed to address the Premier's concerns, the Premier sent the Bill to the Constitutional Court to decide on the Bill's validity. The provincial legislature argued that the power to pass legislation regulating financial management of a provincial legislature had been expressly assigned to the provinces by the national Financial Management of Parliament Act. Additionally, it argued that this power was envisaged by section 195 (basic values plus principles governing public administration), section 215 (national, provincial plus municipal budgets) and section 216 (nature of treasury controls that must be implemented) of the Constitution.

***The court's reasoning:***

- The defining feature of the Constitutional scheme for the allocation of legislative powers between the national and provincial spheres is that whereas the legislative powers of provinces are limited and clearly defined, the legislative powers of the national legislature is not. The national legislature has *plenary* legislative powers.
- Provincial legislatures may only pass legislation on schedule 4 matters, schedule 5 matters, any matter 'expressly assigned' to the provinces by national legislation and any matter for which the Constitution 'envisages' the enactment of provincial legislation
- The financial management of a provincial legislation is not listed in either schedule 4 or 5. Was **the power to legislate on this matter expressly assigned to the provinces?**
  - The court held that 'expressly' refers to a clear identification of provincial competencies. If national legislation does assign powers to the provinces, it must clearly stipulate the nature and scope of this power. This is in line with the principles of co-operative government which require no sphere of government to assume any power or function except those conferred in terms of the Constitution.

- The assignment of such a power cannot merely be implied, it must be express.
- Thus, the Financial Management of Parliament Act did not expressly assign the financial management of a provincial legislature to the provinces.

***Was the power to legislate on this matter nonetheless envisaged by the Constitution?***

- The court held that only the provisions in the Constitution that clearly, unequivocally and expressly allowed the enactment of provincial legislation were to be regarded as being 'envisaged' by the Constitution.
- Furthermore, the power must be expressly assigned and not merely implied by the Constitution

The court held that the sections relied on by the provincial legislature did not clearly and unmistakably envisage the enactment of this law by provincial legislatures.

Note that in the dissenting judgments, the minority of the Constitutional Court disagreed with the majority's interpretation of the word 'envisaged' in section 104(1)(iv) of the Constitution. They reasoned that it should mean something different to the words 'expressly assigned' mentioned in section 104(1)(iii). The majority seemed to interpret the two terms to mean similar things. The minority argued that if the drafters of the Constitution wanted the terms to mean the same thing, they would have used the same words. Instead, 'envisaged' should mean something less than 'expressly assigned'. The minority concluded that the power to pass the legislation in question was in fact envisaged by the Constitution.

***Conclusion:***

- The majority of the court held that the Bill did not fall into the legislative competence of the provincial legislature and was thus, unconstitutional and invalid.



## 5. CONFLICTS BETWEEN LEGISLATIVE FUNCTIONS

Now that we know both national and provincial legislatures have the ability to make laws, what happens if they both create laws on the same matter?

If the conflict is over a matter in:

- **Schedule 4** → provincial legislation prevails unless one of the requirements of section 146 of the Constitution is met. In that case, national legislation prevails.
- **Schedule 5** → provincial legislation prevails unless one of the requirements in section 44(2) of the Constitution is met. In that case, national legislation will prevail.

But before these sections are looked at, it makes sense to establish if both the national and provincial legislation is actually valid. The legislation will be invalid if:

- A sphere of government legislates in an area where it has no legislative competence (for example, a province legislates on a matter not listed in either schedule 4 or 5).
- The legislation has followed the wrong process (for example, there was no public participation, or the national legislation was incorrectly tagged).

Thus, the first step in dealing with a legislative conflict is to establish whether the legislation in question deals with a schedule 4 or 5 matter. In other words, which sphere actually has the competence to legislate over the matter? Then look at whether the relevant legislature did in fact pass the legislation.

### (a) Determining legislative competence

The Constitutional court clarified the test for determining legislative competence in the Liquor Bill case: *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*<sup>45</sup>

#### **Factual Background:**

- The national legislature passed the Liquor Bill intended to regulate the liquor industry. The Bill divided the economic activity of the liquor industry into three parts: manufacture, distribution and retail sales. Both manufacture and distribution were treated as national issues, while retail sales were treated as provincial.
- When the Bill came to the President for assent, he was unsure as to whether national government had the competence to pass such a Bill. He referred it back to the NA for reconsideration, but no amendments were made. The Bill was then referred to the Constitutional Court to decide the matter.

#### **Nature of the Bill:**

- The Bill sought to regulate the production, distribution and retail sale of liquor.
- The Bill divided economic activity within the liquor industry into a three-tiered registration system: production, distribution and retail sales.
- It treated manufacture and distribution as national issues and retail sales as a provincial issue.
- The purpose of the Bill was to *inter alia*, maintain economic unity and essential standards for the liquor trade and industry through establishing a national administrative and regulatory framework. In addition, it required provincial legislatures to pass their own legislation to establish provincial liquor authorities

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<sup>45</sup> Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999).

***The competence test:***

- The court clarified the test to be used when determining legislative competence, based on Canada's 'pith and substance test'.<sup>46</sup> This test is merely concerned with determining the heart or main subject matter of the Bill; and what the Bill incidentally accomplishes is irrelevant.
- However, the court stated that even if a matter was of provincial competence, if it required regulation *inter*-provincially (between the provinces) as opposed to *intra*-provincially (within the province), then the national legislature might legislate on the matter. To clarify, the exclusive powers of the provinces relate to matters which can be regulated intra-provincially.

***Application:***

The court found that the true substance of the Bill embraced the following objectives:

- (a) Prohibition on cross-holdings between the three tiers;
- (b) A single national system for the registration of liquor manufacturers and distributors; and
- (c) Prescription of retail licensing mechanisms in the provinces.

**The court held** that (a) fell within national government's competence to regulate trade; (b) warranted the national legislature's intervention in terms of section 44(2)(b) as this provision was aimed at more than simply liquor licensing but manufacture and distribution as well. This had a bearing both inter-provincially and intra-provincially.

However, in respect of (c), the court found that there was no satisfactory reason provided for why the retail structures set up by the Bill were reasonably necessary for or incidental to the national system under (b).

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<sup>46</sup> Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, 2007 SCC 22 at para 35-32.

## **Conclusion**

- The Minister failed to justify national government's intervention in terms of retail sales of liquor licensing, an area of exclusive provincial competence.<sup>47</sup>
- Thus, the Bill was unconstitutional.

### **(b) The Test for Tagging**

Remember that it is only the national legislature that has to tag Bills. This is because there are two houses of Parliament (NA and NCOP). The provincial legislature does not need to tag their Bills as their legislatures consist only of one house. When considering potential legislative conflicts between provincial and national legislation, it is important to check if the national legislation was correctly tagged. If not, the legislation will be invalid.

### ***Tongoane v Minister for Agriculture and Land Affairs*<sup>48</sup>**

This case sets out the 'substantial measures' test which applies to how a Bill is to be tagged in the national legislature.

#### ***Factual background:***

- The Communal Land Rights Act ('CLaRA') was enacted by the national legislature to provide legally secure tenure or comparable protection for people or communities whose tenure of land was legally insecure as a result of unjust apartheid policies. It was a highly controversial piece of legislation as it dealt with land in relation to customary law.
- Four communities challenged CLaRA on both substantive and procedural grounds.

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<sup>47</sup> See *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) at para 133(c)(i).

<sup>48</sup> *Ibid.*

- Substantively, they argued the CLaRA would replace their indigenous law system of land administration which would impact negatively on the evolving customary law regulating their land. They were unhappy that their land would now be subject to the control of traditional councils, which they contended were incapable of administering the land. Furthermore, they argued that CLaRA undermined the security of tenure in their land. Procedurally, they argued that the manner in which CLaRA was enacted was incorrect; Parliament's decision to pass CLaRA as a section 75 Bill instead of a section 76 Bill was inaccurate as it was a Bill that affected the provinces.

**(Note that only the procedural challenge will be focused on in this chapter.)**

***The Constitutional Court held that:***

- The Constitution regulates the manner in which legislation is to be enacted by the national legislature. Parliament must first tag a Bill submitted to it in order to determine the procedure for the Bill to be enacted.
- If a Bill is enacted as a section 76 Bill as opposed to a section 75 Bill, a more burdensome procedure is required. This is because section 76 Bills affect the provinces and thus the NCOP has a greater say in its passing.
- The substance of CLaRA related to the issue of security of land tenure or comparable protection, which fell within the competence of the national legislature only.
- Section 76 Bills are Bills whose provisions substantially fall within a functional area listed in schedule 4.
- The test for tagging such a Bill is different from the test to determine legislative competence.
- The test for tagging, or the 'substantial measures test', focuses on all the provisions of the Bill in question to determine the extent to which they substantially affect matters listed in schedule 4.
- Tagging is not concerned with determining the sphere of government that is competent to legislate on a matter, but with how the Bill should be considered by the provinces and the NCOP, and this depends on whether it affects the provinces substantially.

- To apply the pith and substance test to the tagging stage of the Bill undermines the constitutional role of the provinces in legislation in respect of which they should have a meaningful say. This is because the test focuses only on the substance of the Bill and treats all provisions which fall outside its main substance as incidental to it and irrelevant to the tagging process. In doing so, it ignores the impact of those provisions on the provinces.

### ***Applying the test***

- First, CLaRA deals with land tenure as it relates to communal land.
- Second, CLaRA deals with the transition from old order rights which include rights derived from indigenous law, to new order rights which include indigenous law rights which have been confirmed or converted by the Minister in terms of section 18 of CLaRA.
- Third, it introduces a new system of administration of communal land in which traditional councils are given wide-ranging powers and functions.
- The provisions of CLaRA in a substantial measure affected indigenous law and customary law and traditional leadership. These were functional areas listed in schedule 4
- Accordingly, CLaRA was incorrectly tagged as a section 75 Bill

### ***Conclusion:***

- The Constitution manifestly contemplates public participation in the processes of the NCOP and incorrectly tagging a Bill prohibits the public from participating where they should.
- CLaRA was thus unconstitutional in its entirety because it was not enacted in accordance with the provisions of section 76.

### **Tagging v Competence test**

Note the differences between the two tests set out by the *Liquor Bill* and *Tongoane* cases

<b>TEST</b>	<b>TAGGING TEST</b>	<b>COMPETENCE TEST</b>
<b>OTHER NAME</b>	Substantial measures test	Pith and substance test
<b>AUTHORITY</b>	The 'Tagging' test's authority is from the <i>Tongoane</i> case	The competence test's authority comes from the <i>Liquor Bill</i> case
<b>WHEN IS IT USED</b>	Used to determine which process a Bill should follow in the national legislature (is it a section 75 or 76 Bill?)	Used to determine which sphere of government can make law on the matter
<b>WHAT IS THE TEST</b>	Does the Bill . . . <b>in a substantial manner</b> . . . affect the interests of the provinces?	What is the true heart of the Bill? Once you have this answer, see whether this matter is listed in schedule 4 or 5 or neither

### **(c) Solving Legislative Conflicts**

The steps below set out the approach to a problem where there is a potential conflict between provincial and national legislation.

#### **Step 1: What is the conflict?**

Scan the national and provincial legislation and find the potential areas where they may conflict eg both sets of legislation concern health care or regulations for pet-owners or minimum wage etc.

## **Step 2: Determine legislative capacity**

### *First*

- See if the area of potential conflict is a matter listed in schedule 4 or schedule 5. This is done by applying the competence/pith and substance test.
- After determining the pith and substance of the legislation, find where this matter is listed in the schedules.
- Note, it may not be listed at all eg the true pith and substance of the Bill is animal control and diseases, listed as a schedule 4 matter.
- National legislation covering a schedule 5 matter is *prima facie* invalid but the discussion does not end here as it may meet a requirement listed in section 44(2).
- See if the area of potential conflict is a matter listed in schedule 4 or schedule 5. This is done by applying the competence/pith and substance test.
- After determining the pith and substance of the legislation, find where this matter is listed in the schedules.
- Note, it may not be listed at all e.g. the true pith and substance of the Bill is animal control and diseases, listed as a schedule 4 matter.
- National legislation covering a schedule 5 matter is *prima facie* invalid *but* the discussion does not end here as it may meet a requirement listed in section 44(2).
- Provincial legislation legislating on matters outside of section 104 is invalid.

### *Then*

#### *Check compliance with manner and form provisions?*

Legislation may fall within the correct schedule but still be invalid due to the fact that its legislative process was unconstitutional. Here it is important to check if the national legislation was correctly tagged (*Tongwane*) and the provincial legislation involved public participation.<sup>49</sup> eg

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<sup>49</sup> Doctors for Life International v Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (1 August 2006).



The Bill's pith and substance concerns alternative forms of energy, but according to the substantial measures test it affects the environment which is a schedule 4 matter that affects the provinces. Thus, it should have been tagged as a section 76 Bill.

**v. Step 3: The Conflict Test**

- Look back at the potential conflict you identified in step 1.
- Is it possible to interpret the conflict in a way that avoids the direct conflict test? In other words, is it possible to obey both laws at the same time?
- If so, will you apply the direct conflict test or follow Bronstein's suggestion and treat all *prima facie* conflicts as conflicts?
- Whichever test you choose, make sure to substantiate why you are choosing this test over the other.

**vi. Step 4: Solving the Conflict**

- a. If the conflict is over a matter listed in schedule 4 section 146 of Constitution national legislation prevails; or

b.

The national legislation is aimed at preventing unreasonable action by a province that:

- (a) is prejudicial to the economic health or security interests of another province or the country as a whole; or
- (b) impedes the implementation of national economic policy.

Provincial legislation prevails if neither of the above situations apply.<sup>50</sup> Note that a national or provincial act can only prevail if the law was approved by the NCOP.<sup>51</sup>

**NOTE: Compare the *Liquor Bill* case with section 146(2)(a)**

Note that the issue with the *Liquor Bill* case is that it stated if something can be dealt with intra-provincially, it is a schedule 5 matter, and if it should be dealt with inter-provincially, it is a schedule 4 matter. Section 146(2)(a) in the Constitution states that if a matter cannot be regulated by a province acting alone then national legislation prevails. These two tests seem to be saying the same thing. Essentially this means that if you use the *Liquor Bill* test, the section 146 test becomes redundant.

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<sup>50</sup> Supra note 1 at s146(5).

<sup>51</sup> Supra note 1 at s146(6).

***If the conflict is over a matter listed in schedule 5 → section 44(2):***

National legislation may intervene in a schedule 5 matter if it is NECESSARY for one or more of five listed purposes:

- 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.

***Step 6: Conclusion***

Note that where a court decides that one piece of legislation prevails over another, the other piece of legislation is not invalidated. Instead, it becomes inoperative for as long as the conflict remains.<sup>52</sup> In other words, if the opposing legislation gets repealed or suspended then the other legislation will bounce back. If a conflict that comes before a court cannot be resolved, then national legislation will prevail over the provincial legislation.<sup>53</sup>

**(d) The Conflict Tests**

When faced with a potential conflict between national and provincial legislation, one must apply a conflict test.

The Constitution says that:

When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or

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<sup>52</sup> Supra note 1 at s149.

<sup>53</sup> Supra note 1 at s148.

constitution that avoids a conflict, over any alternative interpretation that results in a conflict.<sup>54</sup>

This section is what led the court in the *Certification of the Constitution of the Province of KwaZulu-Natal* case to develop the direct conflict test.<sup>55</sup> This test asks whether it is possible to obey both national and provincial legislation at the same time – for example, if a national law says the maximum amount to be charged for public transport is R5/km and a provincial law says the maximum amount to be charged is R4/km. According to the direct conflict test, there would be no inconsistency as one could abide by both laws at the same time. This conclusion would not require the conflict resolution steps, and seems to be in line with the above constitutional provision.

Victoria Bronstein<sup>56</sup> argues that while the direct conflict test minimises conflict, it maximises regulation which is undesirable.<sup>57</sup> This is because more laws mean more regulation to ensure both laws are obeyed. Her method presupposes that all *prima facie* conflicts are treated as conflicts. Legislative silence should be treated as deliberate in some circumstances; in other words it is possible for gaps left in provincial legislation to conflict with specific provisions set out in national legislation. For example, if a national law says the maximum amount public transport may charge only is R5/km and a provincial law says the maximum amount is R4/km, Bronstein argues that the right to only pay R4 in one province contradicts the government's right to charge up to R5 according to national law. Therefore, there is a conflict between the amounts at provincial law and national law. Thus, section 146 of the Constitution would apply.

While Bronstein concedes that a literal interpretation of section 150 of the Constitution may favour the direct conflict test, this section cannot be read in isolation. Section 146 anticipates the judiciary playing an active and substantive role

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<sup>54</sup> Supra note 1 at s150.

<sup>55</sup> Supra note 35.

<sup>56</sup> Victoria Bronstein 'Conflicts' in S Woolman (ed) (2008) Constitutional Law in South Africa, Chapter 16.

<sup>57</sup> Ibid at 1.6.3.

in adjudicating conflicts between national and provincial governments.<sup>58</sup> The direct conflict test may often undermine the question of whether the essential functions of one level of government are undermined by the laws of another level of government.

## **6. LOCAL GOVERNMENT**

Up to this point, we have discussed the powers and functions of the national and provincial spheres of government. This section will deal briefly with local government. If you recall the table set out earlier in this chapter, both legislative and executive authority at a local level vests in the municipal councils. Section 152(1) of the Constitution sets out the objectives of local government (LG):

- to provide democratic and accountable local government for local communities;
- to ensure the provision of services to communities in a sustainable manner;
- to promote social and economic development;
- to promote a safe and healthy environment;
- to encourage the involvement of communities and community organisations in the matters of lg.

and, section 153 provides that a municipality must:

- structure and manage its administration and budgeting and planning processes to give priority to basic needs of community;
- structure and manage its administration and budgeting and planning processes to promote the social and economic development of the community;
- participate in national and provincial development programmes.

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<sup>58</sup> Section 146(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(a) **Three different categories of municipality are distinguished:<sup>59</sup>**

Type	Power	Type of executive system
<b>Category A:</b> Metropolitan municipality	Exclusive municipal executive and legislative authority in its area	Either a collective or mayoral executive system. May combine its executive system with a sub-council participatory system or a ward participatory system or both.
<b>Category B:</b> Local municipality	Shares municipal executive and legislative authority with category C	May have a collective, mayoral or plenary executive system and may combine its executive system with a ward participatory system but not with a sub-council participatory system.
<b>Category C:</b> District municipality	Municipal executive and legislative authority in an area which includes more than one municipality	May have a collective, mayoral or plenary executive system but may not combine its executive system with a sub-council or ward participatory system

The Constitution envisaged the enactment of national legislation to establish criteria to determine whether an area should have a single category A municipality, or both B and C. This came to be the Municipal Structures Act.<sup>60</sup> Metropolitan municipalities must be established in all metropolitan areas, and local and district municipalities must be established in all other areas.

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<sup>59</sup> Supra note 1 at s155.

<sup>60</sup> Local Government: Municipal Structures Act 117 of 1998.

Each municipality in South Africa has a council where decisions are made. These councils are made up of elected members who make decisions for their area on policies, by-laws, their budget, development plans and service delivery. The council elects a mayor who is assisted by a mayoral or executive committee which consists of councillors. There are different types of mayors, executives and committees set out in the Municipal Structures Act. The Member of the Executive Council for Local Government (MEC) in each province decides which structures will be used by different councils. The Act distinguishes between three executive systems of municipal government:<sup>61</sup>

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<sup>61</sup> Ibid at s7.

<b>EXECUTIVE SYSTEMS</b>	
<b>COLLECTIVE EXECUTIVE GOVERNMENT</b>	The executive authority and leadership of the municipality is exercised by an executive committee. Here the mayor is elected by the council along with an elected executive committee. The members of the executive committee can be made up from members of different parties. The mayor acts as the chairperson of the executive committee and the council elects a Speaker.
<b>MAYORAL SYSTEM</b>	The executive authority and leadership of the municipality is exercised by a mayor assisted by a mayoral committee. Most local councils have an executive mayor. An executive mayor is analogous to the president and the mayoral committee resembles the cabinet. Where there is an executive mayor, a Speaker is elected.
<b>PLENARY EXECUTIVE COMMITTEE</b>	The executive authority and leadership is exercised by the municipal council itself. These are used in very small municipalities. The council elects a mayor but without an executive or a Speaker.

The Act also distinguishes between two participatory systems of local government:<sup>62</sup>

- **The sub-council participatory system** which allows for delegated powers to be exercised by sub-councils established for parts of the municipality. These council committees specialise in specific areas and make recommendations to council.
- **The ward participatory system** which allows for matters of local concern to be dealt with by committees established for wards. These wards are elected by their communities. This allows for better participation from the

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<sup>62</sup> Ibid.



community to inform council decisions. Ward committees have merely advisory power

The type of municipality is important in determining three issues:

1. The institutional relationship between the municipality's executive and legislative functions
2. Whether a metropolitan or local municipality is permitted to establish ward committees
3. Whether a metropolitan municipality is permitted to establish sub-councils that exercise delegated powers for parts of the municipality

#### **(b) Powers**

The Constitution distinguishes between local government's original powers and assigned powers.<sup>63</sup> Original powers are the powers derived directly from the Constitution itself, and assigned powers are those assigned to local government in terms of national or provincial legislation. A municipality must exercise its legislative and executive authority within the parameters set out by national and provincial legislation. In the absence of national or provincial law regulating a local government matter, a municipality is free to determine the content of its legislative and executive decisions. The original powers of local government can be found in Part B of schedule 4 and 5 of the Constitution. This includes the power concerning any matter that is reasonably necessary for or incidental to the effective performance of its Part B functions.<sup>64</sup> Note that the powers listed in Part B have also been assigned to national and provincial legislatures.

In terms of section 99 of the Constitution, Cabinet members may assign their functions to a municipal council. This is a discretionary power, as the Constitution makes use of the word 'may' as opposed to 'must'. An analogous discretionary

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<sup>63</sup> Supra note 1 at s156.

<sup>64</sup> Ibid at s156(5).

power is given to members of the provincial executive councils in section 126. National and provincial governments may increase the powers of certain municipalities or municipalities in general.<sup>65</sup>

Section 156(4) provides that the national and provincial governments *must* assign the administration of a matter listed in Part A of schedule 4 or 5 to a municipal council if the following conditions are met:

- matter relates to local government;
- matter would most effectively be administered locally;
- municipality has the capacity to administer the matter;
- the municipal council agrees to the assignment.

Section 156(4) is mandatory, unlike sections 99 and 126 which assert discretionary powers. Section 156(4) reinforces the principle of subsidiarity, which requires that the exercise of public power takes place at a level as close as possible to the citizenry.

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<sup>65</sup> Ibid at s 44(1)(iii) and 104(1)(c).

### **(c) Conflicts**

A by-law made by local government that conflicts with national or provincial legislation is invalid.<sup>66</sup> This rule, however, is subject to section 151(4) which states that the national or provincial government may not compromise or impede a municipality's right or ability to exercise its powers or perform its functions.

### ***Powers of National and Provincial Spheres in Relation to Local Government***

Provinces must not only monitor and support local government but also promote their development by ensuring their ability to perform their functions and manage their own affairs.<sup>67</sup> Furthermore, national government (subject to section 44 of the Constitution) and provincial governments have the legislative and executive authority to oversee the effective performance by municipalities of their Part B functions by regulating their executive authority.<sup>68</sup> These sections imply that neither national nor provincial governments can give themselves the power to exercise municipal powers or the right to administer municipal affairs.<sup>69</sup> These two spheres are limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities. While national and provincial spheres are entitled to pass laws regulating local government matters set out in schedule 4B and 5B, they cannot pass laws giving themselves power to administer or implement those laws. The municipalities themselves must exercise the power to administer or implement those laws.

The powers of national and provincial governments in relation to local government can be summarised as follows:

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<sup>66</sup> Ibid at s156(3).

<sup>67</sup> Supra note 1 at s 155(6)(a) and (b).

<sup>68</sup> Ibid at s155(7).

<sup>69</sup> See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010).

1. Power to **monitor** local government, to develop the capacity of municipalities to perform their functions and manage their affairs;<sup>70</sup>
2. Power to **support** local government and strengthen their capacity to manage their own affairs, exercise their powers and perform their functions;<sup>71</sup>
3. Power to **regulate** local government. They can do this by establishing the frameworks in which municipalities perform;<sup>72</sup>
4. Power to **intervene** in local government where functions are not being fulfilled<sup>73</sup> or there is a need for budgetary intervention<sup>74</sup> or financial crisis intervention.<sup>75</sup>
  - a. South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs<sup>76</sup>

**Facts:** The applicant, South African Municipal Workers' Union ('SAMWU'), a registered trade union whose members are drawn from all levels of municipal employees, sought an order declaring the Local Government: Municipal Systems Amendment Act ('the Act') invalid. SAMWU challenged the Act's validity on procedural and substantive grounds. Procedurally, they argued that the Bill form was erroneously not tagged as a section 76 Bill that affects the provinces. Substantively, they argued section 56A violated *inter alia*, the right to make free political decisions.

**Background:** After an increase in maladministration within municipalities, the Act introduced measures to ensure that professional qualifications, experience and competence were the overarching criteria governing the appointment of municipal managers as opposed to political party affiliation. Section 56A restricted municipal

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<sup>70</sup> Supra note 1 at s155(6).

<sup>71</sup> Ibid at s154(1).

<sup>72</sup> Ibid at s155(7).

<sup>73</sup> Ibid at s139(1).

<sup>74</sup> Ibid at s139(4).

<sup>75</sup> Ibid at s139(5).

<sup>76</sup> South African Municipal Workers 'Union v Minister of Co-Operative Governance and Traditional Affairs (CCT54/16) [2017] ZACC 7; 2017 (5) BCLR 641 (CC) (9 March 2017).

managers or managers directly accountable to municipal managers from holding political office in a political party.

**Procedural challenge:** The Act seeks to promote a number of values listed in section 195(1) of the Constitution regarding public administration. The court stated that in terms of section 76(3)(d) of the Constitution, a Bill must be dealt with as a Bill affecting the provinces (section 76 Bill) if it falls within a functional area listed in schedule 4 or provides for legislation envisaged in certain sections including section 195. The court applied the test in *Tongoane* to conclude that the interests of the provinces were substantially implicated so as to trigger the application of the section 76 procedure.

**Substantive challenge:** Due to the fact that the procedural challenge was successful, the invalidity of the Act was confirmed, and so the court did not find it necessary to assess the substantive challenge.

**Conclusion:** The invalidity of the Act was confirmed. However, in order to avoid disruption, the declaration of invalidity would only operate prospectively, and would be suspended for 24 months to allow the legislature an opportunity to remedy the defect. The majority found that there was no legal basis to make an exception to section 56A in relation to the remedy given in respect of the whole Act.

## 7. QUESTIONS

### Question 1

Due to concerns about an increase in unlawful gambling, the Western Cape provincial government is keen to take action. The Provincial Gambling Act has just been referred to Premier X of the Western Cape for his assent. Upon his perusal of the Act, he becomes uncertain as to the validity of the legislation. It seems to Premier X that this legislation is very similar to the recent National Gambling Act that was enacted earlier in the year to regulate the gambling industry. Premier X is concerned that the Western Cape does not have the competence to legislate on the same thing.

#### **The National Gambling Act provides as follows:**

##### 2. Provincial licences

(1) Only national gambling licences are sufficient for the following activities-

- (i) Casinos
- (ii) Racing
- (iii) Gambling or wagering

(2) Provincial gambling licenses for activities referred to in (1) are insufficient.

#### ***The Provincial Gambling Act provides as follows:***

##### 5. Provincial licences

(1) Only national gambling licenses will be sufficient for the following activities-

- (i) Casinos
- (ii) Racing

(2) Provincial licences are sufficient for all other activities not mentioned in (1).

You are Justice Y sitting on the Constitutional Court bench. Premier X has referred the Provincial Gambling Act to the Constitutional Court as he believes it to be in conflict with the National Gambling Act.

*Write a reasoned opinion on whether or not you agree with Premier X.*

## **Question 2**

The National Health Care Act 20 of 2019 has recently come into effect. Everyone has a Constitutional right not to be refused medical care,<sup>77</sup> but the government wants to alleviate some of the pressure on the healthcare system. Government hospitals struggle to keep up with the number of patients being brought in by ambulances. The national Act was created as a response to this. Often patients call emergency services for things like the flu, colds or even exaggerate their symptoms to get out of work. Under this National Health Care Act, paramedics will have the power to prescribe certain medication and write sick notes for patients in the hope that fewer patients (who do not need hospital care) will request to be taken to government hospitals.

The Western Cape provincial legislature has applied to the Constitutional Court to challenge the validity of the National Health Care Act, claiming that it conflicts with their Provincial Medical Care Act. Under this Act, paramedics must bring all patients to a government hospital if they so request. The purpose of the provincial act is to regulate the health industry in the province. This Act does not give paramedics the power to prescribe medication or write sick notes for patients.

*Write a well-reasoned opinion as to whether or not you think the Western Cape provincial legislature will be successful in its application.*

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<sup>77</sup> Supra note 1 at s27(1)(c).

### Question 3

There has been a shocking increase in the amount of pollution in South Africa and especially the Western Cape. Protesters have been putting pressure on the government all over the country to respond to the poor quality of air in the city centres. Elections are coming up and governments are keen to respond to the needs of their citizens. Parliament decides to respond by making public transport vehicles pay less for petrol. They believe this will encourage citizens to make more use of public transport as opposed to their own vehicles. This will have the desirable result of reducing the amount of emissions released by motor vehicles in the city centre. As from December 2019, public transport vehicles will only pay R10 for a litre of petrol.

The Western Cape provincial legislature decides that they will save the environment by placing a tariff on the petrol price of certain vehicles notorious for their bad impact on the environment. From December 2019, owners of Bentleys, Fords and Mercedes-Benz will pay R17 per litre of petrol, R2 more than other motorists.

The City of Cape Town has independently decided to regulate transport in the area. Traffic going into the City Centre has become unmanageable. They will tackle this problem by lowering the price of public transport going to the city centre during weekdays. This new by-law now makes the idea of public transport more attractive than driving individual vehicles into town which create more traffic.

- a) Discuss the competency of each sphere to pass the legislation they have each passed
- b) Assume that the national and provincial provisions are valid (that is, assume that both sets of legislation fall under schedule 4 of the Constitution). Determine whether they conflict with one another and, if they conflict, which provisions will prevail.
- c) Is the municipal by-law original or delegated legislation? Explain your answer, very briefly.



#### Question 4

- a) What is federalism, and has South Africa adopted a federalist system of government? (7 marks)
- b) What are the differences and similarities between the Divided Model and the Integrated Model? Which model does South Africa subscribe to? (5 marks)
- c) What is the difference between the test for tagging and legislative competence? (6 marks)

## 8. ANSWERS

### QUESTION 1 (unlawful gambling)

The issue in this case is whether the National Act is in conflict with the Provincial Act as they both deal with gambling. A key feature of multi-level government in SA is the division of legislative power between the spheres of government. Parliament and provincial legislatures have concurrent competence on matters in schedule 4 while Parliament has exclusive competence in schedule 5 matters.

#### ***Potential Conflicts:***

The national act states that national gambling licences as opposed to provincial licences are required for casinos, racing, gambling or wagering. The provincial act merely states that national gambling licences are only required for casinos and racing. The potential conflict in the laws lies in the question whether a licence is needed for gambling and wagering.

#### ***Legislative Capacity:***

It is necessary to determine whether the national and provincial spheres have competence to legislate on this matter. If the matter is one listed in schedule 4, both the national and provincial legislation will be valid. If the matter falls into schedule 5, the provincial legislation will be valid and the national legislation will be *prima facie* invalid. It will be valid if it meets section 44(2) of the Constitution. Provincial legislation purporting to legislate on matters outside section 104 (which sets out legislative competencies for provinces) is invalid.

The *Liquor Bill* case provides criteria for determining whether legislation concerns a schedule 4 matter or a schedule 5 matter. According to the 'pith and substance' test, the question turns on the true purpose and effect of the legislation. Both Acts were created as responses to unlawful gambling in the country. The main purpose of both the provincial and national acts is to regulate the gambling industry. This falls directly into the matter of 'Casinos, racing, gambling and wagering' listed in

schedule 4. This means it is a matter over which the national and provincial legislatures have legislative competence.

Legislation may fall within the correct schedule but still be invalid because the legislative process was unconstitutional. This includes the requirement of the national Act being correctly tagged and the provincial act having facilitated public participation. The test for tagging was set out in the *Tongoane* case as the 'substantial measures' test. The question is whether the Bill, in a substantial measure, affects the provinces. If so, it should be tagged as a section 76 Bill which involves more input from the NCOP. If not, it is tagged as a section 75 Bill with less influence from the NCOP. In this case, since the Bill concerns a Schedule 4 matter, it substantially affects the interests of the provinces. Assuming the national Act was tagged as a section 76 Bill and the provinces facilitated public participation, they have complied with procedural requirements.

### ***The Conflict Test:***

Is there a conflict between the Acts? At first blush, there is a conflict: one law says you need a national licence for certain activities while the other law does not require a national licence for the same activities. The direct conflict test from the *KZN Certification* judgment asks whether it is possible to obey both laws at the same time. If so, one should opt for this approach to avoid declaring any law invalid. If one obtained a national licence for casinos, racing and gambling or wagering, both Acts would also be complied with at the same time by following the stricter law. There is academic criticism of the direct conflict test, particularly by Bronstein, for being too artificial. For example, it may minimise conflict but it maximises regulation. It requires people to comply with the more regulated law in order to abide by both. She backs this up by saying even though section 150 of the Constitution requires the courts to try to resolve conflicts between tiers of government, the Constitution provides great detail on what to do when there is a conflict; thus it envisages the judiciary playing a big role in adjudicating legislative conflicts. Thus, the two laws should be treated as conflicting.

### ***Solving the Conflict:***

As the conflict is over a matter listed in schedule 4, it is necessary to apply section 146 of the Constitution. Accordingly, national legislation will prevail only if it applies uniformly and it either:

- Deals with a matter that cannot be regulated effectively by provincial legislation, it requires uniformity across the nation and provides that uniformity by establishing norms and standards; frameworks; or national policies.
- Or the national legislation is necessary for the maintenance of national security; the maintenance of economic unity; the protection of the common market in respect of the mobility of goods, services, capital and labour; the promotion of economic activities across provincial boundaries; the promotion of equal opportunity or equal access to government services; or the protection of the environment.

In this case, the national Act creates standards for the regulation of the gambling industry which require uniformity as unlawful gambling is a criminal offence. Therefore, Premier X was correct in thinking that the provincial Act conflicted with the national Act. There is a conflict and, due to section 146 of the Constitution, national legislation will prevail over the provincial legislation.

## QUESTION 2

The issue in this case is whether the national Act conflicts with the provincial Act and if so, which legislation will prevail.

### ***The Potential Conflict:***

The potential conflict between the two Acts lies in the power given to paramedics under the acts. The national Act allows paramedics to prescribe certain medication and write sick notes. However, the provincial act does not give this authorisation. Furthermore, the national Act does not require paramedics to bring all patients to a hospital while the provincial act does.

### ***Legislative Capacity:***

It is necessary to determine whether the national and provincial spheres have competence to legislate on this matter. If the matter is one listed in schedule 4, both the national and provincial legislation will be valid. If the matter falls into schedule 5, the provincial legislation will be valid and the national legislation will be prima facie invalid. It will be valid if it meets the requirements of section 44(2) of the Constitution. Provincial legislation purporting to legislate on matters outside of section 104 (setting out legislative competencies for provinces) is invalid. The *Liquor Bill* case provides criteria for determining whether legislation concerns a schedule 4 matter or a schedule 5 matter. According to the 'pith and substance' test, the question is what the true purpose and effect of the legislation is. The national Act deals with paramedics and ambulance services, and this would be a schedule 5 matter over which the provinces have exclusive competence. However, these provisions are merely incidental to the Act's true purpose which is related to health services as it aims to divert some of the pressure on government hospitals. Thus, the pith and substance of the national Act is health services, a schedule 4 matter. Thus, the national legislature is competent to legislate on this matter. The pith and substance of the provincial Act is also the regulation of health services. Thus, as this is a schedule 4 matter, the Western Cape provincial legislature is also competent to legislate on the matter.

Legislation may fall within the correct schedule but still be invalid because the legislative process was unconstitutional. This includes whether the national Act was correctly tagged and the provincial Act having facilitated public participation. The test for tagging was set out in the *Tongoane* case as the 'substantial measures' test. The question is whether the Bill, in a substantial measure, affects the provinces. If so, it should be tagged as a section 76 Bill which involves more input from the NCOP. If not, it is tagged as a section 75 Bill with less influence from the NCOP. In this case since the Bill concerns a schedule 4 matter, it substantially affects the interests of the provinces. Assuming the national Act was tagged as a section 76 Bill and the provinces facilitated public participation, they have complied with procedural requirements.

### ***The Conflict Test:***

Is there a conflict between the Acts? There seems to be a conflict as the national Act gives paramedics certain powers while the provincial Act does not. The direct conflict test set forth in the *KZN Certification* judgment asks whether it is possible to obey both laws at the same time. If so, one should opt for this approach to avoid declaring any law invalid. On the facts, the provincial Act does not authorise paramedics to prescribe medicine or write sick notes, but it does not expressly prohibit it either. Even with this authorisation, paramedics could still comply with the provincial Act by bringing patients to hospital if they nonetheless make this request.

There is academic criticism of the direct conflict test, particularly by Bronstein, for being too artificial. For example, it may minimise conflict but it maximises regulation. It requires people to comply with the more regulated law in order to abide by both. She backs this up by saying even though section 150 of the Constitution requires the courts to try to interpret a conflict away, the Constitution provides great detail on what to do when there is a conflict; thus it envisages the judiciary playing a big role in adjudicating legislative conflicts. Thus, the two laws should be treated as conflicting.

### **SOLVING THE CONFLICT:**

As the conflict is over a matter listed in schedule 4, it is necessary to apply section 146 of the Constitution. Accordingly, national legislation will prevail only if it applies uniformly and it either:

- Deals with a matter that cannot be regulated effectively by provincial legislation;
- It requires uniformity across the nation and provides that uniformity by establishing norms and standards; frameworks; or national policies.
- Or the national legislation is necessary for—
  - a) the maintenance of national security;
  - b) the maintenance of economic unity;
  - c) the protection of the common market in respect of the mobility of goods, services, capital and labour;
  - d) the promotion of economic activities across provincial boundaries;
  - e) the promotion of equal opportunity or equal access to government services; or
  - f) the protection of the environment.

In this case, the national Act does apply uniformly and establishes frameworks for the health industry all over the country. The powers of paramedics across the country enable equal access to government services. Everyone in South Africa would be able to receive prescriptions and/or sick notes from paramedics and all hospitals would benefit from alleviation of crowding in government hospitals. Thus, the National Act will prevail.

Thus, I do not think the Western Cape provincial legislature will be successful in its application. According to section 149 of the Constitution, a decision by a court that national legislation prevails over the provincial legislation does not invalidate the provincial legislation. Instead, the provincial legislation becomes inoperative for as long as the conflict remains

### QUESTION 3

#### ***The competency of each sphere to pass their respective legislation:***

Local government has made a by-law on the cost of public transport. 'Municipal public transport' is a matter listed in schedule 4B which is an area of local government competence. Thus, to the extent that the by-law regulates municipal public transport as opposed to provincial or national public transport, the City of Cape Town is competent to make this law.

Regarding the provincial and national Acts, the *Liquor Bill* case sets out the pith and substance test to determine the legislative capacity of governmental spheres. The test involves looking at the true purpose and effect of the legislation to see whether it falls within schedule 4 or 5. The purpose of the Acts is pollution control. However, the effect of these Acts is seen in public transport. These are both matters that fall in schedule 4, an area of concurrent competence. Thus, both the national and provincial legislatures are competent to legislate on the matter.

#### ***Do the national and provincial laws conflict?***

There are two possible tests to determine whether there is a conflict or not. The *KZN Certification* judgment outlines the test for identifying conflict, the direct conflict test, which asks whether all conflicting laws can be obeyed at the same time. If yes, then there is no conflict. Bronstein criticises this test and instead proposes that any conflict should be seen as *prima facie* conflict which must then be resolved.

The provincial legislation requires tariffs by which owners of Bentley, Ford and Mercedes-Benz vehicles will pay R17 for litre of petrol, R2 more than other motorists. The national legislation allows public transport vehicles to only pay R10 per litre of petrol. Applying the direct conflict test, is there a way to obey both laws at the same time? Technically yes. Obeying the provincial legislation requiring certain cars to pay more for petrol could still be obeyed if public transport vehicles paid less for petrol. Thus, according to this test there is no conflict.

Applying Bronstein's test, this would have to be treated as a *prima facie* conflict to be resolved. Accordingly, section 146 of the constitution must be applied.



National legislation would prevail in terms of this section as it deals with a matter that requires uniformity across the nation and national legislation provides this by providing standards for petrol prices.

I argue in favour of applying the direct conflict test as it is in harmony with section 150 which says when there is a conflict, the court must prefer any interpretation that avoids a conflict. Thus, there is no conflict between the laws.

***Is the municipal by-law original or delegated legislation?***

The municipal by-law is original legislation. Municipal public transport is a functional area listed in schedule 4B of the Constitution. This power is derived directly from the Constitution and not delegated from other spheres of government.

**QUESTION 4**

***Federalism***

a) The name for the structure of government where governmental power is divided into different levels of government is known as federalism. This refers to a combined system of government that consists of a general government and other lower level governments. South Africa's Constitution avoids the use of the term 'federal'. It displays the federalist characteristic of a multi-level system of government, but it remains unitary in spirit. In other words, national government retains the most power and influence over policies and laws. South Africa has adopted a 'quasi-federal' system of government. Section 40 of the Constitution states that the government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

b) In a federal or quasi-federal system, the division of power between different spheres of government may be based either on a divided model of federalism or an integrated model of federalisation. A divided model is where the subject matter of policy and law-making powers are strictly divided between the levels of government. Each sphere has its own exclusive powers and very few concurrent powers. In an integrated model, the subject matter of policy and law-making powers are not strictly divided between the levels of government. Some subject matters are allocated

exclusively to one sphere, but most are concurrent. South Africa subscribes to the latter.

c) The test for tagging is used to determine which process a Bill should follow in the national legislature (i.e. is it a section 75 or section 76 Bill). The test is whether the Bill, in a substantial measure, affects the provinces. The legislative competence test is used to determine which sphere of government can legislate on the matter. The test is what the true heart of the Bill is.