CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 38/01

MEMBER OF THE EXECUTIVE COUNCIL FOR
LOCAL GOVERNMENT AND DEVELOPMENT
PLANNING OF THE WESTERN CAPE PROVINCE — First Applicant

BOLAND DISTRICT MUNICIPALITY — Second Applicant
(as successor to the Winelands District Council)

versus

PAARL POULTRY ENTERPRISES CC
t/a ROSENDAL POULTRY FARM — Respondent

Heard on : 6 November 2001

Decided on : 14 December 2001

JUDGMENT

YACOOB J:

Introduction

[1] The local government restructuring process in terms of the Local Government Transition Act No. 209 of 1993 (the LGTA) was completed for the whole country when municipal elections[1] were held towards the end of last year.[2] This application for leave to appeal arises

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1 Pursuant to the Local Government: Municipal Structures Act 117 of 1998.

2 Item 26(1)(a) of Schedule 6 to the Constitution provides:
"26.__(1)__Notwithstanding the provisions of sections 151, 155, 156 and 157

from that process as it unfolded in relation to local government structures in the Western Cape outside the Cape Town metropolitan area during 1997 and 1998. In particular, this Court must consider the validity of section 10[3] (the savings provision) of a Proclamation[4] (Proclamation 52) enacted by the Member of the Executive Council of the Western Cape Province (the MEC) purportedly pursuant to section 10(1) of the LGTA.

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of the new Constitution—

(a) the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force in respect of a Municipal Council until a Municipal Council replacing that Council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution . . . ."

3 The section is considered in more detail at paras 22 and 23 below.

4 Proclamation 52 of 1998 enacted by Provincial Gazette Extraordinary 5316 of 11 December 1998.

[2] Proclamation 52 was prompted by an unusual sequence of events. Before it was amended in November 1996, the LGTA did not require district councils to be elected on the basis of proportional representation. Consequently they were elected in the Western Cape according to establishment Proclamations[5] that did not provide for their election on that basis. Parliament then passed an Act[6] (the 1996 amendment) which substantially amended the LGTA, and in a provision that came into effect on 1 July 1997 required district councils to be elected according to a system of proportional representation. No one did anything to ensure that district councils in the Western Cape were reconstituted to comply with this amendment. As a result the Cape of Good Hope High Court[7] (the High Court) made an order that district councils in the Western Cape had been "improperly elected" since 1 July 1997 in that they had not been elected on the basis of proportional representation in compliance with the LGTA.[8] The MEC was required to put the matter right within sixty days. Proclamation 52, enacted by the MEC in December 1998 in an effort to comply with this judgment and order (the *District Council Judgment*), provided in the main for district councils in the Western Cape to be constituted on the basis of proportional representation. But it did more. The savings provision in it, section 10, sought to validate all decisions and actions of district councils retrospectively from 1 July 1997 to cover the period

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5 Proclamations 152 of 1995 enacted by Provincial Gazette Extraordinary 5004 of 15 December 1995, 6 of 1996 enacted by Provincial Gazette Extraordinary 5028 of 11 March 1996 and 18 of 1996 enacted by Provincial Gazette Extraordinary 5040 of 26 April 1996 all of which will be discussed later in the judgment.

6 Act 97 of 1996.

7 In *The Minister for Provincial Affairs and Constitutional Development v The Member of the Executive Council for Local Government in the Western Cape Province and Others* (Cape of Good Hope High Court) Case No 1499/98, 2 July 1998, unreported, per Foxcroft J, Tebbutt J concurring.

8 Section 9D(1)(b)(i).

during which these councils had been improperly elected according to the *District Council Judgment*. This became a bone of contention.

[3] The savings provision reads as follows:

> "10. Subsection (5) of section 42 of the Enactment contained in Proclamation 152 is substituted by the following:
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> (i) by the substitution therefor of the following—
>
> '(5) Any—
>
> (a) movable and immovable property and other assets the ownership of which was transferred or vested;
>
> (b) levies, revenue and other monies, levied or paid or recovered or payable or recoverable by or to a district council;
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> (c) prosecution commenced or defended;
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> (d) litigation launched or defended or any arbitration commenced by or against a district council;
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> (e) power exercised or duty or obligation performed in connection with the employment of employees, including the appointment of such employees;
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> (f) resolution taken;

(g) notice, certificate or other document issued;

(h) direction, approval, consent or authority given;

(i) exemption, licence or permit granted or issued;

(j) by-law made;

(k) employee nominated;

(l) agreement or contract entered into;

(m) delegation of powers granted;

(n) rates, tariffs or charges levied or imposed;

(o) reservation of land made;

(p) election made;

(q) power exercised or duty or obligation performed, and

(r) other action taken or thing done,

(i) by a prior regional services council shall be deemed to have been taken, issued, given, granted, made, elected, nominated or done by the succeeding district council and shall remain of force and effect until rescinded, varied or amended by the

succeeding district council, and

(ii) by a district council which has been declared by the Cape High Court in case number 1499/98 not to have been properly elected since 1 July 1997 in accordance with the basis of proportional representation as required by the provisions of section 9D(1)(b)(i) of the Act as amended, since 1 July 1997 shall be deemed to have been done, taken, issued, given, granted, made, elected, nominated, exercised or performed by a district council constituted in accordance with the said section 9D(1)(b)(i).'

(ii) . . . ."

[4] The Winelands District Council (Winelands) was one of those declared to have been improperly elected in the *District Council Judgment*. In the High Court, Winelands[9] sued the respondent,[10] for the payment of certain levies.[11] The latter asked for a declaratory order that Winelands had been constituted improperly, unlawfully and inconsistently with the LGTA since 1 July 1997, and that material decisions taken in relation to the institution of proceedings and the

9 The plaintiff in the court below.

10 The defendant in the court below.

11 Regional Services and Regional Establishment levies were outstanding, to the amount of R320 217,75 in terms of section 12(1)(a) of the Regional Services Council Act 109 of 1985, for the period July 1995 to September 1997.

issue of summons during the first half of 1998 had therefore been incompetent. The respondent relied on the *District Council Judgment* and Winelands resisted the claim that it had not been properly constituted by relying on the savings provision. The respondent took the point that this provision was invalid and the issue of its invalidity was set down for special hearing[12] before any evidence was heard. The High Court allowed the MEC to intervene in the proceedings to support the validity of the savings provision and, after hearing argument, ultimately declared it to be ultra vires the LGTA and invalid.[13] The MEC and Winelands have, with a positive certificate from the High Court, applied for leave to appeal directly to this Court against the judgment of the High Court and the President directed amongst other things that the application be set down for hearing and that the merits of the appeal be argued at the same time.

[5] It became apparent at the hearing before this Court that Winelands had ceased to exist and that the Boland District Municipality (Boland) had been established in its place. The applicants lodged an application seeking an order that Boland be substituted for Winelands as the second applicant in so far as is necessary. The application is not opposed and should be granted.

[6] The respondent contended in limine that the application for leave to appeal should not be granted because the issue in the appeal is not a constitutional matter and because the circumstances of this case do not warrant an appeal directly to this Court from the judgment of the High Court. I disagree. The finding by the High Court that the savings provision is invalid is

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12 In terms of Rule 33(4) of the Uniform Rules of the High Court.

13 *The Winelands District Council v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm and Another* (Cape of Good Hope High Court) Case No 3519/1998, 30 August 2001, unreported, per Jali J, Davis J concurring.

necessarily a finding that the action of the MEC in enacting the Proclamation constituted an unlawful exercise of public power. Any issue involving the legality of the exercise of public power is a constitutional matter.[14] The case does raise a constitutional matter.

14 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 paras 56 and 58, which deals with the position under the Interim Constitution; *Pharmaceutical Manufacturers Association of South Africa and Another: in Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 paras 31 and 51.

[7] The applicants urged that leave to appeal directly to this Court be granted. They say that the appeal does not raise any matter other than a constitutional one, that there will be a considerable saving in costs and time if their request were to be acceded to and that the issue calls for urgent final resolution. In support of urgency, they point to the fact that there is now considerable uncertainty about the lawfulness of the existence of seven district councils in the Western Cape.[15] The confirmation of the decision of the High Court would mean that everything done and all decisions made by all district councils in the Western Cape from July 1997 until about the end of 1998 would be null and void. The resultant potential dislocation is obvious. They nevertheless sought at the beginning of the hearing to have admitted as evidence an affidavit in which the degree of that dislocation was particularised. This application, which was opposed, is rejected. The proposed evidence adds nothing. We do not need it to be persuaded of the obvious dislocation and the dire consequences that might flow if there were uncertainty about the capacity of the district councils in the Western Cape to act during a period of about a year-and-a-half. This is a case in which leave to appeal directly to this Court should be granted. Stable government requires certainty on this issue as soon as possible and the applicants'

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15 These district councils were established by Proclamation 152 of 1995 (above n 5), and were all joined in the case that ended with the *District Council Judgment* (Case No 1499/98) as the third to ninth respondents.

motivation is well founded.[16] The merits of the appeal are considered in the rest of this judgment.

16 *Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party* 1998 (4) SA 1157; 1998 (7) BCLR 855 (CC) paras 29 - 32.

[8] A preliminary matter must be briefly addressed before delving into the merits. The High Court, having declared the savings provision invalid, made no order pursuant to section 172(1) of the Constitution[17] in order to control the effect of invalidity in the interests of justice. In fact, section 172 is not mentioned in the High Court judgment.

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[17] Section 172(1) provides:

"(1) 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; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[9] In the *Pharmaceutical Manufacturers* case[18] Chaskalson P, responding to a proposition that judicial review under the Constitution and under the common law are different concepts, said on behalf of a unanimous Court:

> "I take a different view. The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. I deal more fully with this below."

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18 *Pharmaceutical Manufacturers Association of South Africa and Another: in Re Ex Parte President of the Republic of South Africa and Others* (above n 14) para 33.

Later in the same judgment Chaskalson P continued:[19]

> "I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."

[10] A dispute about whether a provincial proclamation or a part of it is consistent with an Act of Parliament in terms of which that subordinate legislation has been made, is a dispute covered by section 172 of the Constitution. Section 172 obliges a court to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. National legislation is defined in section 239 of the Constitution so as to include subordinate legislation made in terms of an Act of Parliament. A provincial proclamation made in terms of an Act of Parliament including a provincial proclamation made in terms of the LGTA is national legislation according to the Constitution. It is therefore "law" within the meaning of section 172(1). There can be no room for any suggestion that disputes about whether a provincial proclamation falls within the terms of an enabling Act of Parliament are concerned with a common law principle unrelated to the Constitution. The nature of the inconsistency relied upon was that the MEC lacked the power to make the savings provision. The ultimate question was whether the law in issue was consistent with the Constitution. The High Court, having decided

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[19] Ibid para 44.

that the savings provision was invalid was bound to consider whether it was necessary to control the effect of that order in the interests of justice and equity pursuant to section 172(1).

[11] None of the pleadings before the High Court nor the special case referred to the provisions of section 172(1) of the Constitution. The High Court did not refer to this empowering provision either. The judgment of the High Court is silent as to the source of its authority to declare the provision invalid. There is some uncertainty about whether the High Court considered that this was a case covered by section 172(1) of the Constitution. To the extent that this was not done, the High Court erred. We, like it, must consider the case under this section.

The validity of the savings provision

[12] It was contended before the High Court in support of the savings provision that the MEC's section 10 power was original legislative power;[20] alternatively that the broad and inclusive section 10 empowerment provision of the LGTA conferred the relevant authority on the MEC by necessary implication. The High Court rejected both legs of this submission. The applicants advanced much the same argument before this Court. The submissions were disputed by the respondent who contended that the savings provision was inconsistent with the LGTA because in effect it purported to transform a district council that had not been properly constituted in terms of the LGTA into one that was. The submissions of both parties concerning the scope of the authority of the MEC rested on the correctness of applicants' starting point that the MEC continued to enjoy the powers conferred by the LGTA in respect of district councils

20 *Middelburg Municipality v Gertzen* 1914 AD 544.

despite the provisions of section 10N(2) which provides as follows:

> "(2) The powers conferred upon the MEC by section 10 shall lapse in respect of the area of jurisdiction of a local council, metropolitan council, metropolitan local council, rural council or representative council on the day immediately prior to the commencement of the Local Government Transition Act Second Amendment Act, 1996."

[13] The submission was that district councils are not mentioned in section 10N(2) and that the MEC's section 10 power had not lapsed in relation to these councils. This submission accords with part of the reasoning essential to the conclusion in the *District Council Judgment*. The order directing the MEC to rectify the defect was based on the proposition that the LGTA not only authorised the MEC to enact a Proclamation to ensure that district councils were elected consistently with the amended LGTA but indeed obliged the MEC to do so. At pages 15 - 17 of the typed judgment the judge said:

> "It is true that in section 10N of the Transition Act it is stated that the powers conferred upon the M.E.C. by section 10 shall lapse in respect of the area of jurisdiction of a local council, metropolitan council, metropolitan local council, rural council or representative council on the day immediately prior to the commencement of the Local Government Transition Act Second Amendment Act, 1996. What is notable is that the powers conferred upon the M.E.C. in respect of **district councils** did not lapse. Mr *Heunis* also submitted that the fact that a provincial committee was to be disestablished in terms of section 10N(1) meant that the M.E.C. was no longer capable of exercising section 10 powers in respect of district councils.
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> I do not agree with that submission. There must have been a reason why the powers of the M.E.C. in regard to district councils were not included in the lapsing provisions of section 10N(2). If the committee no longer exists, then the effect is that the M.E.C. can

act without the committee. Certainly, in a situation like the present one, where the argument is that the Minister should have done what he thought necessary himself and should not have tried to compel the M.E.C. to act in accordance with the requirements of the Second Amendment Act, the argument is of little force. One is not dealing with a situation where an M.E.C. is initiating any provincial legislation or proclamation or regulation where the advice of a committee might be important. He is being told what he ought to do by the National Minister, and he retains the power to carry out the instructions of Applicant on the Act as it is presently worded."

[14] After the hearing in this Court, doubt arose whether the MEC's power in relation to district councils had indeed not lapsed by reason of section 10N(2) of the LGTA. Consequently the President issued additional directions requesting the parties to furnish further written argument on:

"(a) Whether it is correct that the powers conferred on the Provincial Member of the Executive Council responsible for local government by Section 10 of the Local Government Transition Act 209 of 1993 (the LGTA) did not lapse in respect of District Councils when the LGTA was amended by the insertion of section 10N. In addressing this issue, the Parties are requested to have due regard to -

(i) the fact that section 10N(2) provides that the relevant powers "shall lapse in respect of the area of jurisdiction of" the bodies mentioned in the sub-section, and not that the powers are to lapse in respect of the named local government structures;

(ii) the provisions of Section 9D(1)(b)(i) and (ii) of the LGTA which are to the effect that District Councils are composed of representatives of local, rural or representative councils whose areas of jurisdiction fall within the area of that District Council and of representatives of remaining areas;

(iii) the disestablishment of Provincial Committees by section 10N(1) of the LGTA; and

(iv) any other relevant factor.

(b) The legal consequences if section 10N had application to the section 10 powers of the MEC in respect of District Councils more particularly in regard to -

(i) whether the MEC responsible for local government in the Western Cape had the power to promulgate Proclamation 52 of 1998 and;

(ii) whether section 10N(3) had the consequence that section 8 of Proclamation 152 of 1995 remained in force and, if so, until when."

[15] Written argument on these matters has been filed on behalf of all the parties and the Court expresses its appreciation for their help. It is logical to consider first whether the MEC retained any authority in relation to district councils.

[16] The applicants in their further submissions point to the fact that the section 10 powers were not conferred on an area basis; they seek to remind us that all municipalities operate within an area of jurisdiction and ask us to ignore the words "of the area of jurisdiction" in section 10N(2), contending that they add nothing. They refute the possibility that district councils were excluded because, they point out, areas of jurisdiction comprise those of local, rural, and representative councils and emphasise that district councils also have jurisdiction in remaining areas.[21] It is further suggested, echoing the views in the *District Council Judgment* quoted in paragraph 13 above, that the disestablishment of provincial committees, militated against the conclusion that the MECs lost their section 10 power in relation to district councils. Finally, it was submitted that the authority of the MEC in relation to district councils was preserved for the limited purpose of facilitating a provincial proclamation providing for them to be elected on a

[21] In terms of section 9D(1)(b)(ii) which will be elaborated upon later.

proportional basis consistently with the 1996 amendment.

[17] These submissions were disputed on behalf of the respondent. It contended that section 10N(2) referred to the areas of jurisdiction of the entities mentioned in it and that, since the MEC was deprived of his authority in areas of jurisdiction of transitional local, rural and representative councils, he was also deprived of authority over district councils because their areas overlapped. On this basis respondent's counsel concluded that the authority of the MEC had been preserved only in relation to "remaining areas", that is areas in which primary structures of local government were non-existent.

[18] The meaning and effect of the introduction of section 10N into the LGTA at the end of 1996 must be ascertained. We must do this bearing in mind that section 10N was not introduced alone, it being but a small element of the whole of Part VIA inserted by the 1996 amendment. The purpose for which Part VIA was introduced, must in turn be determined with due regard to the stage the transition had reached at the time and in the context of an understanding of the transition process in local government as a whole and in non-metropolitan or rural areas in particular.

[19] The LGTA understandably set up a regime for transition in metropolitan areas that differed somewhat from that in non-metropolitan and rural areas.[22] The transition process in neither was predictable and could therefore not be mechanical or fixed. That the LGTA had to be amended upon numerous occasions to cater for changed circumstances or needs evidences

22 Compare section 7(1)(b)(i) and 7(1)(b)(ii) and section 8(1)(a) and 8(1)(b).

this. It is self-evident, for example, that as local government became more structured and democratised, so it became both necessary and desirable that the extent of executive power over the process be decreased. Common to the reconstruction process in both metropolitan and non-metropolitan or rural areas was that both were divided into two phases: the pre-interim phase which embraced negotiations within negotiating forums and ended immediately before elections in terms of section 9 of the LGTA, and the interim phase which began on the day of these elections[23] and continued until final arrangements for local government restructuring were implemented.[24]

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23 The last of these elections was held on 26 June 1996.

24 The definition of pre-interim phase and interim phase in section 1 of the LGTA read with sections 6, 7, 8 and 9.

[20] We are not here concerned with metropolitan transition. It is enough to say that this process involved negotiations for and the establishment of metropolitan councils and metropolitan local councils,[25] the determination of their respective powers and functions as well as their direct election in terms of a system that allowed for both proportional and ward representation. The non-metropolitan and rural transition process was more complex and less predictable.

[21] Transition provisions for non-metropolitan or rural areas in the LGTA at its inception were both tentative and incomplete.[26] The most concrete of these related to local councils which were to be negotiated, proclaimed and directly elected with agreed powers and functions in the

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25 Metropolitan local councils were referred to as metropolitan substructures until the change effected by section 10B. These will be referred to as metropolitan local councils. See the definitions introduced by section 10B. In addition, all the structures established pursuant to the LGTA bore the prefix "transitional" before this word was excised by the definitions introduced by section 10B. I will for convenience not use the word "transitional".

26 *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) per Kreigler J paras 178 - 183; *African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal and Others* 1998 (3) SA 1 (CC); 1998 (4) BCLR 399 (CC) per O'Regan J paras 4 - 19; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) per Ngcobo J paras 16 - 21.

same way as metropolitan councils and metropolitan local councils.[27] Local councils were retained from the pre-interim phase through to the interim phase. The position was very different in relation to the two other structures provided for:

[27] Sections 7(1)(b) and 8.

a. A local government co-ordinating committee was created with certain specified powers and duties but with the councils of those local government bodies existing in its area at its formation retaining all their other powers. No provision was initially made for any election or democratisation of this committee which was to exist during the pre-interim phase only.[28] The process of reconstruction that started with the existence of local government co-ordinating committees in the pre-interim phase was not taken further for the interim phase.

[28] Section 7(1)(c).

b. A district council[29] was to replace any regional services council[30] or joint services board[31] which were both old order local government structures. The district council was to exercise certain powers and duties in relation to functions to be performed by local councils, local government co-ordinating committees or local government bodies jointly with these bodies. The MEC had very wide powers in relation to all matters including the way in which district councils were to be constituted. Nowhere in the LGTA as originally conceived was there any provision or any guideline as to what they should do, whether they were to be elected or not and if so, from where they were to be elected. One thing was clear from the expanded definition of this power: a district council became entitled to the levies to which its predecessor (either the regional services council or the joint services board) had been entitled to

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29 In terms of section 10(3)(i)which provides:

> "the disestablishment of any local government body referred to in paragraph (h) or (i) of the definition of local government body and the establishment of a body to be known as a services council, sub-regional council, regional council or district council to jointly exercise the powers and perform the duties in relation to certain local government functions for a non-metropolitan area of local government by transitional local councils, local government co-ordinating committees or local government bodies within such areas, including the delimitation of such an area after due consideration of the advice and written recommendations of the Board, and the constitution, functioning, powers, duties, assets, rights, employees and financing of such body: Provided that such services council, sub-regional council, regional council or district council shall have the power to levy and claim the regional services levy and the regional establishment levy referred to in section 12_(1)_*(a)* of the Regional Services Councils Act, 1985, or section 16_(1)_*(a)* of the KwaZulu and Natal Joint Services Act, 1990, as the case may be, which the disestablished local government body referred to in paragraph *(h)* or *(i)* of the definition of local government body would, but for its disestablishment, have levied and claimed . . . "

30 Referred to in paragraph (h) of the definition of local government body contained in section 1 of the LGTA.

31 Referred to in paragraph (i) of the definition of local government body contained in section 1 of the LGTA.

> claim before they had been replaced. It was not certain how district councils would look after the pre-interim phase because provincial committees and local government bodies would presumably have ceased to exist if elections were held in the areas of these local government bodies. Rural and representative councils had not yet seen the light of day. It seemed as though only local councils and district councils would continue to exist in a non-metropolitan area after elections and during the interim phase. There was no clear plan for local government transition in non-metropolitan or rural areas at this time.

[22] The nature of the section 10 power afforded to the provincial MEC in the LGTA at its inception was necessitated by and must be seen in this context. Before the pre-interim phase of negotiation, there existed a range of racially based unrepresentative local government bodies[32] with structures in the rural areas and most areas occupied by a majority of black people being under-resourced and relatively undeveloped. The task of replacing these with viable, non-racial representative local government required much flexibility particularly in non-metropolitan or rural areas where neither the pre-interim nor interim phase had been reasonably conceptualised. The powers of the provincial MEC were structured as follows. Sections 10(1) and (2) provided for a widely defined terrain of power in relation to local government restructuring in the province while section 10(3) specified that power in detail making it clear that the grant of specific power was not to be regarded as derogating from the general wide power conferred by section 10(1).

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32 As appears from the definition of local government bodies in section 1.

Sections 10(1) and (2) of the LGTA at its inception provided:[33]

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33 The section is now not materially different and reads as follows:
"10.___Powers of MEC.—(1)__For the purposes of this Act the MEC concerned may in respect of the area of jurisdiction of the province for which he or she is appointed, but subject to the

provisions of subsection (4)—

(a) by proclamation in the *Provincial Gazette*, make enactments not inconsistent with this Act with a view to the transitional regulation of any matter relating to local government;

(b) provide in any such enactment for the amendment or repeal of a law in force in or in a part of that province, including an Act of Parliament, or any provision of such a law, in so far as it relates to any such matter and applies in or in such part of that province;

(c) provide in any such enactment that any law, including an Act of Parliament, or any provision of such a law, pertaining to local government affairs shall, subject to the adjustment or amendment of such law or provision as he or she may make in such enactment, apply to any local government body, transitional council or transitional metropolitan substructure referred to in section 16, or to any category of such local government bodies, transitional councils or transitional metropolitan substructures, in that province or a part thereof,

and he or she may make different such enactments in respect of different areas, local government bodies, transitional councils or transitional metropolitan substructures.

(2) The MEC may in like manner amend or repeal a proclamation made under subsection (1)."

"Powers of Administrator

10. (1) For the purposes of this Act the Administrator concerned may in respect of the area of jurisdiction of the province for which he or she is appointed—

(a) by proclamation in the *Official Gazette*, make enactments not inconsistent with this Act with a view to the transitional regulation of any matter relating to local government;

(b) provide in any such enactment for the amendment or repeal of any law, including any Act of Parliament or the legislative assembly of any Self-governing Territory, in so far as it relates to any such matter and applies in the province; and

(c) provide in any such enactment that any law, including any Act of Parliament or the legislative assembly of a Self-governing Territory, or any provision of any such law, pertaining to local government affairs shall, subject to the adjustment or amendment of such law or provision as he or she may make in such enactment, apply to any local government body, transitional council or transitional metropolitan substructure referred to in section 16, or to any category of such local government body, transitional council or transitional metropolitan substructure,

and he or she may make different such enactments in respect of different areas, local government bodies, transitional councils or transitional metropolitan substructures.

(b) The Administrator may in like manner amend or repeal a proclamation made under subsection (1)."

[23] All the specific powers contained in section 10(3) are relevant to the process of the transformation or the replacement of old local government bodies with elected structures contemplated by the LGTA and as appears later became superfluous once this process had been completed. The MEC could for example establish, disestablish and re-establish metropolitan

councils or metropolitan local councils, as well as replace local government bodies with these councils and appoint their members. Local government bodies could be dissolved and membership of these bodies terminated by this functionary pursuant to section 10(3). As is mentioned earlier,[34] the MEC had powers concerning the delimitation of areas as well as the constitution, powers and functions of district councils.

[34] Para 21b above.

[24] Section 10 was however not as wide as might be imagined. All Proclamations had to be consistent with the LGTA itself. Thus for example the Administrator was obliged to enact Proclamations in accordance with agreements reached during the pre-interim phase as set out in section 7(1)(b) and (c). All decisions of the Administrator or MEC could only be taken with the concurrence of the provincial committee which represented the national element in the decision-making process so that neither the provincial nor the national government could act alone.[35] All Proclamations in relation to delimitation of areas of jurisdiction of bodies to be established by Proclamation could only have been done after due consideration of the advice and written recommendation of the local government demarcation board in the province.[36]

[25] The first mention of a rural area in the LGTA occurred towards the end of 1994 when it was amended[37] by the introduction of a provision[38] which empowered the MEC to establish a transitional council for a rural area of local government called the transitional rural council. The MEC was given wide powers in relation to the delimitation of the area of the council as well as its constitution, election, functioning and other matters pertaining to it. However, the

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35 Sections 3 and 4 of the LGTA.

36 See for example section 10(3)(i) read with the definition of board in section 1 which is now deleted.

37 By Proclamation R174 of 1994 enacted by Government Gazette 16093 of 30 November 1994.

38 In terms of section 10(3)(iA) which provides:

> " . . the establishment of a transitional council for a rural area of local government not falling within the area of jurisdiction of a transitional metropolitan council or a transitional local council, including the delimitation of the area of jurisdiction of such council after due consideration of the advice and written recommendations of the Board, and the constitution, election, functioning, powers, duties, assets, rights, employees and financing of such council, all the members of which shall be elected in accordance with a system of proportional representation or of ward representation or of both proportional representation and ward representation . . . ."

amendment added nothing to the definition of a district council and it is impossible to determine how the rural council was going to fit into the scheme of non-metropolitan local government. The same amendment added a sub-paragraph about the local government co-ordinating committee to the effect that it should at least be responsible for the preparation for and the conduct of a section 9(1) election within its area of competence.[39] These amendments read together seem to suggest that local government co-ordinating committees were to mature into elected rural councils.

[39] Section 7(1)(c)(i)(dd).

[26] All this was clarified only at the end of June 1995 when a whole new Part VA entitled "rural local government"[40] was introduced into the LGTA. Part VA provided for the establishment of representative councils consisting of elected members as well as nominated members representing interest groups[41] and defined the powers and functions of these bodies.[42] There was to be no interest group representation in rural councils. The MEC was given additional extensive powers in relation to rural local government. Perhaps most significantly, this Part included section 9D which was entitled "Framework for rural local government". The section was to the effect that:

> a. Each province was to be divided into areas of jurisdiction of metropolitan councils and district councils;[43]

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40 Inserted by Proclamation R65 of 1995 enacted by Government Gazette 16521 of 30 June 1995.

41 Section 9C(1) and (2).

42 Section 9B(2).

43 Section 9D(1)(a).

b. A district council was to consist of elected members as prescribed by regulation from each of the local, representative or rural councils whose areas are situated within the area of the district council, and where there is a remaining area within the district council, members to represent that area.[44] The section did not say that district councils must be chosen on the basis of proportional representation. Importantly, their areas of operation were not limited to the areas of local, representative and rural councils, but included remaining areas. Somewhat curiously, the new definition section of Part VA continued to define a district council by reference to section 10(3)(i) which remained unamended and which, as we saw earlier,[45] makes no reference to how a district council is to be constituted or to representative or rural councils.

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44 Section 9D(1)(b).

45 Para 21b.

[27] The period June 1995 until 26 June 1996[46] saw the enactment of proclamations concerning the establishment of local, rural, representative and district councils in all the provinces as well as the election of all transitional councils that were to be directly elected.[47] After 26 June 1996, and before the introduction of section 10N into the LGTA as an element of a new Part VIA during November 1996, district councils were elected from the members of local, rural and representative councils and where applicable from remaining areas. A brief description of proclamations made by the MEC in the Western Cape is usefully illustrative. A Proclamation enacted there towards the end of 1995[48] (Proclamation 152), amongst other things, established rural councils,[49] provided for the method of their election[50] and determined the powers and functions of rural[51] and district[52] councils. The Proclamation also determined the number of

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46 The date on which the last of the transitional local government elections were held in this country.

47 Metropolitan, metropolitan local, local, rural and representative councils.

48 Proclamation 152 of 1995 (above n 5).

49 Section 3(1)(b).

50 Section 12.

51 Section 38.

seats in the district council. Section 8 provided:

> "The competent authority shall determine the number of seats on a district council on the basis that half of the seats shall represent the interests of councils and half of the seats shall represent the interests of transitional local councils and thereafter—
>
> (a) allocate specific seats to councils and transitional local councils; and
>
> (b) incorporate such allocation in a proclamation published in the Provincial Gazette."

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52 Section 37.

[28] Early in the next year a further Proclamation[53] (Proclamation 6) was enacted to put Proclamation 152 into detailed practice. This Proclamation set out the number of seats in each local and rural council, and the number of representatives of each of the local and rural councils who were together to form each district council.[54] Finally a Proclamation enacted during April 1996[55] (Proclamation 18) took advantage of an opportunity offered by a June 1995 LGTA amendment[56] allowing rural councils to be converted into representative councils.[57]

[29] This was the context in which Part VIA was introduced. It included provisions for the

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53 Proclamation 6 of 1996 (above n 5).

54 Schedule 2.

55 Proclamation 18 of 1996 (above n 5).

56 Proclamation 65 of 1995 (above n 40).

57 Section 9B(4)(c) reads:

> "Without derogating from the generality of the power conferred by section 10, a proclamation contemplated in that section may, in respect of rural local government, provide for . . .
>
> (c) the dissolution of any transitional rural council or the conversion of any such council into a transitional representative council."

lapsing of the section 10 MEC authority and the amendment of section 9D(1)(b)(i) to require that district councils were now to be constituted by members of local, rural or representative councils as well as representatives of remaining areas *on a proportional basis*. Much of that area had undergone immense local government reconstruction since the enactment of section 10. Metropolitan and local councils whose powers had been negotiated and determined had been directly elected in all metropolitan areas. Although district councils had been established in all non-metropolitan areas as contemplated by the framework provisions of section 9D(1)(a) and (b) as they had stood before the 1996 amendment, they were not directly elected.

[30] The primary structures of local government did not cover all of the non-metropolitan areas with the result that there remained areas referred to as "remaining areas"[58] that fell outside the area of a local, rural or representative council. These were areas in which no primary structures of rural local government as envisaged by the LGTA existed.[59] It will be recalled that

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58 Defined in section 9A.

59 If evidence is required for the proposition that these areas existed, reference is made to section 10D(5) introduced by the November 1996 amendment which provides:

> "(5) The Minister shall, after consultation with the MECs, establish a body to advise on the expeditious establishment of municipalities in remaining areas and on the rendering of assistance to municipalities in rural areas for the development of administrative infrastructure and the building of service rendering capacity."

these remaining areas were also represented on district councils.[60]

60 Above para 26.

[31] By 1996 the difference between levels of development achieved in metropolitan areas as opposed to that in non-metropolitan areas was substantial. Directly elected metropolitan councils and metropolitan local councils were in place for the whole of the metropolitan area. This was not so in non-metropolitan areas. Perhaps the most significant difference for present purposes is that local government in non-metropolitan areas did not consist only of directly elected structures but were dominated by district councils. These structures were indirectly elected except in remaining areas, where they were directly elected members. The members to serve on district councils from remaining areas were not all to be elected members but up to twenty per cent of them could be nominated to represent interest groups recognised by the MEC.[61] District councils were unique. The development of democratic local government in these areas lagged far behind that in metropolitan areas. The process of the transformation or replacement of old local government bodies with elected structures contemplated by the LGTA had been virtually completed in metropolitan areas and was anything but complete in non-metropolitan areas. This points to a need to maintain some measure of MEC authority there.

[32] Section 10N provides:

> "Transitional provisions relating to sections 3, 9, 10 and 10C.—(1)__A committee established under section 3 shall be disestablished on the day immediately following upon the day on which the last election or elections contemplated in section 9 have been held for the province concerned.
> (2)__The powers conferred upon the MEC by section 10 shall lapse in respect of the area of jurisdiction of a local council, metropolitan council, metropolitan local council, rural council or representative council on the day immediately prior to the commencement of

61 Section 9D(3)(b).

the Local Government Transition Act Second Amendment Act, 1996.

(3)__Any proclamation made under section 10 and which was in force immediately prior to the commencement of the Local Government Transition Act Second Amendment Act, 1996, shall, notwithstanding the provisions of subsection (2), remain in force.

(4)__The MEC may, with the concurrence of the Minister, by proclamation in the Provincial Gazette—

(a) amend or repeal a proclamation referred to in subsection (3): Provided that such proclamation may be amended with retrospective effect to a date not earlier than the publication thereof;

(b) notwithstanding anything to the contrary in this Act contained, amend or repeal a regulation contemplated in section 9_(2); or

(c) re-allocate the powers and duties which have been agreed upon in terms of section 10C(3).

(5)__In the event of an inconsistency between a proclamation referred to in subsections (3) or (4) and the provisions of this Act, the latter shall prevail: Provided that the provisions of this subsection shall not apply to those provisions of a proclamation dealing with the allocation of powers and duties of municipalities."

[33] A plain reading of section 10N could lead to the construction that the powers of the MEC were not to lapse in respect of local, metropolitan, metropolitan local or rural and representative councils but in respect of the area of jurisdiction of each of these councils. This would mean that the section 10 powers lapsed in respect of those areas over which local, rural and representative councils had jurisdiction and which also fell within the jurisdiction of a district council. The only areas, therefore, in respect of which the section 10 authority would not have lapsed, on this reading, would have been remaining areas.

[34] This interpretation is not entirely free from difficulty, however. Section 10N(2) specified that the powers of the MEC were to lapse in respect of both the areas of jurisdiction of

metropolitan councils and metropolitan local councils. But the area of jurisdiction of a metropolitan council is the same as the sum total of metropolitan local council areas of which the former is composed. It would therefore have been sufficient for a legislature intent upon defining the lapse of authority by reference to areas of jurisdiction, to have specified only the areas of jurisdiction of metropolitan local councils or those of metropolitan councils. To mention both is superfluous unless the meaning to be attributed to "areas of jurisdiction" in section 10N(2) is not geographical. There is yet another difficulty. As pointed out earlier, the net result of the construction that powers of MECs were to lapse in respect of the geographic areas of jurisdiction of non-governmental structures, is that the MEC's authority was preserved for remaining areas alone. If that had been the legislature's purpose, it would surely have said so.

[35] There was reason to treat district councils differently from other local government structures in relation to the authority of the MEC. District councils were the only structures that had not been directly elected and that were responsible for the provision of services in undeveloped rural areas where there were no directly elected local government structures. In contradistinction to this, all of the areas of jurisdiction of metropolitan councils (themselves directly elected) consisted of directly elected metropolitan local councils. To put it another way, circumstances relating to advanced democratisation that contribute to the efficacy of the decision to remove the powers of the MEC in relation to the councils mentioned in section 10N(2) were not applicable to district councils.

[36] It was submitted on behalf of the respondent that the abolition of provincial committees is inconsistent with the retention of section 10 authority in respect of district councils because the

legislature would not have wanted to grant wide power to provincial functionaries without a countervailing democratic element. However, they contended in the same breath, that Parliament was content to permit the MEC to exercise wide powers without any democratic control in respect of remaining areas. If the aim was to retain the power of the MEC uninhibited by a provincial committee in remaining areas, there seems no reason to suggest an intention not to retain section 10 authority in respect of district councils. As was said in the *District Council Judgment*: "[I]f the (provincial) committee no longer exists, the effect is that the MEC can act without the committee."[62]

[37] The retention of the authority of the MEC in relation to district councils is explicable. The need for the development of democratic local government structures in non-metropolitan areas might be better served if the MEC retained section 10 authority in respect of district councils. In any event, the powers of the MEC in relation to district councils is balanced by a provision that obliges the use of district councils, amongst other structures, "with a view to developing a democratic, effective and affordable system of local government."[63]

[38] The difficulties associated with the interpretation of section 10N(2) are

62 Above n 7 at 16.

63 Section 9D(1)(d).

largely a consequence of construing the phrase "area of jurisdiction" to refer to geographic areas. The phrase can reasonably be interpreted as referring not to geographical areas but to the jurisdictional ambit of the powers and functions of the various bodies mentioned in section 10. On this basis, the authority of the MEC to act pursuant to section 10 of the LGTA lapsed in respect of the ambit of the powers and functions of local, rural, metropolitan and metropolitan local councils. On the other hand, the MEC's section 10 powers continued to exist in relation to all matters concerned with the exercise of powers and performance of functions of district councils. "Area of jurisdiction" in section 10 should therefore not be interpreted to refer to geographic areas.

[39] Finally, it must be remembered that the MEC did have section 10 power in respect of district councils of the province. The suggestion is that section 10N(2) stripped the MEC of that power. If the legislature had intended to do this, one would have expected it to have done so directly and not in an oblique way. The MEC did have authority to make Proclamation 52 and this conclusion in the *District Council Judgment* is correct.

[40] The next question is whether the MEC had authority to enact the savings provision. The submission concerning inconsistency and the absence of the power of the MEC was rooted in the proposition that district councils had been improperly constituted since 1 July 1997. That proposition was derived from the order in the *District Council Judgment* to the effect that district councils had been "improperly elected" since 1 July 1997. Absent this substratum the entire

argument collapses. If district councils had, on a proper analysis, been lawfully constituted during the period 1 July 1997 until they were reconstituted after the enactment of Proclamation 52, a savings provision would have been unnecessary because there would have been no need to validate acts and decisions of district councils. We must therefore decide whether district councils were lawfully constituted in the Western Cape during this period.

[41] Section 8 of Proclamation 152[64] which became applicable to representative councils in March 1996 by reason of Proclamation 18, did not provide for local and representative councils to be represented on district councils on a basis of proportional representation. Section 9D(1)(b)(i) as it then read did not require this.[65] Proclamations 6 and 18 respectively which were a more concrete implementation of Proclamation 152 and determined the number of seats that each named local and representative council was to have in each separately identified district council also did not result in any proportional representation. All these Proclamations were valid and district councils had been validly elected pursuant to them.

[42] None of these proclamations was repealed or amended consequent upon the amendment to section 9D(1)(b)(i) requiring district councils to be elected on the basis of proportional representation. It is important to note also that the establishment Proclamations were not set aside by the *District Council Judgment*. They remained on the provincial statute book until the enactment of Proclamation 52 which provided in detail for district councils to be elected on the

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64 Cited in paragraph 27 above.

65 *Worcester Transitional Local Council and Others v Member of the Executive Council for Local Government of the Western Cape Province and Others* (Cape of Good Hope High Court) Case No 7480/96, 7 October 1996, unreported.

basis of proportional representation consistently with the relevant amendment to the LGTA as from 31 January 1999. What is more, no law binding on district councils required their reconstitution before Proclamation 52 was enacted.

[43] The question to be answered is whether there was any inconsistency between section 8 of Proclamation 152 and the seat allocation provisions contained in Proclamations 6 and 18 of 1996 read together on the one hand, and the amended section 9D(1)(b)(i) requiring district councils to be elected on the basis of proportional representation, on the other. There was none. The unamended section 9D(1)(b)(i) read with section 10(3)(i) of the LGTA could not have been implemented in the absence of proclamations enacted by the MEC determining the precise number of seats that each local, district or rural council or, if applicable, each remaining area, would have on the district council concerned. Likewise, the amended section of the LGTA remained devoid of sufficiently concrete content and could not have been implemented until and unless a provincial proclamation or national Regulations equivalent to the establishment Proclamations set out the number of seats to which each local, rural or representative council was entitled to have in a district council.

[44] Until the appropriate provincial proclamation or national Regulations had been enacted, there was no law defining the number of seats that each primary council should have in a district council other than Proclamation 152 of 1995 read with Proclamations 6 and 18 of 1996. The amendment to section 9D(1)(b)(i) required national or provincial subordinate regulation re-determining the composition of district councils. The failure to enact the necessary legislative framework did not result in district councils becoming unlawfully constituted. There was no

vacuum. The failure did, however, constitute a breach of an obligation by the functionaries obliged to put the appropriate legal mechanism in place. There was accordingly no inconsistency between section 8 of Proclamation 152 read with Proclamations 6 and 18 of 1996 and section 9D(1)(b)(i) of the LGTA. Therefore district councils constituted in accordance with Proclamation 6 of 1996 in the Western Cape therefore remained lawfully constituted beyond 1 July 1997 until there was an appropriate national or provincial regulation that defined the number of seats each local, rural or representative council should have on a district council consistently with proportional representation as required by the amendment.

[45] The *District Council Judgment* correctly ordered the MEC to do so. It erred however in declaring district councils to have been improperly elected. The *District Council Judgment* focused on whether the MEC was obliged to ensure that district councils came to be elected consistently with the changes required by the amendment. In the process of doing so, the judgment acknowledged that district councils had not been elected in accordance with the amended section 9D(1)(b)(i) as a matter of fact. It did not focus on the separate question whether the failure to enact the necessary legal framework and to cause the councils to be reconstituted accordingly, had resulted in their being unlawfully constituted in the legal sense despite the fact that they had initially been constituted according to the legal mechanism applicable to them. District councils had been properly elected in accordance with the only regulatory mechanism that had been applicable to them at the time. This conclusion concerning the effect of section 9D(1)(b)(i) accords with the spirit, purport and objects of the Constitution, and particularly with its founding value, the rule of law. The spirit, purport and objects of the Constitution and the rule of law contemplate "a purposive ordering of social relations" in

communities regulated by law.[66]

[46] The conclusion that lawfully constituted district councils remained lawfully constituted despite the failure to enact an appropriate new subordinate regulatory mechanism, means that the declaratory relief sought by the applicants in the High Court cannot be granted. The application for leave to appeal must therefore be granted and the appeal must succeed. The order made by the High Court should be set aside.

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66 *Fedsure* above n 14 at para 56 n 54 which quotes from a judgment in *Reference Re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th) 1 at 24, where the Supreme Court of Canada held that:

> "Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a constitution. The Constitution, as the supreme law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution."

[47] One last comment needs to be made. The High Court, having declared the savings provision inconsistent with the Constitution, did not consider whether it was necessary to make an order to control the effect of the declaration of invalidity. It ought to have done so. Even if the *District Council Judgment* had been correct that district councils had been unlawfully constituted from 1 July 1997 to the date of their recomposition pursuant to Proclamation 52, and even if the High Court were correct that the savings provision is inconsistent with the Constitution, there would have been compelling reasons in the circumstances of the present case, to attach conditions to the order to enable councils to recover rates and taxes levied in good faith by the de facto councillors, and to avoid the consequence that would otherwise follow from an unconditional order declaring that all the district councils in the Western Cape were unlawfully constituted for a period of more than eighteen months.

[48] The findings in this judgment are that:-

a. Section 10 of the LGTA conferred wide powers in respect of local restructuring on provincial MECs;

b. this included the power to constitute district councils;

c. the nature and rate of local government reconstruction was more complex and less rapid in non-metropolitan areas as opposed to metropolitan areas;

d. when the authority of the MEC in relation to certain local government matters lapsed by reason of the introduction of section 10N(2) of the LGTA towards the end of 1995, local government restructuring was less advanced in non-metropolitan or rural areas dominated by district councils;

e. the authority of the MEC did not lapse in respect of district councils by reason

of the introduction of section 10N(2);

f. district councils had, before the amendment to section 9D(1)(b)(i) requiring their election according to proportional representation, been properly constituted in accordance with a valid provincial regulatory framework;

g. the failure to enact a new regulatory framework aimed at the reconstitution of district councils on the basis of proportional representation pursuant to the amendment rendered an order directing the MEC to do so appropriate;

h. that failure, however, did not result in district councils becoming unlawfully constituted; and

i. these councils remained lawfully constituted after 1 July 1997 despite the failure to enact the new regulatory framework.

Costs

[49] The respondent relied on a number of defences in an effort to resist the payment of levies to a public body responsible for the delivery of services in a rural area in which there was obviously considerable need for services. One of the defences relied on has now turned out to be futile. There is no reason why it should not pay the costs both in the High Court and in this Court consequent upon that futile point having been taken.

Order

[50] The following order is made:

1. The Boland District Municipality is substituted for the Winelands District Council as the applicant.

2. The application for leave to appeal is granted.

3. The appeal is allowed with costs including the costs consequent upon the employment of two counsel.

4. The order of the High Court is set aside and for it is substituted an order that:

   a. The Defendant's application for declaratory relief is dismissed.

   b. The Defendant is ordered to pay the costs of the application.

5. The matter is referred back to the High Court and is to be dealt with in the light of this judgment.

Chaskalson CJ, Langa DCJ, Ackermann J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Yacoob J.

For the applicants:	JC Heunis SC and N Bawa instructed by the State Attorney, Cape Town for the first applicant and by Dirk Joubert Attorneys, Stellenbosch for the second applicant.
For the respondents:	WG Burger SC instructed by Van Der Spuy and Partners, Cape Town.