CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 7/02

UTHUKELA DISTRICT MUNICIPALITY	First Applicant
ZULULAND DISTRICT MUNICIPALITY	Second Applicant
AMAJUBA DISTRICT MUNICIPALITY	Third Applicant
versus	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF FINANCE	Second Respondent
THE MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT	Third Respondent
AND 64 OTHERS	4th to 67th Respondents

Heard on : 14 May 2002

Decided on : 12 June 2002

JUDGMENT

DU PLESSIS AJ:

[1] Government in the Republic of South Africa "is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated."[1]

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1 Section 40(1) of the Constitution of the Republic of South Africa.

Municipalities established throughout the territory of the Republic constitute the local sphere of government.[2]

[2] The local sphere of government is structured as

> "(a) self-standing municipalities, (b) municipalities that form part of a comprehensive co-ordinating structure, and (c) municipalities that perform co-ordinating functions."[3]

The Constitution refers to these municipalities respectively as Category A, B and C municipalities.[4] This case concerns the entitlement of category C municipalities to an equitable share of revenue raised nationally.

[3] In terms of section 214(1)(a) of the Constitution, an Act of Parliament must provide for "the equitable division of revenue raised nationally among the national, provincial and local spheres of government". Section 227(1)(a) of the Constitution in turn provides that "local government and each province . . . is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it".

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2 Section 151(1) of the Constitution.

3 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the RSA, 1996*, 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) para 77.

4 Section 155(1).

[4] In order to comply with sections 214(1)(a) and 227(1)(a) of the Constitution, Parliament annually enacts a Division of Revenue Act. At issue in this case is the Division of Revenue Act 1 of 2001 ("the 2001 Act") that dealt with the 2001/2002 financial year.[5] Section 3(1) thereof provided for the division of revenue raised nationally among the national, provincial and local spheres of government.[6] Section 5(1)[7] in turn provided for the allocation to individual

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5 The 2001 Act has now been repealed by the Division of Revenue Act 5 of 2002. The effect of this will be considered later.

6 Section 3(1) provided as follows:
"Revenue anticipated to be raised nationally in respect of the financial year is divided among the national, provincial and local spheres of government for their equitable share as set out in Column A of Schedule 1."

municipalities, of their equitable share. The subsection made no provision for the payment to Category C municipalities of an equitable share of revenue raised nationally.

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[7] Section 5(1) provided as follows:

> "The national accounting officer responsible for local government must determine the allocation for each category A and B municipality in respect of the equitable share for the local sphere of government set out in Schedule 1 for the financial year and such determination must be published by the Minister in a *Gazette* by 15 May 2001."

[5] The three applicants are Category C municipalities whose respective areas of jurisdiction fall within the KwaZulu-Natal (KZN) province. In three separate applications they applied to the Natal High Court for orders declaring section 5(1) of the 2001 Act unconstitutional "in its omission to accord Applicant's entitlement to an equitable share of revenue raised nationally allocated to the local sphere of government".[8] The three applications were consolidated and the High Court gave an order declaring section 5(1) unconstitutional and "invalid to the extent that it excludes Category 'C' municipalities from sharing with Category 'A' and 'B' municipalities in the local government allocation of revenue raised nationally."[9] (It is convenient to refer to Category B municipalities as "local municipalities" and to Category C municipalities as "district municipalities".)

[6] In this Court the applicants sought an order confirming the High Court's order,[10] as well as an order directing the national government to pay to them their respective equitable shares. When the application was heard in this Court, the 2001 Act had been repealed by the Division of Revenue Act, 2002[11] ("the 2002 Act"). The 2002 Act does not expressly exclude district municipalities from receiving an equitable share of revenue raised nationally ("the equitable

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8 Prayer 2.2 of the First Applicant's Notice of Motion. The Second and Third Applicants' prayers are identically worded.

9 The form of the order is such that it did not bring about the invalidity of section 5(1). It is unnecessary to discuss that here. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 63 and 64.

10 Section 172(2)(a) of the Constitution provides: "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

11 Act 5 of 2002.

share").[12] Whether this Court should nevertheless deal with the confirmation is a question that I deal with later.

[7] The applicants cited 67 respondents. Only the first three respondents opposed both the High Court application and the application before us. They are respectively the President of the RSA, the national Minister of Finance and the national Minister of Provincial Government.

12 Section 5(1) of the 2002 Act.

[8] The fourth, fifth and sixth respondents are respectively the Premier of KZN, the Member of the Executive Council (MEC) for Finance in KZN and the province's MEC for Traditional and Local Affairs. The seventh respondent is the Municipal Demarcation Board.[13] The eighth respondent is the KwaZulu-Natal Local Government Organisation (KWANALOGA), an organisation representing the majority of municipalities in KZN. It is recognised as such in terms of section 2(1)(b)[14] of the Organised Local Government Act.[15] The South African Local Government Organisation (SALGA) is the national organisation recognised in terms of section 2(1)(a) of the same act.[16] SALGA was not cited as a respondent, but the director of this Court notified it of the application for confirmation. Neither of these organisations appeared to oppose

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13 A juristic person established in terms of section 2 of the Local Government: Demarcation Act, 27 of 1998.

14 Section 2(1) provides:
"(1) Subject to section 6, the Minister must, by notice in the *Gazette*—
(a) recognise one national organisation representing the majority of the provincial organisations contemplated in paragraph (b); and
(b) with the concurrence of the responsible member, recognise one organisationin each province representing the majority of municipalities in the province in question: Provided that all the different categories of municipalities in the province in question are represented in the organisation in question."

15 Act 52 of 1997.

16 Id.

or support the confirmation of the order of the High Court.

[9] The ninth to sixty-seventh respondents are, together with the applicants, all the local and district municipalities in KZN. Three local municipalities filed affidavits opposing the relief sought, but they did not enter an appearance. One district municipality filed an affidavit in support of the relief; another wrote a letter to the applicants' attorneys in support of the relief.

[10] During the course of argument before this Court the matter stood down in order for the parties to discuss a settlement. The six parties concerned settled the matter on the basis that the respondents pay to each of the applicants a specified amount. The parties further agreed that the applicants would furnish the respondents with proof concerning revenue and expenditure and that the respondents would in specified circumstances be entitled to withhold money from the applicants' 2002 equitable share. The parties sought no order as to costs. (The settlement was not made an order of Court and my summary thereof is no more than narrative). Mr Dickson who appeared for the applicants withdrew the application for payment of the applicants' 2001 equitable share. Counsel did not make any further submissions regarding the confirmation of the High Court's order but the applicants did not withdraw the application for confirmation.

[11] In the event this Court is still seized with the confirmation proceedings. However,

> "[a]t least where the provision declared invalid by the High Court has subsequently been repealed by an Act of Parliament, the Court has a discretion to decide whether or not it should deal with the matter. In this regard, the Court should consider whether any order

it may make will have any practical effect either on the parties or on others."[17]

If its order will have no practical effect, this Court will not deal with confirmation proceedings.[18]

[12] If the order may, despite the repeal of the legislation under consideration, have some practical effect on the parties or on others, the Court will in its discretion decide whether or not to deal with the confirmation. In doing so all the circumstances of the case will be taken into account. Factors that must be taken into account include the nature and extent of any practical effect the order may have, "the importance of the issue raised, its complexity and the fullness of the argument on the issue".[19]

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17 *President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) para 16.

18 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001(9) BCLR 883 (CC) para 11.

19 Id.

[13] If parties who may be affected by confirmation proceedings are organs of state,[20] a further important factor must be taken into consideration. Organs of state have the constitutional duty to foster co-operative government as provided for in Chapter 3 of the Constitution.[21] This entails that organs of state must "avoid legal proceedings against one another".[22] The essence of Chapter 3 of the Constitution is that "disputes should where possible be resolved at a political level rather than through adversarial litigation."[23] Courts must ensure that the duty is duly performed.[24] This is apparent from section 41(4) which provides:

> "If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."

[14] In view of the important requirements of co-operative government, a court, including this Court, will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level. When exercising a

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20 Section 239 of the Constitution defines "organ of state" as:
(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution—
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii exercising a public power or performing a public function in terms of any legislation,
but does not include a court or a judicial officer;"

21 Chapter 3 comprises sections 40 and 41 of the Constitution. The sections and the requirements of co-operative government are discussed in *National Gambling Board v Premier KwaZulu-Natal and Others* 2002 `(2) SA 715 (CC; 2002 (2)BCLR 156 (CC) paras 29 to 39.

22 Section 41(1)(h)(vi) of the Constitution.

23 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 291.

24 It does not seem as if the parties fully addressed the issue of co-operative government in argument before the High Court.

discretion whether to deal with confirmation proceedings, this Court must thus bear in mind that Chapter 3 of the Constitution contemplates that organs of state must make every reasonable effort to resolve intergovernmental disputes before having recourse to the courts.

[15] I now proceed to consider whether, in view of these considerations, this Court should deal with the confirmation order.

The Practical Effect of an Order.

[16] In view of the settlement and the repeal of the 2001 Act, an order regarding the confirmation of the High Court's order will have no practical effect as far as the applicants are concerned.

[17] Section 34 of the 2002 Act provides:

> "(1) Subject to subsection (2), the Division of Revenue Act, 2001 (Act No. 1 of 2001), is hereby repealed with effect from the date on which this Act takes effect or from 1 April 2002, whichever is the later.
> (2) The repeal of the Act referred to in subsection (1) does not affect any act in terms of that Act which is necessary for the effective implementation of this Act or the performance of any outstanding duties or obligations under or in terms of that Act."

The presently relevant effect of subsection (2) is this: If this Court finds that district municipalities, or some of them, were constitutionally entitled to an equitable share in terms of the 2001 Act, the equitable share for that year must be paid to those

municipalities.[25] An order in this case may have a practical effect for the national government and the local sphere of government in general. Therefore it is necessary to decide whether in our discretion we should deal with the confirmation.

Co-operative government

[25] It is unnecessary to decide whether, absent subsection (2), the effect would have been the same.

[18] Municipalities are organs of state in the local sphere of government.[26] The first, second and third respondents, are all organs of state in the national sphere.[27]

[19] Apart from the general duty to avoid legal proceedings against one another, section 41(3) of the Constitution[28] places a two-fold obligation on organs of state involved in an intergovernmental dispute: First, they must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for. Second, they must exhaust all other remedies before they approach a court to resolve the dispute.

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26 Para (a) of the definition of "organ of state" above n 22. And see *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 19.

27 *National Gambling Board* case above n 21 paras 19 to 21.

28 Section 41(3) provides:
"An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

[20] There is a dispute-resolution mechanism in place in the context of fiscal disputes between organs of state in the national and local spheres.[29] Part 2 of the Intergovernmental Fiscal Relations Act[30] (the Fiscal Relations Act) establishes a Local Government Budget Forum (the Forum). The Forum consists[31] of the national minister of finance, the member of the executive council for finance of each province, five representatives nominated by SALGA[32] and one representative nominated by each provincial organisation recognised in terms of the Organised Local Government Act.[33] KWANALOGA, who represents the majority of municipalities in KZN, thus has one representative on the Forum.

[21] Section 6 of the Fiscal Relations Act deals with the functions of the Forum and provides:

> "The Budget Forum is a body in which the national government, the provincial governments and organised local government consult on–
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> (a) any fiscal, budgetary or financial matter affecting the local sphere of government;
>
> (b) any proposed legislation or policy which has a financial implication for local government;

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29 Section 41(2) of the Constitution provides:
"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."
In the *National Gambling Board* case, above n 22 para 33, it was said that the Act envisaged in section 41(2) has not been enacted. Our attention was not drawn to the Fiscal Relations Act 97 07 1997 which was not relevant then. Part 2 of the Fiscal Relations Act deals only with specified disputes and does not detract from the duty of the legislature pointed out in *National Gambling Board*.

30 Act 97 of 1997.

31 Section 5 of the Fiscal Relations Act.

32 Above para 8.

33 Section 2(1) of the Organised Local Government Act quoted above at n 14.

(c) any matter concerning the financial management, or the monitoring of the finances, of local government; or

(d) any other matter which the Minister has referred to the Forum."

Meetings of the Forum are convened by the Minister of Finance, and any person may attend meetings on invitation.[34]

[22] That the mechanism provided for in the Fiscal Relations Act is applicable to disputes concerning the 2001 equitable share of local government is evident from section 31(1) of the 2001 Act:

> "An organ of state involved in an intergovernmental dispute regarding an allocation provided for in this Act must, before approaching a court to resolve such dispute, make every effort to settle the dispute with the other organ of state concerned, including making use of the structures established in terms of the Intergovernmental Fiscal Relations Act."[35]

In their affidavits the applicants contended that section 31(1) is not applicable to the present dispute because it does not concern "an allocation provided for" in the 2001 Act,

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34 Section 7 of the Fiscal Relations Act.

35 Section 31(1) of the 2002 Act provides:
"An organ of State involved in an intergovernmental dispute regarding <u>any provision of this Act</u> must, before approaching a court to resolve such dispute, make every effort to settle the dispute with the other organ of state in question, including making use of the structures established in terms of the Intergovernmental Fiscal Relations Act." (Own underlining)

but the absence of an allocation to district municipalities. It is unnecessary to express a view on the merit of this contention: Section 41(1)(h)(vi) obliges organs of state to avoid litigation against one another irrespective of whether special structures for that purpose exist or not.[36]

[23] If municipalities are aggrieved by the omission of district municipalities from the 2001 equitable share, they can and must make use of the dispute-resolution procedures described above. If such municipalities are unable to resolve their grievances, they must approach the relevant national minister directly. The papers before this Court do not suggest that the national organs of state involved are not willing to address, at a political level, problems regarding the 2001 equitable share. From an annexure to an affidavit filed in this Court by the first three respondents it appears that the Minister of Finance, dealing with the present issue, said in Parliament:

> "Our intergovernmental system for dealing with financial and fiscal matters is maturing, and flexible enough to allow us to deal with some of the unintended consequences of section 5(1) of the Division of Revenue Act, 2001."

[24] In the circumstances and in the interest of co-operative government, this Court should not exercise its discretion to decide the confirmation issue. It must first be left to the organs of state to endeavour to resolve at a political level such issues as there may still be.

[25] There is a further reason why we should not exercise our discretion to decide the confirmation issue. Due to the repeal of the 2001 Act and the settlement, we did not have the benefit of full argument on the different and complex questions raised by the confirmation issue. It is not advisable in the circumstances to deal with it.

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36 *National Gambling Board* above n 21 para 33.

The order

[26] In the result the following order is made:

1. No order is made in respect of the confirmation application.

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

For the appellants: AJ Dickson SC and AA Gabriel instructed by E R Browne Inc, Pietermaritzburg

For the respondents: T Beckerling SC and F Kathree instructed by the State Attorney, Durban