

THE CONSTITUTIONAL CASE FOR COOPERATIVE GOVERNMENT

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Introduction

In the talks leading up to the adoption of the new Constitution, the creation of Provinces with constitutionally-guaranteed powers was a hotly contested topic. Some political parties were averse to any notions of federalism, while others welcomed it. Those opposed to the Provinces viewed them as a costly and unnecessary duplication of services, while others saw the Provinces as vital in the concretisation of the nation's democracy, as well as necessary for improved service delivery.

Two decades later, there are nine Provinces but there is still political debate - with critics viewing them as risks to national unity and integration. However, the reality is that Provinces with local government are a fundamental function of South Africa's constitutional democracy. The Constitution establishes a framework in which all three spheres of government must exercise their powers and importantly, how they must respect, care for, support and cooperate with each other. As such, this paper, using case law emanating from the courts, discusses the application of the principles of cooperative government, as well as the constitutional distribution of powers between the national and provincial governments.

Background

In the Constitutional Assembly talks on the creation of Provinces, a debate ensued on federalism. Advantages stated were that it facilitates democracy through increasing participation - bringing governments closer to the people, while introducing checks and balances that minimise opportunities for majority tyranny.¹ Federalism, it was said, aids developmental goals in permitting policies and programmes to be tailored to the specific needs and preferences of particular regions.² It may also increase transparency and accountability through bringing officialdom closer to the people they serve. It further encourages inter-group harmony by giving each constituent group a political space of their own in which they are able to express their values, identities, and interests, without fear of domination or veto by a central government controlled by an ethnic majority.³

¹ B De Villiers "Intergovernmental Relations in South Africa" 1997 (12) SAPL 198.

² N Haysom "The Origins of Cooperative Government: The Federal Debates in the Constitution Making Process" in N Levy & C Tapscott (eds) Intergovernmental Relations in South Africa: The Challenges of Cooperative Government (2001) p 43.

³ N Haysom "The Origins of Cooperative Government: The Federal Debates in the Constitution Making Process" in N Levy & C Tapscott (eds) Intergovernmental Relations in South Africa: The Challenges of Cooperative Government (2001) p 45.



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On the other hand, counter-arguments ranged from the fear of local interests impeding the will of a democratic majority, to conflicting views on whether decentralised decision-making is actually less prone to elite domination and corruption.⁴ Some viewed federalism as creating competing centers of power which, for a weak or fragile state, could generate instability. Additionally, where economic and social development policy are deliberately fragmented, the ability to respond to such challenges could be frustrated.⁵ On diversity, it was argued that federalism could entrench the very challenges it is ostensibly designed to manage, providing nationalistic ethnic elites a platform from which to promote secession.⁶

Despite the debates over federalism in democratic South Africa, the 1996 Constitution adopted a system of multi-level governance, rather than the creation of a strong federal state. Chapter three of the Constitution establishes national, provincial and local governments made up of “*spheres*” that ought to be “*distinctive, interdependent and interrelated*”.⁷

Cooperative Governance

The relationship between the national and provincial governments is governed by the principle of cooperative government, set out in Chapter three of the South African Constitution. This principle demands that the relationship between the spheres of government be one of close cooperation, within a larger framework that recognises the individuality of every component, as well as their interrelatedness and interdependence. The relationship should also include consultation, coordination and mutual support.

The principle of cooperative government is intended to regulate the relations between complete governments, rather than between a government and its provincial and local administrative agencies. Notions of consultation, cooperation and coordination are not necessary between a government and its agencies - as the agencies are obliged to follow orders.

The Constitution requires the spheres of government to preserve the unity and indivisibility of South Africa, secure the wellbeing of the Republic, provide effective government and cooperate in mutual trust and good faith by fostering friendly relations, assisting, supporting, and informing one another, consulting on mutual

⁴ C Murray & R Simeon “Multilevel Governance in South Africa: An Interim Report” (unpublished paper).

⁵ C Murray & R Simeon “Reforming Multilevel Government in South Africa” p 3 (unpublished paper).

⁶ C Murray & R Simeon “Reforming Multilevel Government in South Africa” p 3 (unpublished paper).

⁷ The local sphere consists of two levels; government districts and municipalities - except for the six major cities. There are nine provinces, eight metropolitan municipalities 44 district municipalities and 2261 local municipalities, all being elected independently.

interests, coordinating their actions and legislation, and adhering to agreed procedures.⁸

They must respect one another's constitutional status and powers and may not encroach on one another's geographical, institutional or function integrity.⁹ They may not assume powers not conferred on them by the Constitution.¹⁰ Organs of state involved in an intergovernmental dispute have to exhaust other remedies and only approach courts as a means of last resort.¹¹

Parliament is obliged to enact legislation to establish structures and institutions which encourage and facilitate intergovernmental relations.¹² To this end, legislation such as the *Intergovernmental Fiscal Relations Act*¹³ details the manner in which governments and administrative agencies cooperate on a bilateral and multilateral basis. The *Intergovernmental Relations Framework Act*¹⁴ has also been adopted to regulate this matter comprehensively.

The Constitution further gives effect to the principle of cooperative government in other specific areas where governments can participate in measured ways in decision-making in other spheres.

For example, the National Council of Provinces' (NCOP) main purpose is to represent the Provinces in national legislative decision-making. The provincial legislatures not only consider and comment to Parliament on national legislation directly affecting the Provinces, they confer mandates on their delegates in the NCOP on legislation affecting the Provinces. Representatives of local government are entitled to attend the NCOP as observers. The NCOP gives provincial interests a measure of protection from being completely dominated by central government. The Provinces have exclusive legislative authority in respect of the functional areas mentioned in Schedule 5 to the Constitution and share concurrent legislative authority with Parliament in respect of the functional areas mentioned in Schedule 4. These are real powers that Provinces may exercise on their own initiative, but subject to the Constitution.

Governments can delegate powers to governments in other spheres. This power to delegate is said to facilitate both interaction and cooperation. Section 238 of the

⁸ Section 41(a) of the Constitution.

⁹ Section 41(1)(g) of the Constitution.

¹⁰ Section 41(1)(f) of the Constitution.

¹¹ Section 41(3) and (4) of the Constitution.

¹² Section 41(2)(a) and (b) of the Constitution.

¹³ Act 97 of 1997.

¹⁴ Act 13 of 2005.

Constitution makes provision for the delegation of executive functions and the performance of agency services for other governments. Parliament may also delegate any legislative power, except the power to amend the Constitution, to a legislature in another sphere, and in turn a provincial legislature may assign any legislative power to a local government according to sections 44 and 104 of the Constitution. The ability to delegate powers allows for flexibility and encourages the decentralisation of powers.¹⁵

In certain instances, national government may intervene in provincial affairs and Provinces may also intervene in local affairs. These powers ought to be exercised only when necessary. As such, the Constitution provides for the circumstances and procedures under which Parliament may adopt legislation on an exclusive provincial matter;¹⁶ how the national government may intervene in a provincial matter at the executive level¹⁷ and under which circumstances transfer of funds to a Province may be stopped.¹⁸ The Provinces have similar powers of intervention in respect of local affairs.¹⁹

In a nutshell, Provinces and local government are expected to play an independent role in development, with national government providing legislative leadership and direction - the lower levels of government principally focus on implementation and delivery of nationally mandated programs.

Concurrent Powers and Conflicting Laws

The Constitution provides that if national and provincial legislation in a concurrent matter are inconsistent, the national legislation that applies uniformly in South Africa prevails over the provincial legislation, if certain conditions listed in section 146 are met.²⁰ If not, then the provincial legislation prevails.

¹⁵ Malherbe R "The Constitutional Distribution of Powers" in B de Villiers (ed) "Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice" (2008) p 26.

¹⁶ Section 44 of the Constitution.

¹⁷ Section 100 of the Constitution.

¹⁸ Section 216 of the Constitution.

¹⁹ Section 139 of the Constitution.

²⁰ According to section 146(2) If national legislation deals with a matter that cannot be dealt with effectively by the Provinces separately, section 146(2)(a) and (b) if national legislation deals with a matter that to be dealt with effectively requires uniformity across the nation, and the national legislation provides such uniformity by establishing norms and standards, frameworks or national policies. Section 146(2)(c) (i - vi) If the national legislation is necessary for the maintenance of national security or 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 opportunities or equal access to government services of the protection of the environment. Section 146(3)(a) and (b) If the national legislation is aimed at the prevention of unreasonable action by a province which is prejudicial to the economic health or security interests if another province or the country as a whole, or which impedes the implementation of national economic policies.

The Provinces may automatically exercise their legislative and executive authority in respect of exclusive and concurrent matters but they must have the administrative capacity to assume responsibility effectively. However the same provision also requires the national government to assist Provinces in developing the capacity required for the effective exercise of their powers and performance of their functions.²¹ The legislative authority of the Provinces implies that they may amend and repeal legislative matters under their jurisdiction.

Concurrency means that both national and provincial government may freely legislate on any concurrent matter.²² The provisions of section 146 only determine which legislation prevails in the case of inconsistency. National legislation on a particular matter does not exclude the Provinces from legislating on that same matter. This is also confirmed by section 149 of the Constitution, which provides that in instances of inconsistency, a specific law should prevail and that the other law is not invalid but is rather inoperative as long as the inconsistency exists. The law thus remains in force and should be applied to the extent that it is not inconsistent with the law that prevails over it.

This implies that the intention of the South African Constitution is for Provinces to be fully-fledged governments with effective and substantial legislative powers, and not to be mere administrative agents of the national government.²³ It also shows that the national Parliament is not supposed to regulate concurrent matters in detail and that it should leave the detail for the Provinces to fill through specific legislation.²⁴

While it may, on occasion, be difficult for courts to determine whether legislation is necessary as required by section 146 - with some jurisdictions regarding this as a political question to be dealt with through the political structures and not the judicial process - the South African Constitution counters this problem by providing that in a dispute over the question whether national legislation is necessary, the Court must have due regard to the approval or rejection of the legislation by the NCOP.²⁵

Division of Revenue

As alluded to above, the Provinces have limited financial resources of their own and they have an equitable share in the national revenue.²⁶ Each Province's share in the

²¹ Section 125(3).

²² Malherbe R "The Constitutional Distribution of Powers" in B de Villiers (ed) "Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice" (2008) p 27.

²³ Rautenbach IM & Malherbe EFJ "Constitutional Law" (2004) p 241.

²⁴ Malherbe R "The Constitutional Distribution of Powers" in B de Villiers (ed) "Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice" (2008) p 21.

²⁵ Section 146(4) of the Constitution.

²⁶ Section 214 of the Constitution.

national revenue is calculated in accordance with a formula annually determined in the *Division of Revenue Act*²⁷, after consideration of certain factors set out in the Constitution.²⁸ Ultimately, it would appear that the Provinces are largely dependent for the financial resources they need to fulfil their duties on the national government, with which they share powers on those matters.

Despite provisions of the Constitution on factors that need to be taken into account in calculating the provincial allocations - this means that the national government through Parliament determines the funds it makes available to the Provinces for exercising their authority over concurrent matters.²⁹

Finally, the national treasury exercises control over provincial finances,³⁰ further emphasising the approach followed in South Africa towards the indivisibility of revenue. This follows that any revenue challenges faced by a Province cannot not be assessed without analysing national government's exercising of its fiscal dominance.

Case Law

The practical importance of the principles of cooperative government ultimately have to be granted meaning by the courts. The following examples lend credence to this contention.

*Minister of Police and Others v Premier of the Western Cape and Others*³¹

A dispute arose in 2012 in which the Minister of Police and the National Commissioner of the South African Police Service (SAPS) contested the power of the Premier of the Western Cape Province (the Premier) after she appointed a provincial Commission of Inquiry with powers to *subpoena* members of the SAPS to appear before it over allegations of police inefficiency. The Premier argued in turn that she was empowered by the Constitution and other related provincial legislation. The Premier acted in accordance with section 206(3) and (5) read with section 127(2)(e) of the Constitution and section 1(1) of the *Western Cape Provincial Commissions Act*. In deciding this matter, section 206(5) of the Constitution was found to be critical: that a Province “*may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community.*”

²⁷ 10 of 2014.

²⁸ Section 228 of the Constitution.

²⁹ See the Intergovernmental Fiscal Relations Act 97 of 1997. The ensuing problem being that responsibilities are assigned to the provinces by the national government without the accompanying financial resources to deal with those responsibilities effectively.

³⁰ Section 216 of the Constitution.

³¹ 2014 (1) SA 1 (CC).

Section 127(2) of the Constitution also asserts that the Premier of a Province is responsible for appointing commissions of inquiry. The judges found themselves “*in perfect agreement*” with the claim by the Premier’s legal team that the powers of a Premier in terms of this section “*are the equivalent, at the provincial sphere of government, of the more extensive powers exercised by the President in terms of section 84(2)*” - which similarly provides for the President to establish commissions of inquiry.

*Van Wyk v Uys*³²

The Western Cape High Court was asked to decide on whether the Member of the Executive Council (MEC) could suspend a councillor in spite of ongoing investigations into allegations of impropriety by the councillor. The Code of Conduct for Councillors provided that the Council can investigate an alleged breach of the code of conduct, as well as take disciplinary action. The Council could not suspend or remove a councillor but could request the MEC to do so. The Code further stated that that the MEC could suspend or remove a councillor from office if found that there had been a breach of the code that warrants such steps. The text was unclear as to whether the MEC could use this power on their own initiative or only on request from the Council. The High Court emphasised the principles of cooperative governance and the respect for the institutional integrity of local government, as is demanded by the principles. This led the High Court to determine that the MEC could only suspend or remove a councillor after a request from the council.

*Government of the Republic of South Africa v Irene Grootboom*³³

In a matter involving the justiciability of the right of access to housing, when the Court was requested to rule on the question of which sphere of government is responsible for what part of the realisation of the right to access to housing, the Court avoided defining the responsibilities of the various spheres of government. The Court elected to emphasise the cooperative effort required in Chapter three of the Constitution. This meant in the framework of the housing debate, local government could abdicate its responsibility by pointing at the constitutional divisions of power, which places categories of housing as a concurrent provincial and national competency. Importantly, the Court further laid emphasis on the fact that the central responsibility of the national sphere of government should be that that the necessary laws, policies, programmes and strategies meet the State’s duty to fulfil the right of access to housing.

³² 2002 (5) SA 92.

³³ 2001 (1) SA 46 (CC).

*Uthukela v President of the Republic of South Africa*³⁴

Three district municipalities of the KwaZulu-Natal Province brought a case against the national government, arguing that district municipalities should be entitled to an equitable share of revenue that is raised nationally. When the Constitutional Court was approached to confirm the judgment of the lower court, the Constitutional Court declined to make an order. Importantly, the Court stated that *“in view of the important requirement of cooperative government, a court including this Court will rarely decide on intergovernmental disputes unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level.”*³⁵ Since there existed a dispute resolution mechanism in the form of the Budget Forum and the Court had not been informed of national government’s willingness - or otherwise - to address the issue at a political level, the matter was referred back to the parties to deal with any outstanding issues.

*Premier of the Western Cape v George Municipality*³⁶

The Premier of the Western Cape took umbrage over the George Municipality’s refusal to allow the then Premier to display his posters in the municipality and thus litigated over this refusal. The Western Cape High Court dismissed the application, finding the Premier’s actions unreasonable. The Court considered that *“the reasonable care required of a public body to utilise public funds responsibly was not displayed in this regard. In litigating on urgent grounds without attempting to rescue the matter properly with respondent which sought to avoid litigation and the expenditure of further public funds, the applicants failed in its constitutional duty”*.³⁷ As such this duty to avoid litigation does not only result in matters being referred back as happened in the above *Uthukela* judgment but can also result in the matter being finalised to the disadvantage of the organ of state initiating the litigation.

*In re: Certification of the Constitution of the Republic of South Africa*³⁸

The Constitutional Court held that held that the content and scope of the power to monitor local government is restricted to the power to observe or keep under review local government, but does not include the control of local government affairs.³⁹ The Court further interpreted the power of monitoring local government as

³⁴ 2003 (1) SA 678 (CC).

³⁵ 2003 (1) SA 678 (CC) par 14.

³⁶ SA 345 (C).

³⁷ SA 345 (C) par 4.

³⁸ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC).

³⁹ Par 372.

limited to measuring or testing at intervals, local government's compliance with the Constitution and with national and provincial directives.⁴⁰ As such, the power to monitor local government differs from the power to intervene in local government. Intervention is arguably the most powerful, far-reaching and intrusive form of supervision in local government.⁴¹ The Constitutional Court cautioned that that this power of intervention should be exercised only in exceptional circumstances.

*Premier Western Cape v President of the Republic of South Africa*⁴²

This matter involved a dispute between the government of the Western Cape Province and the national government relating to the constitutional validity of some amendments to the *Public Service Act*.⁴³ The Province argued that the new legislative arrangement both infringed the executive power vested in the Province by the Constitution and also undermined the legitimate autonomy of the Provinces recognised by the Constitution. The Court stated that *"the provisions of Chapter three of the Constitution are designed to ensure that in fields of common endeavor the different spheres of government cooperate with each other to secure the implementation of legislation in which they all have a common interest. Cooperation is of particular importance in the field of concurrent law making and implementation of laws"*.⁴⁴ Accordingly, the Court found that a procedure requiring the President and a Premier to seek agreement concerning the legality of a proposed restructuring of a public service within a provincial administration is consistent with the constitutionally established system of cooperative governance.

Conclusion

The application of the principles of cooperative government is undoubtedly a developing concept, with the Courts yet to make full pronouncements on many of the principles mentioned in section 41(1). For example, it remains to be seen what meaning the courts will attach, for example, to breaches of principles, such as the duty to foster friendly relations and to coordinate actions. For the time being, from the cases discussed in the body of this paper, various dimensions of cooperative governance such as distinctiveness, interrelatedness and the the duty to avoid litigation have been given meaning by the courts.

Ultimately, the Constitution has made apparent the three distinct spheres of government in order to distribute powers meaningfully. National government is not

⁴⁰ Par 373.

⁴¹ According to J de Visser "Developmental Local Government: A Case Study of South Africa" (2005) pp 215-217.

⁴² 1999 (3) SA 657.

⁴³ 47 of 1997.

⁴⁴ 1999 (3) SA 657 par 55.



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intended to dictate to the other spheres, nor is it intended to subsume the powers of others spheres completely.

Arguably, the powers of national government ought to support other spheres in the exercise of their functions in terms of the Constitution.