

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 67/03

MUZAMANI SAMUEL MASHAVHA

Applicant

versus

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

MINISTER FOR SOCIAL DEVELOPMENT

Second Respondent

THE NORTHERN PROVINCE MEC FOR  
HEALTH AND WELFARE

Third Respondent

THE WESTERN CAPE MEC FOR SOCIAL  
WELFARE AND PENSIONS

Fourth Respondent

THE KWAZULU-NATAL MEC FOR SOCIAL  
WELFARE AND POPULATION DEVELOPMENT

Fifth Respondent

Heard on : 26 February 2004

Decided on : 6 September 2004

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JUDGMENT

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VAN DER WESTHUIZEN J:

*Introduction*

[1] This application deals with the constitutional validity of a presidential proclamation, Proclamation R7 of 1996 (the proclamation).<sup>1</sup> The proclamation seeks, within the framework of the allocation of executive and legislative powers in the interim Constitution, to assign the administration of almost the whole of the Social Assistance Act 59 of 1992 (the SAA) to provincial governments. The question to be decided is whether it was competent for the President to assign the administration of the SAA to the provinces. Relevant issues include the interpretation of provisions of the interim Constitution embodying transitional arrangements, provincial and national legislative authority and the relationship between the national and provincial governments.

[2] Mr Mashavha (the applicant) seeks confirmation of the order of invalidity of the proclamation, made in the Pretoria High Court (the High Court) by Shongwe J on 7 November 2003.<sup>2</sup>

[3] The President of the Republic of South Africa (the first respondent) opposed neither the original application nor the application for confirmation. The Minister for Social Development (the second respondent) filed an answering affidavit not to resist the relief sought, but to place on record the facts and circumstances that make it appropriate to suspend the order of invalidity, as contemplated in section 172(1)(b)(ii)

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<sup>1</sup> Government *Gazette* 16992 GN R7, 23 February 1996.

<sup>2</sup> The judgment has been reported as *Mashavha v President of the RSA and Others* 2004 (3) BCLR 292 (T).

of the Constitution,<sup>3</sup> and offered to pay the applicant's costs. The Northern Province Member of the Executive Council (MEC) for Health and Welfare (the third respondent) opposed neither the application in the High Court, nor the confirmation application. The Western Cape MEC for Social Welfare and Pensions (the fourth respondent) and the KwaZulu-Natal MEC for Social Welfare and Population Development (the fifth respondent) were granted leave to intervene. The fourth respondent was not represented. The fifth respondent not only opposed the application, but also filed a conditional counter-application. In its first judgment the High Court did not deal with the conditional counter-application. In a second judgment the conditional counter-application was dismissed and the order accordingly amended. Only the fifth respondent opposes the application for confirmation before this Court. The fifth respondent also filed a late application for leave to appeal against the dismissal of the conditional counter-application.

### *Legislative background*

[4] The assignment purportedly took place in terms of section 235 of the interim Constitution. According to section 235(8) the President may by proclamation in the *Gazette* assign, within the framework of section 126, the administration of a law referred to in section 235(6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to a specified extent.<sup>4</sup>

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<sup>3</sup> Section 172(1)(b)(ii) of the Constitution states as follows:

“[A]n order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

<sup>4</sup> The exact wording of section 235(8)(a) is as follows:

[5] Section 235(6) deals with the allocation of the power to exercise executive authority in terms of laws which, immediately prior to the commencement of the interim Constitution, were in force and which continue in force after such commencement in terms of section 229.<sup>5</sup> The provision distinguishes between categories of laws. In terms of section 235(6)(b) all laws concerning matters which fall within the functional areas specified in Schedule 6 of the interim Constitution and which are not matters referred to in section 126(3) shall, if immediately before the commencement of the interim Constitution administered by or under the authority of a functionary referred to in subsection 1(a) or (b), be administered by a competent authority within the jurisdiction of the national government, until the administration with regard to any particular province is assigned under section 235(8) to a competent authority within the jurisdiction of the government of such province.<sup>6</sup>

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“The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the Gazette assign, within the framework of section 126, the administration of a law referred to in subsection (6) (b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.”

<sup>5</sup> Section 229 states as follows:

“Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority.”

<sup>6</sup> Section 235(6) states as follows:

“The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows:

- (a) All laws with regard to matters which—
  - (i) do not fall within the functional areas specified in Schedule 6; or
  - (ii) do fall within such functional areas but are matters referred to in paragraphs (a) to (e) of section 126 (3) (which shall be deemed to include all policing matters until the laws in question have been assigned under subsection (8) and for the purposes of which subsection (8) shall apply mutatis mutandis),
 shall be administered by a competent authority within the jurisdiction of the national government: Provided that any policing function which but for subparagraph (ii) would have

[6] The SAA was enacted on 6 May 1992, but only came into operation on 1 March 1996. Section 22 provides that it would come into operation on a date fixed by the President by proclamation in the *Gazette*.<sup>7</sup> The SAA repealed and replaced several statutes which had provided for the payment of grants to people in need and to welfare

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been performed subject to the directions of a member of the Executive Council of a province in terms of section 219 (1) shall be performed after consultation with the said member within that province.

(b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126 (3) shall—

- (i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1) (a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent authority within the jurisdiction of the government of such province; or
  - (ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1) (c), subject to subsections (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this subparagraph shall not apply to policing matters, which shall be dealt with as contemplated in paragraph (a).
- (c) In this subsection and subsection (8) “competent authority” shall mean—
- (i) in relation to a law of which the administration is allocated to the national government, an authority designated by the President; and
  - (ii) In relation to a law of which the administration is allocated to the government of a province, an authority designated by the Premier of the province.”

Section 126 is quoted below in n 28.

Section 235(1) states as follows:

“A person who immediately before the commencement of this Constitution was—

- (a) the State President or a Minister or Deputy Minister of the Republic within the meaning of the previous Constitution;
- (b) the Administrator or a member of the Executive Council of a province; or
- (c) the President, Chief Minister or other chief executive or a Minister, Deputy Minister or other political functionary in a government under any other constitution or constitutional arrangement which was in force in an area which forms part of the national territory, shall continue in office until the President has been elected in terms of section 77 (1) (a) and has assumed office: Provided that a person referred to in paragraph (a), (b) or (c) shall for the purposes of section 42 (1) (e) and while continuing in office, be deemed not to hold an office of profit under the Republic.”

<sup>7</sup> Section 22, before being amended, stated as follows:

“This Act shall be called the Social Assistance Act, 1992, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.”

organisations who cared for them and consolidated them into a single Act. Before coming into operation, the SAA was amended several times.<sup>8</sup>

[7] The proclamation was promulgated on 23 February 1996, in other words shortly before the SAA came into operation. It purported to amend the SAA and to assign the administration of certain provisions to the provinces from the date it came into operation. The assignment was purportedly made in terms of section 235(8) of the interim Constitution.

[8] Further amendments have been made to the SAA by the Welfare Laws Amendment Act 106 of 1996 and the Welfare Laws Amendment Act 106 of 1997. Some of these amendments have not yet come into operation. The significant aspect of the 1997 amendment was that it reversed the changes made by the proclamation by once again replacing references to the provincial functionaries, which pursuant to the proclamation were meant to administer the SAA, with references to national functionaries. The provinces have administered all of the assigned provisions of the SAA pursuant to the proclamation and subject to the subsequent amendments of 1996 and 1997.

### *Factual background*

[9] The applicant has been a manual labourer all his life. He went to school to Standard 6 and has no specific skills. For a considerable time he washed cars at a

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<sup>8</sup> See the Health and Welfare Matters Amendment Act 118 of 1993, the Health and Welfare Matters Second Amendment Act 180 of 1993 and the Social Assistance Amendment Act 45 of 1994.

garage in Limpopo (previously known as Northern Province). In 1992 he was injured in a collision, suffered fractures to both his hands and was hospitalised for one year and four months. He now walks with difficulty with the aid of a crutch and has only partial use of his right hand. Since the accident he has not been employed. In October 2000 he applied for a disability grant and was referred for a medical examination. He was advised that he could not work again. He then submitted his medical report and was advised to collect his grant after three months. He went to the Bungeni Pension office each month over a long period, but in vain. In November 2001, when he did not receive any notification from the pension office, he contacted an attorney for legal advice. His attorney wrote letters to the second and third respondents, demanding the payment of his grant. He started receiving his grant only on 25 January 2002. He received a sum of R2 280,00, which represented his arrears for four months, but contends in the papers that he is still owed a further R5 460,00 as arrears. After the death of his wife he remarried. His current wife is unemployed, suffers from epilepsy and also receives a disability grant. He lives with his wife, two minor children of this marriage and a 25 year old child born to him and his first wife. All of them rely on the proper administration of the disability grants for their daily sustenance and wellbeing.

[10] The applicant contends that had it not been for the purported assignment of the administration of parts of the SAA to Limpopo, his grant would have been approved and paid within a reasonable period. He would then have been able to rely on a consistent standard of the definition of disability, and his grant would not have been

subject to the vagaries of the budgeting administration of Limpopo or potential demands for the reallocation of social assistance monies to other purposes. At the time when the application was heard by this Court the applicant had received what was due to him and he therefore sought no relief other than the confirmation of the declaration of constitutional invalidity.

*The applicant's submissions and the finding of the High Court*

[11] The applicant's attack on the validity of the proclamation was couched in four main points or "chapters". If he were to succeed on any one of these, it was contended, the application for confirmation must succeed. The four points are the following:

- (1) The SAA was not "in force" and "administered" at the time of the assignment, as required by section 235(8)(a) and section 235(6)(b), read with section 235(1), of the interim Constitution.
- (2) The SAA is not a Schedule 6 law, which it must be in order for it to be assigned, because it cannot be said to fall within a functional area referred to in Schedule 6 of the interim Constitution.
- (3) The SAA is a section 126(3) law, in other words a law with regard to a matter referred to in section 126(3) of the interim Constitution. In terms of section 235(8)(a) and 235(6)(b) the President does not have the power to assign such laws to the provinces.
- (4) The proclamation is unduly vague and therefore invalid.

[12] To a large extent this pattern of argument was also followed before the High Court. Shongwe J concluded that the SAA was not “in force” and in any event not being “administered” immediately before the interim Constitution came into effect, and that consequently the assignment of the administration of the SAA was invalid. Having found on the above point, it was not necessary to decide on the other causes of action, but he expressed the view that the SAA is a section 126(3) law, as argued by the applicant, and that the President accordingly did not have the power to assign its administration to the provinces. On the Schedule 6 issue he did not agree with the applicant.

[13] Shongwe J consequently ordered as follows:

- “1. That Proclamation R7 of 1996 was invalid insofar as it purported to assign the administration and amend provisions of the Social Assistance Act 59 of 1992.
2. That the fifth respondent pays the applicant’s costs.
3. That in terms of section 172(1)(b) of the Constitution this order be suspended until 1 April 2004 to allow the competent authority to correct the defect.
4. That this order is referred to the Constitutional Court for confirmation.
5. That this order shall be published by the second respondent within 14 days of the order of the Constitutional Court by displaying this order at each office where applications for social assistance are processed in all 11 official languages; and

5.1 in the *Government Gazette*;

5.2 in two successive editions of the newspaper “Sunday Times”.

6. That the second respondent pays the fifth respondent's wasted costs occasioned by the postponement on 11 November 2002." [numbering adapted]

[14] In view of the reasoning of the applicant and the finding of the High Court, I deal with the abovementioned points, although they are inter-related and some aspects of the investigation may overlap.

*Was the SAA "in force" and "administered"?*

[15] The applicant's argument is essentially that in terms of section 235(8)(a) of the interim Constitution the President may only assign the administration of a law referred to in section 235(6)(b), meaning inter alia a law which was "in force" and which was being "administered" by one of the authorities mentioned in sections 235(6)(b)(i) and (ii), read with section 235(1), immediately prior to commencement of the interim Constitution. The applicant contends – and the High Court held – that the SAA was not "in force" when the interim Constitution came into effect on 27 April 1994, because although it was enacted on 26 April 1992, it only came into operation on 1 March 1996. It was not "in force" before being promulgated or put into operation and was "in limbo" – in the words of Shongwe J – awaiting promulgation after enactment.

[16] According to the fifth respondent the ordinary meaning of the term "in force" is "in existence on the statute book". The applicant contends for a "narrower" meaning, such as "in operation", but the argument is apparently dependent on the submission that the SAA was not being "administered" at the relevant time. The applicant argues

that when section 235(6) speaks of old order laws that were “in force”, it refers to those laws that were being “administered” by the old order authorities identified in section 235(1) only. The argument that “in force” means something narrower than simply “in existence on the statute book” is thus interrelated with and dependent on the meaning of “administered”. According to the applicant, a law is only “administered” by the exercise of administrative powers and the performance of administrative actions under the law itself, which cannot happen under a law that is not yet in operation. The SAA was not being “administered” by anybody immediately prior to 27 April 1994.

[17] The fifth respondent inter alia refers to “preparatory steps” that were taken after enactment but before commencement of the SAA, which steps were underway at the time the interim Constitution commenced. According to the applicant – as well as the High Court – these preparatory steps are not sufficient to view the SAA as being “administered”, particularly as the regulations prepared would not come into operation until the SAA itself does.

[18] It is a well known rule of statutory interpretation that language must be interpreted to have its ordinary meaning, but the assumption that general language must have a single “objective” meaning regardless of context is fallacious. Therefore the context within which a word, term or phrase is used is often of the utmost importance.<sup>9</sup>

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<sup>9</sup> See for example *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 17 and Botha *Statutory Interpretation* 3 ed. (Juta, Cape Town 1998) at 48, with reference to case law.

[19] Section 235 is indeed a provision of the interim Constitution. As stated by Chaskalson P in *S v Makwanyane and Another*,<sup>10</sup> a constitution

“... is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive, and the courts. . . .”

[20] In addition to the purpose and role which a constitution ordinarily has, the interim Constitution had to provide a mechanism for a process of fundamental transition in South Africa. The implications for a broad sphere of governmental, administrative and other activities were far-reaching. The constitutional dispensation before and after 27 April 1994 differed drastically. The interim Constitution was the instrument through which transition from an undemocratic order under parliamentary sovereignty to a democratic one under constitutional supremacy took place.<sup>11</sup> The transition could be described as revolutionary, but in so far as this description is appropriate, the South African revolution was a negotiated and consequently a constitutionally and legally regulated one. Provision had to be made for legislative, executive, judicial and administrative continuity. The differences in the structure of the state before and after 27 April 1994 were profound, including the demise of the so called “homelands”, nine new provinces instead of the four old ones, and a new relationship between national and provincial government, which resulted from an

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<sup>10</sup> 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 15.

<sup>11</sup> See for example *Executive Council, Western Cape Legislature, and Others v President of Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) from para 69 onwards.

intense process of negotiations. A system of laws, including legislation on national and provincial level and in the “homelands”, existed before 27 April 1994 and provision had to be made not only for the preservation of these laws, but also for identifying the authorities responsible for their implementation and administration. In the absence of such provisions, all legislation from the pre-1994 order would have lapsed, because it would not have had lawful provenance in the interim Constitution as the supreme law. The interim Constitution itself therefore gave continued life to these laws.<sup>12</sup>

[21] Chapter 15 is the last chapter of the interim Constitution and deals with the transition under the heading “General and Transitional Provisions”. The chapter is a package of transitional provisions addressing a wide range of issues, including international agreements, public administration, assets and liabilities, the judiciary as well as certain other structures.

[22] Under the heading “Continuation of existing laws”, and as the first provision of Chapter 15, section 229 states that all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority.<sup>13</sup> Section 235 also appears in

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<sup>12</sup> As to the constitutional context and scheme of the transitional arrangements in the interim Constitution, id at para 75 onwards and para 165, and *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) especially at paras 18-26.

<sup>13</sup> See the text of section 229 n 5 above.

Chapter 15. Its heading indicates that it contains transitional arrangements with regard to executive authorities.<sup>14</sup>

[23] In the *Executive Council, Western Cape Legislature* case,<sup>15</sup> Chaskalson P stated the following with regard to the purpose of section 235:

“The overall purpose to be achieved through the application of s 235 is a systematic allocation of the 'power to exercise executive authority' in terms of each of the 'old laws', to an authority within the national government or authorities within the provincial governments. Subsection (8)(b)(ii) indicates that this authority may be allocated to provincial functionaries in respect of parts of a law and, in respect of other parts of the same law, to national functionaries. To achieve this purpose the President is given the power in ss (8)(b) to amend or adapt the laws to the extent that he considers it necessary 'for the efficient carrying out of the assignment'. The purpose of this power is clearly to provide a mechanism whereby *a fit* can be achieved between the old laws and the new order.”

[24] The phrase “in force” is used in section 235(6), as it is in section 229.<sup>16</sup> It also appears in section 234(6) with reference to the rules and orders of Parliament.<sup>17</sup> From

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<sup>14</sup> The heading is: “Transitional arrangements: Executive authorities”.

<sup>15</sup> Above in n 11 at para 84.

<sup>16</sup> On behalf of the fifth respondent it was pointed out that the language of section 229 is based on section 135 of the Union of South Africa Act 1909, which served the same function in respect of pre-Union legislation. The same applied to corresponding provisions in its successors, namely section 107 of the Republic of South Africa Constitution Act 32 of 1961 and section 87 of the Republic of South Africa Constitution Act 110 of 1983. With reference to especially *R v Detody* 1926 AD 198 at 201; as well as *Ex Parte Minister of Justice: In re R v Bolon* 1941 AD 345 at 360; *S v Theron* 1984 (2) SA 850 (A) at 877D-878H; and *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 732A-D, it is argued that it could only mean “in existence on the statute book”.

<sup>17</sup> Section 234 deals with “Transitional arrangements: Legislative authorities” and subsection (6) states as follows:

“The rules and orders of Parliament in force immediately before the commencement of this Constitution, shall, to the extent that they can mutatis mutandis be applied in respect of the

the context as it emerges from the overall scheme of the interim Constitution, and from Chapter 15 in particular, it is clear that the purpose of sections 229 and 235(6) is to provide for the continued existence of laws which were in existence immediately before 27 April 1994 (subject to repeal or amendment) and for the allocation of power to exercise executive authority in terms of such laws. There is no clear contextual reason for giving the phrase “in force” in section 235(6) a different meaning from the same phrase in section 229, especially in view of the fact that section 229 is referred to in section 235(6).

[25] Therefore the phrase “in force” should not be interpreted in section 235(6) to draw any distinction between laws which were actually being implemented, executed, or administered at a particular time and laws which had been enacted but not yet come into operation, or which were not being implemented actively. It simply refers to laws which existed (on the statute book, if one wishes to put it that way) immediately before 27 April 1994, and which would continue to exist in terms of section 229.<sup>18</sup>

[26] The same reasoning applies to the term “administered” in section 235(6)(b). The purpose of this section is clearly not to distinguish between laws which were being actively implemented immediately before 27 April 1994, or laws under which powers were exercised or actions performed, and laws which were in existence but

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business and proceedings of Parliament under this Constitution, continue in force until amended or replaced in terms of this Constitution.”

<sup>18</sup> In the 1996 Constitution transitional arrangements are dealt with in Schedule 6. Under the heading “Continuation of existing law” section 2(1) states as follows: “All law that was in force when the new Constitution took effect, continues in force. . . .” Law which was “in force” therefore also refers to “existing law”, and not to law which was “in operation”.

latent. The term “administered” does not relate to the effectiveness, frequency or intensity of activity taking place in terms of the law at a particular time. It serves to identify the authority responsible for the administration of a law, whether or not active steps were actually being taken, immediately before the commencement of the interim Constitution. As stated earlier, the purpose of Chapter 15 is to provide for a wide-ranging process of transition from the old order to the new one. In the process, functionaries and institutions, amongst others, had to be identified, to arrange for the orderly and constitutionally recognised continuation of the performance of certain functions and for the transfer of authority, power, and responsibility. These include the Chief Justice and the judiciary,<sup>19</sup> the President and Ministers, Deputy Ministers, Chief Ministers and Administrators,<sup>20</sup> and the Commission for Administration and the Public Service Commission.<sup>21</sup>

[27] In dealing with the continuing existence of laws which were in force immediately before the commencement of the interim Constitution, section 235(6)(b) states that any law which was being administered by or under the authority of the functionaries specifically mentioned in section 235(1) (namely the State President or Ministers, members of the provincial executives, and executives of former homelands), shall after 27 April 1994 be administered by a competent authority, until the administration of such law is assigned as described in the section. In this sense the

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<sup>19</sup> Sections 233(1) and 241.

<sup>20</sup> Section 235(1) above n 6.

<sup>21</sup> Section 238.

term “administered by” refers to the responsible authority, and not the degree of activity with which that authority takes steps under the relevant law.<sup>22</sup> As pointed out on behalf of the fifth respondent, some statutes do not require ongoing activity as far as implementation is concerned. Their purpose may for example be to prohibit certain actions and as long as they are not contravened, no activity takes place. Yet, they are being “administered” by the department or minister under whose authority they fall.

[28] The consequence of the interpretation of “in force” and “administered” advanced by the applicant would be that laws which were not actively in operation – such as the SAA – could not survive the transition from the old to the new order. If they are not referred to in section 229, they would have no constitutional basis and would therefore lapse, and not be able to be brought into force. If they are not referred to in section 235(6), there would be no transitional arrangements made for their administration. This could not have been the purpose of these provisions.<sup>23</sup> Consequently the applicant’s contentions and the finding of the High Court that the SAA was not “in force” and “administered” and could therefore not be assigned cannot be upheld.

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<sup>22</sup> In *Western Cape Government: In re DVB Behuising* above n 12 at para 30 Ngcobo J states the following:

“Subsection (6) sets out the criteria for identifying the competent authority to whom the executive authority should be allocated.”

<sup>23</sup> See also *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 7 and section 2(2)(b) of Schedule 6 of the 1996 Constitution which states as follows:

“Old order legislation that continues in force . . . continues to be administered by the authorities that administered it when the new Constitution took effect . . .”

[29] In its conditional counter-application in the High Court, the fifth respondent sought an order that, in the event of a ruling that the SAA was not “in force” immediately prior to the commencement of the interim Constitution, it be declared that the SAA is of no force and effect, as well as a costs order . Although the High Court found that the SAA was not “in force”, the counter-application was dismissed. In view of the conclusion that the finding of the High Court that the SAA was not “in force” is not correct, the fifth respondent’s conditional counter-application and the application for leave to appeal against the dismissal thereof fall away.

*Is the SAA a Schedule 6 law?*

[30] In terms of section 235(6)(b) of the interim Constitution the President may only assign an old order law to the provinces if it is a law with regard to a matter which falls within the functional areas specified in Schedule 6. The relevant functional area in which the SAA is assumed to fall, is “welfare services”. It is submitted by the applicant that the SAA does not fall within the functional area of “welfare services”.<sup>24</sup>

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<sup>24</sup> The functional areas mentioned in Schedule 6 as amended by section 14 of Act 2 of 1994 are: agriculture; abattoirs; airports, other than international and national airports; animal control and diseases; casinos, racing, gambling and wagering; consumer protection; cultural affairs; education at all levels, excluding university and technikon education; environment; health services; housing; indigenous law and customary law; language policy and the regulation of the use of official languages within a province, subject to s 3; local government, subject the provisions of chap 10; markets and pounds; nature conservation, excluding national parks, national botanical gardens and marine resources; police, subject to the provisions of chap 14; provincial public media; provincial sport and recreation; public transport; regional planning and development; road traffic regulation; roads; soil conservation; tourism; trade and industrial promotion; traditional authorities; urban and rural development and welfare services.

[31] Schedule 6 is one of seven schedules following the fifteen chapters of the interim Constitution and is headed “Legislative Competences of Provinces”.<sup>25</sup> It is referred to in and has to be read together with section 126, on “Legislative competence of provinces”, which is the second provision under the heading “Provincial Legislative Authority” in Chapter 9 on “Provincial Government”.<sup>26</sup>

[32] In *Western Cape Government: In re DVB Behuising*<sup>27</sup> Ngcobo J pointed out that in the interpretation of the Schedules the functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively. In the same judgment it is furthermore stated that the inquiry into whether the relevant proclamation dealt with a matter listed in Schedule 6 involves the determination of the subject-matter or substance of the legislation, its essence, or true purpose and effect, that is what the proclamation is about.

[33] According to the applicant, a law providing for the payment of money deals with “welfare”, but not with a “welfare service”. A cash payment does not constitute a “service”. The fifth respondent contends that on its ordinary meaning “welfare”

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<sup>25</sup> The other schedules deal with definitions of provinces and contentious areas; the election system for the National Assembly and Provincial Legislatures; oaths and affirmations of office; constitutional principles regarding the drafting of the new Constitution; the procedure for the election of the President; and repeal of laws.

<sup>26</sup> Section 126 is quoted fully in n 28 below.

<sup>27</sup> Above n 12 paras 17 and also 36.

includes the provision of pensions and grants, and that “welfare services” are the services rendered by those who make available or pay pensions or grants.

[34] In order to make a finding on this point, the meaning of the term “welfare services” would have to be determined within its constitutional context. The true purpose and effect of the SAA would have to be identified with due regard to its subject-matter and historical context. In the view that I take in this matter it is not necessary to decide this question. I assume in favour of the fifth respondent that the SAA does fall within the functional area of “welfare services” in Schedule 6 of the interim Constitution.

*Is the SAA a section 126(3) law?*

[35] Section 235 of the interim Constitution makes provision for the assignment by the President of the administration of laws which fall within the functional areas specified in Schedule 6, but excludes laws with regard to matters referred to in section 126(3)(a) to (e).<sup>28</sup> According to the applicant, the SAA is a law with regard to a

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<sup>28</sup> Section 126 states as follows:

“Legislative competence of provinces’

126. (1) A provincial legislature shall, subject to subsections (3) and (4), have concurrent competence with Parliament to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(3) An Act of Parliament which deals with a matter referred to in subsection (1) or (2) shall prevail over a provincial law inconsistent therewith, only to the extent that—

- (a) it deals with a matter that cannot be regulated effectively by provincial legislation;
- (b) it deals with a matter that, to be performed effectively, requires to be regulated or coordinated by uniform norms or standards that apply generally throughout the Republic;

matter referred to in section 126(3)(a) and (b). Therefore the President did not have the power to assign the administration of the SAA to the provinces.

[36] It is necessary to look at the constitutional context in which section 126 appears. In terms of section 125 provincial legislatures have the power to make laws for the respective provinces in relation to Schedule 6 functional areas. Laws made by the provincial legislature are applicable only within the territory of the province (subject to any exceptions as may be provided for by an Act of Parliament).

[37] Section 126 deals with the powers of provincial legislatures and with the relationship between laws legislated for the province by the provincial legislature and Acts of the national Parliament. In terms of section 126(1) and (2) a provincial legislature has concurrent competence with Parliament to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6, including the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence. However, the concurrent competence of a provincial legislature is subject to subsections (3) and (4).

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- (c) it is necessary to set minimum standards across the nation for the rendering of public services;
  - (d) it is necessary for the determination of national economic policies, the maintenance of economic unity, the protection of the environment, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
  - (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole.
- (4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.
- (5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.
- (6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3)."

Section 126(3) addresses the issue of a conflict between national and provincial legislation and states that an Act of Parliament prevails over a provincial law which is inconsistent with the Act of Parliament, only to the extent mentioned in paragraphs (a) to (e) of section 126(3).<sup>29</sup> Section 126(1) therefore describes the legislative competence of provinces with reference to the functional areas specified in Schedule 6. Thereafter section 126(3) deals with concurrence, or what is sometimes referred to as “overrides”.<sup>30</sup>

[38] The relationship between sections 126 and 235 is complex, because the two sections do not address the same topic. Section 126 deals with legislative authority, and more specifically with the legislative competence of provincial legislatures. Section 235 deals with transitional arrangements regarding executive authorities. Yet, section 235(8) (dealing with the assignment of the administration of laws) refers not only to “the framework of section 126”, but also to section 235(6)(b), which in turn refers to and excludes “matters referred to in paragraphs (a) to (e) of section 126(3)”. Whereas the purpose of section 126(3) is to determine the extent to which an Act of Parliament prevails over a provincial law inconsistent therewith, in the case of a functional area where Parliament as well as a provincial legislature have concurrent competence, the purpose of section 235(6)(b) is to identify laws which may be

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<sup>29</sup> In terms of subsection (4) an Act of Parliament prevails over a provincial law only if it applies uniformly in all parts of the Republic of South Africa.

<sup>30</sup> Whereas the interim Constitution only specifies areas of concurrent national and provincial legislative competence, the 1996 Constitution deals with functional areas of concurrent national and provincial competence (in Schedule 4) as well as functional areas of exclusive provincial legislative competence (in Schedule 5). In all other areas not expressly mentioned, the national Parliament has exclusive legislative competence.

assigned by referring to the “matters” with regard to which the laws exist. However, the purpose of the scheme of sections 235(6) and (8) is to provide for certain laws to be assigned for administration by the provinces, but to restrict the category of such laws to laws dealing with matters falling within Schedule 6 (in other words laws on matters on which provincial legislatures have the competence to legislate), and to laws the assignment of which would not offend the concerns embodied in section 126(3).

[39] As stated earlier, the applicant is of the view that the SAA is a law with regard to a matter referred to in section 126(3)(a) and (b). During argument it was submitted on his behalf that subsection (c) could also be relevant. Therefore the questions to be answered in order to determine whether the SAA is a law which may be assigned are the following: (a) Does it deal with a matter that cannot be regulated effectively by provincial legislation? (b) Does it deal with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic? (c) Is it necessary to set minimum standards across the nation for the rendering of public services provided for by the SAA?

[40] According to the applicant, this calls for an objective test in which the subject-matter of the law has to be determined. The applicant contends that the social assistance which the SAA provides for has to be nationally regulated in order to be regulated effectively, and because it requires to be regulated or co-ordinated by

uniform norms and standards that apply generally throughout the Republic in order to be performed effectively.<sup>31</sup>

[41] An analysis of the SAA is necessary to determine its purpose, subject-matter and effect. The determination of the subject-matter requires an understanding of the relevant legislative scheme. Ordinarily legislation embodies a single legislative scheme, but a law may have more than one subject-matter.<sup>32</sup> The preamble and legislative history of the legislation can be helpful in an analysis of the subject-matter of the legislation.<sup>33</sup>

[42] Aspects of the legislative history of the SAA have been mentioned above<sup>34</sup> and need not be repeated. It repealed and replaced a number of statutes.<sup>35</sup> These statutes provided for the payment of grants to people in need and to welfare organisations caring for them, and were consolidated by the SAA. The SAA was amended by several Acts between its enactment and the publication of the proclamation, as well as afterwards. The legislation preceding and following on the SAA appears to deal with

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<sup>31</sup> Semantically the notion that a “matter” can be “performed” may be problematic.

<sup>32</sup> See *Western Cape Government: In re DVB Behuising* above n 12 at para 39. See also *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) at para 62; 2000 (1) BCLR 1 (CC) at para 63.

<sup>33</sup> *Western Cape Government: In re DVB Behuising* above n 12 at para 36.

<sup>34</sup> See paras 6 to 8 above.

<sup>35</sup> See section 20(1) of the SAA and the Schedule to which it refers. According to the Schedule, the Acts wholly or partially repealed are the Aged Persons Act 81 of 1967, the War Veterans’ Pensions Act 25 of 1968, the Blind Persons Act 26 of 1968, the Disability Grants Act 27 of 1968, the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971, the Mental Health Act 18 of 1973, the Social Pensions Act 37 of 1973, the National Welfare Act 100 of 1978, the Child Care Act 74 of 1983, the Pension Laws Amendment Act 96 of 1983, the Community Welfare Act (House of Representatives) 104 of 1987 and the Social Aid Act (House of Assembly) 37 of 1989.

matters sometimes widely described as “welfare”, “community welfare”, or “health and welfare matters”, as well as with more specific matters such as pensions, social aid, mental health, and certain categories of people such as war veterans, blind persons and children.

[43] The short title of the SAA refers to “social assistance”. The purpose of the SAA, as stated in the long title, is to “provide for the rendering of social assistance to persons, national councils and welfare organisations; and to provide for matters connected therewith”. “Social assistance” is defined in the SAA as “a social grant, a supplementary grant, a grant-in-aid, a foster child grant, a child support grant, a care-dependency grant, or a financial award granted under this Act”.<sup>36</sup>

[44] The sections following on the definitions section deal with payment of grants,<sup>37</sup> social grants,<sup>38</sup> child-support grants,<sup>39</sup> financial awards to welfare organisations and persons,<sup>40</sup> application for social assistance,<sup>41</sup> the stopping of payments of grants to persons who are absent from the Republic,<sup>42</sup> the misspending of grants,<sup>43</sup> and the

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<sup>36</sup> Section 1 (as amended).

<sup>37</sup> Section 2.

<sup>38</sup> Section 3.

<sup>39</sup> Section 4 (as amended). Section 21 of the amended Act deals with the abolition and phasing out of maintenance grants.

<sup>40</sup> Section 5 (as amended).

<sup>41</sup> Section 6.

<sup>42</sup> Section 7.

<sup>43</sup> Section 8.

repayment of sums overpaid.<sup>44</sup> It also deals with appeals against certain decisions,<sup>45</sup> false representations,<sup>46</sup> stamp duty,<sup>47</sup> investigations and powers of the Director-General,<sup>48</sup> offences and penalties,<sup>49</sup> and the Minister's power to make regulations,<sup>50</sup> as well as with the above-mentioned repeal of Acts and the administration of the Act.<sup>51</sup>

[45] Social grants are payable to aged or disabled persons and to war veterans,<sup>52</sup> and child-support to primary care-givers.<sup>53</sup> The Minister may, subject to certain conditions, make financial awards to national councils or welfare organisations which undertake or take or co-ordinate organised activities, measures or social welfare programmes regarding family care, care of the aged, social security, care of the disabled, alcohol and drug dependency and offender care.<sup>54</sup>

[46] According to the applicant, evidence of the confusion arising from the assignment and the piecemeal approach to the SAA and the failure and "sorry saga" of

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<sup>44</sup> Section 9.

<sup>45</sup> Section 10.

<sup>46</sup> Section 12.

<sup>47</sup> Section 13.

<sup>48</sup> Sections 14-16.

<sup>49</sup> Sections 17-18.

<sup>50</sup> Section 19.

<sup>51</sup> Sections 20-21.

<sup>52</sup> Section 2 (a) and (b) and section 3.

<sup>53</sup> Section 4.

<sup>54</sup> Section 5.

the payment of social grants under the SAA, at least in some provinces, should be taken into account. It shows that social assistance is indeed a matter that cannot be regulated effectively by provincial legislation, or that to be performed effectively, it requires to be regulated or co-ordinated by uniform norms and standards. The fifth respondent disputes this, pointing out that the situation is not the same in all provinces, and that there is no proof that the national government would be able to do any better than the provinces as far as the administration of the SAA is concerned. Although what has happened in relation to the assignment of the SAA is not entirely irrelevant to considering the question of whether it was assignable in the first place, the history of the assignment is not determinative of whether it was assignable, for the reasons given by the fifth respondent. The fact that the administration of the SAA by the provinces may have given rise to problems does not necessarily mean that the assignment was not one within the terms of section 235.

[47] On behalf of the fifth respondent it was pointed out that the wording of section 126(3)(a), (b) and (c) is concrete and specific. Terms such as “cannot” in (a), “requires” in (b) and “necessary” in (c) set a high bar, meaning more than simply that it must be “desirable” or “better” for the relevant matter to be regulated by national rather than provincial law. The fifth respondent also warns against mere a priori assumptions as to what is the best. It is correct that the question of whether the assignment was competent or not cannot be determined by a priori assumptions. It must be determined in the light of the constitutional standards set by section 126(3)(a) to (c), interpreted purposively in context.

[48] According to the fifth respondent, social assistance can indeed be regulated effectively by provincial legislation and does therefore not fall under section 126(3)(a). South Africa is a huge country with a land mass equivalent to much of mainland Europe. The division into nine provinces recognizes that different areas have vastly different needs that can be dealt with differently in the same way as France and Poland or Denmark and Austria deal with certain matters, including social assistance, differently. In India relief of the disabled and unemployable and the payment of state pensions are matters of exclusive legislative competence for the states in terms of items 9 and 42 of List II in Schedule 7 to the Constitution.<sup>55</sup> Under section 94A of the Canadian Constitution the Parliament of Canada can make laws in relation to old age pensions and supplementary benefits, including disability grants, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.<sup>56</sup> In other words, there is dual competence subject to a provincial override.

[49] The fifth respondent cites as a direct practical example the Northern Cape's need to deal with problems arising from asbestos mining, that are not present in KwaZulu-Natal, where AIDS dictates a different focus. The extent of rural poverty in the Eastern Cape or Limpopo will have different consequences and create greater needs than, for example, in Gauteng where feeding schemes may be required. It is inherent in our constitutional system, which is a balance between centralized

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<sup>55</sup> Seervai *Constitutional Law of India* 4th ed. vol 1 (N M Tripathi Private Ltd, Bombay 1991) at A-160-A-161; Bakshi *The Constitution of India* (Universal Publishing Co PVT Ltd, Delhi 1996) at 349-50.

<sup>56</sup> Hogg *Constitutional Law of Canada* 4th ed. (Carswell, Ontario 1997) at 1425.

government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That will necessarily mean that there is no uniformity.

[50] The interim Constitution indeed recognizes provinces and provincial as well as national government and in so doing, allows for differences. Therefore section 126(1) provides for the concurrent competence of provincial legislatures to make laws with regard to matters which fall within the functional areas specified in Schedule 6. However, the interim Constitution also clearly recognizes the need for uniformity in certain circumstances; hence section 126(3) provides that national legislation will sometimes prevail over otherwise competent provincial legislation.

[51] The submissions put forward on behalf of the fifth respondent ignore the political, social and economic history of South Africa. There are countless vast differences between this country and the other countries referred to by the fifth respondent. The way social assistance is structured and administered in Denmark and Austria, or even Canada, or India, can hardly be compared to the South African situation. Our history is well known. It is one of colonialization, apartheid, economic exploitation, migrant labour, oppression and balkanization. Gross inequalities were deliberately and legally imposed as far as race and also geographical areas are concerned. Not only were there richer and poorer provinces, but there were “homelands”, which by no stretch of the imagination could be seen to have been treated on the same footing as “white” South Africa, as far as resources are concerned.

These inequalities also applied to social assistance – an area of governmental responsibility very closely related to human dignity. The history of our country and the need for equality cannot be ignored in the interpretation and application of section 126(3). Equality is not only recognized as a fundamental right in both the interim and 1996 Constitutions, but is also a foundational value. To pay, for example, higher old age pensions in Johannesburg in Gauteng than in Bochum in Limpopo, or lower child benefits in Butterworth than in Cape Town, would offend the dignity of people, create different classes of citizenship and divide South Africa into favoured and disfavoured areas.

[52] As to the question whether legislation deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic (in other words the section 126(3)(b) question), the fifth respondent submits that depending on one's political philosophy, one's view of the significance to society of a particular matter and one's concept of what constitutes effective performance, one's judgment will vary. It is for example entirely legitimate for a person who believes in strong central government to take the view that education and nature conservation require uniform norms or standards, whilst a believer in a more devolved approach to government will take the opposite view. A decision concerning whether a matter falls under section 126(3) would thus often depend on the political philosophy of the decision-maker.

[53] This argument cannot be accepted. It is for this Court to give proper meaning to section 126(3) in context. Then the Court must apply the section to the facts of the case before it. It is clear that section 126(3) contemplates that there are matters which fall within the legislative competence of provinces which nevertheless may be regulated by national legislation. One of the criteria to determine whether the matter may be regulated by national legislation is whether it will be effective to do so; another is whether it is a matter which needs uniform norms and standards to be set; a third is whether it is necessary to set minimum standards for the delivery of public services. All three criteria recognize that there are times when uniformity is appropriate. The question that arises in this case is whether any or all of these criteria are present. It may be that reasonable people may legitimately differ in the application of these standards, but it is the standards set by the Constitution which must guide this Court's determination of the case, not the political philosophy of individual judges.

[54] The fifth respondent furthermore argues that when the President assigned the SAA to the provinces he did not take the view that the assigned provisions of the SAA – which exclude section 13 which deals with stamp duties and hence an aspect of national finances – dealt with a matter that required uniform norms and standards. The Court must determine whether, viewed from the perspective at the time, the President's view was one which it was proper for him to hold. It should be wary of an invitation, with the benefit of hindsight, to take a different view, according to the fifth respondent. Once it is accepted that the outcome of this decision may be a matter of

judgment by the President, it is difficult to see on what basis it can be reviewed by a court being asked to decide whether the decision was “right” or “wrong”. The difficulty of that task is compounded when the factual material relied on to demonstrate that the decision was wrong was not available when the decision was taken, but arises from the way in which certain provincial authorities have undertaken the administrative task assigned to them, as is the case here.

[55] The present inquiry does of course not deal with judicial review of the President’s decision to assign the administration of the SAA. The question is not whether it was reasonable or proper for the President to hold a particular view at the time of the decision. The test is an objective one, namely whether section 126(3) is applicable to the SAA. The fact that the President assigned the SAA cannot answer the question of whether that assignment objectively speaking was legally competent or not.

[56] Therefore the fact that subjective views may differ on questions such as what constitutes effective performance and when uniform norms and standards are required, even perhaps depending on factors such as “political philosophy”, cannot mean that the view of the President at the time of the assignment may never be questioned. Such an approach would not be in accordance with the reasoning of this Court in *Western Cape Government: In re DVB Behuising*.<sup>57</sup> In terms of section 4 of the interim

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<sup>57</sup> Above n 12.

Constitution (and section 2 of the 1996 Constitution) the Constitution is supreme, and conduct inconsistent with it is invalid.

[57] In my view social assistance to people in need is indeed the kind of matter referred to in section 126(3)(a), and in a wider sense envisaged by the meaning of the need for minimum standards across the nation in subsection (c). Social assistance is a matter that cannot be regulated effectively by provincial legislation and that requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic, for effective performance. Effective regulation and effective performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality for example as far as the distribution and application of resources and assistance are concerned. A system which disregards historical injustices and offends the constitutional values of equality and dignity could result in instability, which would be the antithesis of effective regulation and performance.

[58] Before a final conclusion is reached that the SAA is a law dealing with a matter referred to in section 126(3), another possibility needs to be considered. As mentioned earlier, it was found in *Western Cape Government: In re DVB Behuising*<sup>58</sup> that one Act may deal with more than one matter. The question is whether an area such as social assistance, as dealt with in the SAA, is only capable of falling inside or outside the scope of section 126(3), or whether some aspects of it may be the kind of

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<sup>58</sup> Id at para 39.

matter referred to in section 126(3), whereas others could well be regulated effectively by provincial legislation, and may not require to be regulated by uniform norms and standards for the sake of effective performance, and therefore fall outside the purview of the section. Section 126(3) itself seems to envisage the possibility of different nuances in the same Act. It states that the Act prevails over a provincial law inconsistent with it “only to the extent” that it for example deals with a matter that cannot be regulated effectively by provincial legislation. In so far as it does not deal with a matter that cannot be regulated effectively by provincial legislation, it therefore does not prevail over the provincial law.

[59] It has been stated above that social assistance is a matter requiring the attention of the national Parliament, for the reasons mentioned. This would for example clearly apply to policy and budgeting decisions regarding the allocation and distribution of resources for grants to different provinces, in the obvious interest of equality. However, it may be arguable that aspects of the practical delivery of social assistance services, for example the actual payment of money to people at particular pay-points, may not only be capable of effective administration on a provincial level, but may indeed require more localized attention than the national government could take responsibility for.

[60] In terms of paragraphs (a) and (b) of the proclamation, the President assigned the administration of all the provisions of the SAA except section 13<sup>59</sup> and “. . . those

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<sup>59</sup> In the second column of Part 1 of the Schedule it is stated that the whole of the SAA, excluding section 13, is assigned.

provisions (if any) . . . which fall outside the functional area specified in Schedule 6 . . . or which relate to matters referred to in paragraphs (a) and (e) of section 126(3) of the Constitution . . .”<sup>60</sup> On the assumption that one Act could deal with more than one matter, and that some of the matters dealt with in an Act may fall inside and others outside the purview of section 126(3), it could be argued that the President only assigned those which he was entitled to assign, namely the matters not referred to in section 126(3). A decision as to what falls within or outside the purview of section 126(3) was not taken by the President and can only be subjected to a constitutional attack once such a decision is indeed taken, for example by an official who interprets section 126(3) and the SAA in order to implement it.

[61] The submissions of the fifth respondent to some extent tie in with this possibility: The President states in paragraph (a) of the proclamation that he assigns the administration of three laws, of which the SAA is one. These three laws are specified in the first column of Part 1 of the Schedule, excluding those provisions (if any) that cannot permissibly be assigned because they fall outside Schedule 6, or

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<sup>60</sup> The main part of the Proclamation is as follows:

“Under section 235(8) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), I hereby—

- (a) assign with effect from the date upon which the Social Assistance Act, 1992 (Act No. 59 of 1992), shall come into operation, the administration of the laws specified in the first column of Part 1 of the Schedule, excluding those provisions (if any) of the said laws which fall outside the functional areas specified in Schedule 6 of the Constitution or which relate to matters referred to in paragraphs (a) to (e) of section 126 (3) of the Constitution to a competent authority within the jurisdiction of the government of a province mentioned in section 124 (1) of the Constitution, designated in respect of each such law by the Premier of the province concerned;
- (b) determine that the said laws are assigned to the extent specified opposite each such law in the second column of Part 1 of the Schedule in so far as such a law is applicable in, or in part of, the province concerned;
- (c) amend with effect from the date referred to in paragraph (a) the said laws to the extent set out opposite each law in the third column of Part 1 of the Schedule; and
- (d) amend with effect from the date of this Proclamation section 22 of the Social Assistance Act, 1992, as set out in Part 2 of the Schedule.”

within section 126(3)(a) to (e). In paragraph (b) of the proclamation the provisions that have been excluded for the reason set out in (a) are identified by reference to the second column of Part 1 of the Schedule.

[62] An analysis of the contents of the SAA is again necessary to determine whether it is indeed a law dealing with more than one matter, and whether these matters could be meaningfully distinguished from each other, or severed, to the extent that some of them could be regarded as section 126(3) matters, but not the others.

[63] As to the payment of grants, section 2 states that the Minister<sup>61</sup> may, subject to the provisions of the Act, and with the concurrence of the Minister of State Expenditure, make social grants to aged and disabled persons and to war veterans out of the moneys appropriated by Parliament.<sup>62</sup> In terms of section 3 any person who satisfies the Director-General<sup>63</sup> that he is, amongst other things, disabled or a war veteran is entitled to the appropriate social grant.<sup>64</sup> In virtually all the sections of the

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<sup>61</sup> See the definition of the “Minister” in section 1 before being amended.

<sup>62</sup> Section 2 of the SAA before being amended.

<sup>63</sup> See the definition of “Director-General” in section 1 after the amendment.

<sup>64</sup> Section 3 states as follows:

“Social grants—

Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he—

- (a) is an aged or disabled person or a war veteran;
- (b) is resident in the Republic at the time of the application in question;
- (c) is a South African citizen; and
- (d) complies with the prescribed conditions.”

SAA the Minister or Director-General is central.<sup>65</sup> The Proclamation of course substitutes the definition of “Director-General” with a definition referring to “the officer who is the head of the component which is charged with welfare matters in the provincial administration of that province”, and the definition of “Minister” with a reference to the relevant MEC of the province,<sup>66</sup> because it does assign the administration of the SAA to the provinces. Whereas the SAA was at the time of its enactment obviously intended to be administered by the then existing national government, the assignment placed it in the hands of the corresponding provincial officials. It is noteworthy that the amendment effected by the Welfare Laws Amendment Act 106 of 1997 again replaced the references to provincial functionaries with references to national functionaries, as mentioned earlier, even though this happened after the assignment.

[64] The substantive provisions of the SAA deal with the making of grants and financial awards,<sup>67</sup> with categories of persons who are entitled to grants and with applications for social assistance.<sup>68</sup> It also deals with financial awards to welfare organisations and persons.<sup>69</sup> As indicated earlier, other provisions deal with issues such as misspending, the repayment of grants, and false representations.

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<sup>65</sup> Only in sections 13 and 18 (on penalties) are these officials not mentioned.

<sup>66</sup> See the third column of Part 1 of the Schedule under the heading “Amendments”.

<sup>67</sup> Section 2.

<sup>68</sup> Section 3 above n 64 and section 4.

<sup>69</sup> Section 5.

[65] There is nothing in the provisions of the SAA indicating that the earlier mentioned possible distinction between section 126(3) matters and other matters could be made in a meaningful way. Most of the SAA appears to deal with the making available of funds and with the spending of such funds. In my view the whole of the SAA therefore indeed falls either outside or within the purview of section 126(3). The provisions of the SAA do not appear to deal with more than one matter, or more than one aspect of the same matter, to the extent that the difference between them might be relevant for the purposes of section 126(3).

[66] In *Western Cape Government: In re DVB Behuising*<sup>70</sup> this Court approached the matter on the basis that the say-so of the President to the effect that the whole of the Act had been assigned was not the end of the matter. On this basis, the judgment investigated whether or not its provisions had properly been assigned. This case is different. The SAA is not, on its face, readily severable into two parts, namely one part that is concerned with matters referred to in section 126(3)(a) and (b) and another part that is not. The President did not, as entitled to do, make any division of this kind. In the circumstances, we must proceed on the basis that, as the proclamation indeed states, the whole of the Act except for section 13 was assigned.

[67] From the conclusion that the subject-matter of the SAA is indeed a section 126(3) matter it necessarily follows that the applicant must succeed on the third of his four points. It is not necessary to deal with the fourth point.

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<sup>70</sup> Above n 12 at para 27.

*Conclusion*

[68] In view of the above mentioned it must be concluded that the proclamation is not valid in so far as it purported to assign the administration and amend provisions of the SAA in terms of section 235(6) and (8), read with section 126 and Schedule 6 of the interim Constitution. It follows that the High Court's finding of invalidity must be confirmed, for reasons different from those advanced by the Court.

*Suspension of invalidity*

[69] Submissions on behalf of the Minister of Justice and Constitutional Development were presented to this Court. As stated earlier, the first respondent did not participate in the proceedings before the High Court or this Court. The position of the national government was set out by the responsible minister as the second respondent. The second respondent did not oppose the relief sought by the applicant but asked for a suspension of the order of invalidity. In terms of section 172(1)(b) of the Constitution the order was indeed suspended until 1 April 2004 to allow the competent authority to correct the defect. According to the second respondent there was much uncertainty around the SAA, the applicant's complaints were valid, the capacity of the provinces to fulfil their obligations pursuant to the assignment of the SAA was limited, and the level of service delivery varied markedly in different provinces. Therefore a holistic solution is called for. To unify the entire system is a "Herculean task", for which the national government needed time. A solution was indeed in the pipeline and was embodied in two Bills before Parliament, namely the South African Social Security Agency Bill and the Social Assistance Bill, which were

anticipated to become law by 1 April 2004. On behalf of the Minister of Justice (representing the national government) it was pointed out to this Court that the Bills would not become law by 1 April 2004, due to certain developments. Therefore the Minister requested that the order of the High Court be amended to suspend the order of invalidity until the provisions of the South African Social Security Agency Bill and the Social Assistance Bill come into effect. Counsel on behalf of the applicant did not disagree with the order proposed, but submitted that a deadline be included. In my view suspension for a period of eighteen months would under these circumstances appear to be reasonable and fair to all interested parties.<sup>71</sup>

### *Costs*

[70] Costs must in this case follow the result, as far as the opposition by the fifth respondent is concerned. This also applies to the conditional application for leave to appeal against the dismissal of the conditional counter-application. The Minister of Justice did not ask for costs.

### *Order*

[71] It is therefore ordered that :

1. Paragraph 1 of the order of the High Court is confirmed.

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<sup>71</sup> Subsequent to the hearing the South African Social Security Agency Act 9 of 2004 (the South African Social Security Agency Bill) was assented to on 2 June 2004 and the Social Assistance Act 13 of 2004 (the Social Assistance Bill) was assented to on 10 June 2004. However, no submissions as to the possible consequences of these developments have been made to this Court by any of the parties. Therefore this matter is determined on the facts as put before the Court at the time of hearing.

2. In terms of section 172(1)(b) of the Constitution the order of invalidity is suspended for a period of eighteen months from the date of this order.
3. The conditional application for leave to appeal against the dismissal of the conditional counter-application is dismissed.
4. The fifth respondent pay the applicant's costs in the application for confirmation before this Court, as well as the costs related to the conditional application for leave to appeal against the dismissal of the conditional counter-application.

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, and Yacoob J, concur in the judgment of Van der Westhuizen J\*.

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\* Ngcobo J heard argument on this case, but was unable to participate in the final deliberations of the Court.

For the applicant:

W Trengove SC instructed by the Legal Resources Centre.

For the fifth respondent:

MJD Wallis SC and AM Stewart instructed by Larson Falconer Inc.

For the Minister of Justice  
and Constitutional Development

V Soni SC instructed by the State Attorney (Pretoria).