SACHS J ABRIDGED JUDGMENT (CONCURRING FOR DIFFERENT REASONS)

Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others

[197] I fully endorse the President's concern with maintaining constitutionalism, and support the overall tenor of his judgment. We have suffered far too much in the past from government by Proclamation not to look with the closest scrutiny at any attempt by Parliament to abdicate its legislative tasks and responsibilities, however well-motivated. I also agree fully with his reasoning and conclusions on the proper interpretation of Principle XXII. In broad terms, I furthermore support his approach and conclusions in relation to the 'manner and form' provisions of Sections 59, 60 and 61.

[198] I have reservations about his interpretation of Section 235(8) and feel that there is considerable merit in the arguments of Madala J. and Ngoepe J. Once an assignment of powers comes into the picture, as I think it should in this case, a literal reading of Section 235(8) would seem to authorise what the President did. A more purposive approach, however, locating the issue in the context of the general transitional arrangements for local government, tips the balance of my thought in favour of an interpretation that would narrow the scope of the President's discretion in the way mentioned by Chaskalson P.

[199] My major reservations relate to the manner in which Section 16A should be approached. In particular, without far more argument and reflection, I believe it would be dangerous to lay down rigid rules concerning fundamental questions relating to the characterization of the function and powers of Parliament. We unfortunately did not

have the benefit of hearing argument from the point of view of Parliament itself, and I regard the matter as largely unexplored. I have had the benefit of reading the judgment of Mahomed DP., which in a manner that is far more elegant and rigorous than the raw notes that follow, deals convincingly with Section 16A. I agree fully with this approach. Since my starting off point is somewhat different from his, however, and because of the importance of the subject, I will attempt to complement his judgment with some views of my own.

[200] In my opinion, the new Parliament should be seen as a dynamic and organic part of the new constitutional order. It is not merely the old Parliament 'cribbed, cabined and confined' by the new Constitution; it is a fundamental component of the new democratic dispensation ushered in by the Constitution and given its legitimacy and composition by the elections of April 27, 1994. Like the fundamental rights enshrined in Chapter 3, it is a feature of modern, democratic society, acknowledged, structured and integrated into the new constitutional order. The Constitution no more invents or creates Parliament than it invents or creates the right to life or the right to equality. It entrusts the legislative authority to Parliament in an open-ended way, without seeking to define specific terms of competence. The assumption is that Parliament will do what Parliaments do, namely, make laws for the governance of the country, and find the necessary funds for their implementation.

[201] I therefore regard Parliament as an institution with powers, functions and responsibilities established and defined by the interim Constitution, rather than as its 'creature'. Parliament can, if it follows certain procedures, amend the Constitution which gave it life; its powers and competence are not expressly defined in the way that the powers of local authorities, regarded as 'creatures of statute', have been. I would therefore consider it as starting the wrong way round to say that Parliament must seek in each and every case to find express or implied textual justification for its capacity to pass laws. It cannot be equated to a town council writ large, but should rather be regarded as the centrepiece of our constitutional democracy. My understanding of Parliament is therefore that it is a body entrusted with very broad powers and responsibilities which have to be exercised within a framework established by the Constitution. It is this framework, not the powers, that is expressly delineated; in each and every case it is necessary to enquire not whether

Parliament had the power to legislate - this is given to it in an unqualified way by Section 37 - but whether it exercised such power "in accordance with the Constitution", that is within the framework established by the Constitution.

[202] This framework has four express components, all of which, taken together, articulate the transformation from a system based on Parliamentary sovereignty to one founded on Parliamentary democracy in a constitutional state. The first element of the Constitutional framework is provided by Chapter 3, which establishes fundamental rights which cannot be infringed by Parliament; this is a substantive provision which impacts on the reach of legislation. Secondly, the legislative power of Parliament is limited both substantively and procedurally in relation to the power of the provinces (Section 126 read with Schedule 6 defines principles for deciding which law prevails in the case of conflict between national and provincial legislation; Sections 61 and 62(2) impose special 'manner and form' requirements in cases where certain fundamental features of provincial government are affected, or where a national law affects one province only). Thirdly, the powers of Parliament to amend the Constitution are subject to special procedures requiring a high majority. Fourthly, in its capacity as Constitutional Assembly responsible for drafting a new Constitution, Parliament is obliged to comply with the 34 Principles contained in Schedule 4. Fourthly, certain procedures affecting the functions of and relationship between the National Assembly and the Senate are laid down by the provisions of Sections 59, 60 and 61.

[203] As I read them, these latter sections are directed towards the manner in which 'Bills' are to be dealt with before they can become Acts of Parliament. I do not see them as purporting to prescribe the only way in which laws can be made. They simply refer to the manner in which legislation before Parliament has to be adopted, and being a constitutional prescription, they cannot be amended by Parliament itself without first amending the Constitution. I see nothing in these sections which deals directly or by necessary implication with the question of delegated legislative powers. The Act which inserted Section 16A into the Transitional Local Government Act (TLGA) was itself passed with due manner and form as an ordinary Bill of Parliament. Mr Seligson contended that because of its effect, it should have been subjected to the manner and form procedures prescribed in Sections 61 and 62(2). I am doubtful whether this

proposition is correct. The provisions of Section 235 read with the TLGA relating to the power of the President to issue proclamations, clearly and directly contemplate the restructuring of government in the provinces by direct Presidential action, which as a result would appear to fall outside the matter subject to special procedural protection as envisaged by Sections 61 and 62(2).

[204] The question at issue does not seem to me to be one of the manner and form in which Parliament acted or of the extent of its powers, but rather of its capacity to delegate any authority which it undoubtedly has. The Constitution contains no express limitation on the power of Parliament to pass a law delegating its legislative authority. If we look at the design and structure of the Constitution as a whole, however, I have no doubt that such a limit must be implied. Indeed, it flows from the very majesty of Parliament, not from its impotence. Certain tasks are entrusted to it and to it alone. Parliament has not only extensive powers but heavy responsibilities; under our Constitution, it is the centrepiece of the whole governmental structure. The President is chosen by Parliament from its ranks (Section 77), and Deputy-Presidents are also selected from amongst its members (Section 84). Unlike countries where there is a strict separation of power between the executive and the legislature, members of the cabinet in South Africa are directly accountable to Parliament for the handling of their portfolios (Section 92). Even in time of war and national emergency, the Constitution ensures that Parliament will continue to have a central role (Section 34). I would be inclined to go a step further. There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.

[205] The issue in this case is therefore not whether Parliament can find the authority to do what it did, but whether it can give away the authority which the Constitution expected it to exercise. I do not feel that the answer to this question can be found in simply distinguishing in a formal way between an Act of Parliament that extends plenary power to legislate (impermissible) and an Act of Parliament which extends power to make subordinate legislation (permissible). This will frequently be a matter of degree rather than substance. I would prefer to start my enquiry by looking at the fundamental purpose that Parliament was designed to serve. The reason why full legislative authority, within the constitutional framework mentioned above, is entrusted to Parliament and Parliament alone, would seem to be that the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision-making process, the involvement of civil society in relation to committee hearings, and the pluralistic interaction between different viewpoints which Parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution. It is Parliament's function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes. It is not its duty to attend to all the details of implementation. Indeed, if it were to attempt to do so, it would not have the time to serve its primary function. Hence the need for delegated legislation, which has become a feature of Parliamentary democracies throughout the world. The power to delegate should therefore be considered as an integral part of the legislative authority; it simply cannot legislate wisely if it tries to legislate too well.

[206] At the same time, if it is not to fail to discharge the functions entrusted to it by the Constitution, there must be some limit on the matters which it can delegate. I do not think it would be helpful to attempt to find a single formulation or criterion for deciding when delegation is permissible and when not, I feel that a complex balancing of various relevant factors has to be done, against a background of what Parliament is there for in the first case. There would seem to be a continuum between forms of delegation that are clearly impermissible at the one extreme, and those that are manifestly permissible at the other. To take tragic but telling examples from history, it would obviously be beyond the scope of Parliament to do what the Reichstag did when it entrusted supreme law-making powers to Adolph Hitler, or in the manner of a Roman Emperor, to declare itself a god, and its horse a consul. At the other extreme,

Parliament can, within the framework of clearly established criteria, delegate to other authorities or persons law-making power to regulate the implementation of its laws. There is however a large amount of delegation in between these two extremes that might or might not be permissible. As I have said, I do not think that any hard and fast rule or simple formula can be used to find a point on the continuum that automatically distinguishes between the two classes of case. To my mind, what would have to be considered in relation to each Act of Parliament purporting to delegate law-making authority, is whether or not it involved a shuffling-off of responsibilities which in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that Parliament has, should not be entrusted to any other agency. This will include an evaluation of factors such as the following:

a. The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;

b. The public importance and constitutional significance of the measure - the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;

c. The shortness of the time period involved;

d. The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

e. The extent to which the subject matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

f. Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.

[207] These items should in not in my view be regarded as a checklist to be counted off, but as examples of the interactive factors which have to be balanced against each other with a view to determining whether or not delegation in the circumstances was consistent with the responsibilities of Parliament. None of them, it should be emphasized, permit Parliament to infringe fundamental rights, violate protected spheres of provincial autonomy or in any other way deviate from the constitutional framework within which Parliament must function. Delegation takes place within, not outside the constitutional framework, but even within that framework it can be unconstitutional if it fails to satisfy the above criteria.

[208] Applying these criteria to the present case, I would note the following relevant factors: the special circumstances relating to the swift-moving and complex process of restructuring provincial and local government; the shortness of the time period involved, and the fact that Parliament was in recess for much of it; the fact that the delegatee was the President, who as head of a government of national unity, was required to involve the whole Cabinet including members of the opposition parties, in the process of making his decisions; the provisions of the Constitution itself contained in Section 235, especially sub-section 7, which clearly contemplated that presidential proclamations would be issued without the necessity of following normal Parliamentary procedures; the degree to which Parliament retained control in the sense that the legislative powers to be exercised under Section 16A had to be approved of by the appropriate committees of both the National Assembly and the Senate, and that Parliament as a whole retained the power by simple resolution to nullify them.

[209] On the other hand, there is the glaring fact that Section 16A provides no clear guidelines as to how the President is to exercise his legislative powers. In the circumstance mentioned above, my view is that if Parliament had established clear guidelines structured around and not going beyond the principles contained in Section 235 read with Section 241 of the Constitution, Section 16A would comfortably have passed muster. This would have been so even if such a provision had permitted the President to repeal or alter laws including the LGTA (as Section 235).

[210] Before concluding this judgment, I wish to mention a theme I have not been able to deal with, because the need for a rapid answer to the questions raised has outweighed the necessity for completeness. It relates to the topic of ‘reading down’. For the reasons I have given, I feel that Section 16A could not be read down so as to make it compatible with the defence of provincial autonomy in the manner argued for by Mr Seligson. I feel, however, that we have not done full justice to his arguments in this particular regard. More particularly, I would have wished to explore whether Sections 16A could not have been read down in another way, namely so as to respect the limitations on the powers which Parliament could permissibly delegate. Reading down is not an option; if it is possible, we must do it [Section 232(3)]. Like severance it is an important mechanism of judicial restraint, which permits constitutionality to

be upheld at minimum legislative and social cost. The matter was never argued in that way, so I raise the issue without attempting to decide it. I suspect that, like the debate on the powers of Parliament, the full implications of Section 232(2) will have to be considered in many future cases.