

**Managing the relationship between the national government
and the provinces.
A discussion of provincial environmental initiatives with reference to
section 24 of NEMA.**

Joanna Amy Eastwood

ESTJOA003

Registered for LLM in constitutional and administrative law

Minor dissertation supervised by Prof Christina Murray

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in constitutional and administrative law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM minor dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed: _____

Date: _____

I. INTRODUCTION

The fact that the South African Constitution¹ incorporates elements of a federal system suggests that it provides for a measure of provincial self-rule. Yet the ambit of this self-rule remains uncertain, with commentators asking whether provinces are to exist only as ‘a cog in the conveyor belt’, facilitating delivery on national government policy, or whether they have the potential to undertake their own initiatives.²

The Constitution favours a co-operative approach to federalism over a divided or competitive approach. As part of this, the national government and the provinces are given overlapping powers in a wide range of functional areas set out in Schedule 4 of the Constitution. Unlike the German federal system, which prevents the *Lander* from legislating in a functional area of concurrent competency once it is regulated by federal legislation, the South African Constitution allows the provinces to legislate in these circumstances.³ Thus, the functional areas in Schedule 4 offer potential opportunities for provincial initiatives.

The functional area of the environment is included in Schedule 4. Relying on its concurrent competency to legislate in this functional area, Parliament passed the National Environmental Management Act⁴ in 1998. Generally referred to as ‘NEMA’, the Act seeks to promote co-operative governance in the regulation of the environment. Among other things, it establishes a new regulatory system for activities that have the potential to cause adverse environmental impacts.⁵ These activities may not be undertaken without an environmental authorisation. Section 24 of NEMA empowers the national Minister of Environmental Affairs and Tourism (‘the Minister’) and the Executive Council member responsible for the environment in each province (‘the MEC’) to list the activities requiring authorisation and to identify the ‘competent authority’ tasked with issuing authorisations.⁶ None of the MECs have exercised this power yet. However, it is apparent from recent draft regulations published under NEMA, that the Minister intends to identify provincial authorities as competent

¹ Constitution of South Africa, 1996.

² R Simeon and C Murray ‘Multi-Sphere Governance in South Africa: An interim assessment’ (2001) 31 *Publius: The Journal of Federalism* 65 at 75.

³ Section 146 of the Constitution regulates the enforceability of national and provincial legislation in a Schedule 4 functional area.

⁴ Act 107 of 1998.

⁵ The new regulatory system is discussed in more detail in Part II of this dissertation. It is intended that this regulatory system would replace the system of environmental authorisations that is currently provided for in terms of sections 21 and 22 of the Environment Conservation Act 73 of 1989.

⁶ The MEC may only exercise this power with the concurrence of the Minister.

authorities in relation to the activities identified by the Minister.⁷

The Western Cape Province ('the Province') has expressed concerns about the regulatory system provided for in section 24 of NEMA and is in the process of drafting provincial legislation in order to address these concerns.⁸ An important objective of the proposed provincial legislation is the establishment of an integrated application and authorisation procedure for activities that currently require land use approval, heritage approval or environmental authorisation.⁹ Thus, the proposed provincial legislation would regulate many of the activities for which environmental authorisation is required under NEMA and, in this respect, it would give rise to duplication. If the operation of the regulations made under section 24 of NEMA is not suspended in the Province, the Province would be placed in the onerous position of having to implement parallel regulatory systems that overlap in the area of environmental authorisations.

This dissertation uses the example of NEMA and the proposed provincial legislation to explore several constitutional issues and is divided into a number of parts. Part II describes the regulatory system provided for in section 24 of NEMA in more detail. Part III discusses the implementation of section 24 of NEMA, with reference to section 85 and section 125 of the Constitution. The latter two sections determine which sphere of government is responsible for the implementation of national legislation that falls within the functional areas listed in Schedule 4 of the Constitution. A related question is whether the national Minister can allocate all the responsibility for implementation of section 24 of NEMA to the provinces. This is what the draft regulations published by the Minister seeks to achieve. Thus, part III of this dissertation considers the constitutionality of the arrangement set up by the Minister in terms of section 24 of NEMA.

Part IV of this dissertation provides some background to the proposed provincial legislation and the duplication that would be caused by its simultaneous operation with section 24 of NEMA in the Province. In light of the potential problem of duplication,

⁷ Two sets of draft regulations have been published for comment under section 24 of NEMA. The second set of draft regulations, which superseded the first, is entitled 'Proposed regulations under section 24(5) of the National Environmental Management Act, 1998 (Act No. 107 of 1998) as amended' was published in General Notice 12 of 2005 in *Government Gazette* 27163 of 14 January 2005.

⁸ One of the concerns about the regulatory system in NEMA is that it does not provide sufficient guidance on what constitutes sustainable development, in order to guide decision makers issuing environmental authorisations. In addition, NEMA adopts an approach of seeking to list all the activities that may have a detrimental impact on the environment. While this approach encourages certainty, it allows certain activities to slip through the cracks because their impacts were not foreseen. A further concern is the lack of integration between environmental authorisations, land use authorisations and heritage approvals, which is at odds conceptually with the notion of the environment as one integrated whole. See part IV of this dissertation for further discussion in this regard.

⁹ In addition, the proposed provincial legislation would ensure that planning instruments such as municipal Integrated Development Plans and provincial Spatial Development Frameworks are developed in a manner that furthers the objectives of sustainable development. The provincial legislation is discussed in more detail in Part IV of this dissertation.

part IV considers the application of section 146 of the Constitution, which provides a mechanism for resolving conflicts between national and provincial legislation in a Schedule 4 functional area. In particular, it explores whether ‘conflict’ - when used in the context of section 146 - includes duplication between national and provincial legislation.

The principles of co-operative government set out in Chapter 3 of the Constitution are essential in a system of co-operative federalism. The requirements of consultation and co-operation must be brought to bear on the implementation of national legislation such as NEMA and the avoidance of duplicated regulatory systems. The application of co-operative governance principles in this context is discussed in part V.

II. CURRENT REGULATORY SYSTEM FOR ENVIRONMENTAL AUTHORISATIONS

(1) Pre-constitutional system of environmental authorisations

The Environment Conservation Act¹⁰ (‘the ECA’) is national legislation that commenced in 1989, before the transition to a constitutional democracy.¹¹ It currently regulates activities that have the potential to impact detrimentally on the environment but it will shortly be replaced by the regulatory system provided for in NEMA.

Section 21 of the ECA empowers the Minister to identify activities that may have a significant detrimental effect on the environment. Section 22 prohibits any person from undertaking an identified activity without a written authorisation issued by ‘the Minister or by a competent authority or a local authority or an officer’. Furthermore, section 22 provides that the competent authority, local authority or officer shall be designated by the Minister by notice in the *Government Gazette*.

The Minister exercised the power to identify activities under section 21 of the ECA only in 1997.¹² In that same year, the Minister also designated the competent authority in each province, acting in terms of his powers under section 22 of the ECA. The relevant portion of the notice designating the competent authority reads as follows:

‘[I] hereby, in terms of section 22(1) of the Environment Conservation Act, 1989 ... designate the competent authority, as defined in section 1 of the said Act ... in each province as an authority which may issue a written authorisation to undertake or cause to undertake an [identified] activity.’¹³

¹⁰ Act 73 of 1989.

¹¹ The ECA was assented to on 1 June 1989 and commenced on 9 June of the same year.

¹² The list is contained in regulations published in GN R1182 in *Government Gazette 18261* of 5 September 1997.

¹³ Government Notice R1184 in *Government Gazette 18261* of 5 September 1997.

The notice refers to the definition of ‘competent authority’ in section 1 of the ECA. That definition reads as follows:

“**competent authority**” in so far as a provision of this Act is applied in or with reference to a particular province, means the competent authority to whom the administration of [the ECA] has under section 235(8) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993) been assigned in that province.’

Unfortunately, the assignments made under section 235(8) of the Interim Constitution¹⁴ dealt with other sections of the ECA and did not provide for the assignment of section 22.¹⁵ Consequently, the designation of the provinces by the Minister is incomplete, as it relies upon the provinces having been assigned the authority to administer section 22 of the ECA. The Constitutional Court noted this oversight in the *Kyalami Ridge* case.¹⁶

In practice, the MEC responsible for environmental matters in each province is regarded as a competent authority for the purposes of issuing authorisations under section 22 of the ECA.¹⁷ While this practice could be challenged, I am not aware of any reported cases in which this argument has been relied upon to set aside an authorisation issued by a provincial department. For present purposes, the important point is that the provinces currently administer and implement section 22 of the ECA in all cases other than those where regulations made under the ECA require that the Minister must consider an application for authorisation.¹⁸

(2) The promulgation of NEMA after the commencement of the Constitution

In 1998, Parliament passed NEMA, which repeals sections 21 and 22 of the ECA with effect from a date to be published in the *Government Gazette*.¹⁹ NEMA stipulates that the date fixed for the repeal to take effect may not be prior to the date on which

¹⁴ Constitution of South Africa Act 200 of 1993.

¹⁵ In this regard, see Proc. R29 in *Government Gazette 16346* of 7 April 1995 and Proc. R43 in *Government Gazette 17354* of 8 August 1996.

¹⁶ *Minister of Public Works and others v Kyalami Ridge Environmental Association and another* 2001 (3) SA 1151 (CC) at para 77. In the case, the oversight was not material, as the Minister exercised the power to issue an authorisation.

¹⁷ See, for example, *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 130 where it is stated that it is common cause that the respondent is a competent authority within the meaning of section 22 of the ECA. The court states the basis for this position as follows: ‘Schedule 4 of the Constitution ... has determined the environment as a functional area in which national and provincial legislature have concurrent competence [*sic*]. The respondent is therefore the competent organ of state and custodian of the environment in the Gauteng province.’

¹⁸ This is in terms of regulation 4(3) of the ‘Regulations regarding activities identified under section 21(1)’ published in GN R1183 in *Government Gazette 8261* of 5 September 1997. The instances in which the Minister must consider an application include where the activity for which authorisation is sought has direct implications for national environmental policy or international environmental commitments.

¹⁹ Section 50(2) of NEMA repeals sections 21 and 22 of the ECA with effect from a date to be published in the *Government Gazette*.

regulations are made in terms of section 24 of NEMA.²⁰ Accordingly, the system of environmental authorisations provided for in section 24 of NEMA will replace the equivalent provisions of the ECA once final regulations are published under NEMA.

The primary purpose of NEMA is to give effect to the environmental right in section 24 of the Constitution.²¹ It seems uncontroversial to assume that NEMA was adopted by Parliament in terms of its competency to legislate in the functional area of 'environment'. Certainly, the discussion of specific provisions of NEMA that follows makes it clear that NEMA is concerned with the protection and management of the environment. The national government shares its legislative competency in the functional area of the environment with the provinces, in terms of part A of Schedule 4 to the Constitution.

NEMA is national framework legislation that, among other things, seeks to promote 'co-operative environmental governance'.²² It invokes a range of general mechanisms to achieve this objective. Firstly, section 2 of NEMA sets out a substantial list of environmental management principles that must be applied by organs of state when they implement NEMA and any other legislation providing for the protection or the management of the environment. Furthermore, NEMA establishes institutions, such as the Committee for Environmental Co-ordination,²³ which are intended to promote co-operative governance and conflict resolution. NEMA also requires specified departments in the national and provincial spheres of government to prepare environmental management plans and environmental implementation plans.²⁴ This is intended to promote co-ordination of environmental functions. So, for example, NEMA requires each provincial government to ensure that the municipalities situated in that province comply with the applicable environmental implementation and environmental management plans.²⁵ Moreover, NEMA creates a general duty to take reasonable measures to prevent pollution or degradation of the environment or, in certain specified circumstances, to minimise and rectify environmental pollution or degradation.²⁶ NEMA also provides general mechanisms for enforcing compliance with its provisions and those of other environmental management Acts.²⁷

²⁰ Section 50(2) of NEMA.

²¹ The preamble to NEMA incorporates section 24 of the Constitution.

²² See the preamble to NEMA.

²³ Section 7 of NEMA establishes the Committee and sets out its objects and functions.

²⁴ See section 16 of NEMA.

²⁵ Section 16(4).

²⁶ This duty is imposed by section 28(1) of NEMA. The lesser duty to minimise and rectify (rather than prevent) pollution or degradation only arises where the pollution or degradation either cannot be prevented or is authorised by law.

²⁷ A substantial array of compliance and enforcement mechanisms is provided for in Chapter 7 of NEMA.

In the context of a general framework Act, Chapter 5 of NEMA is something of an anomaly. It lays down a specific regulatory system for identified activities that require environmental authorisation and geographical areas in which specified activities require authorisation. Section 24 is central to the regulatory system provided for in Chapter 5. The following subsections of section 24 have particular relevance:

‘(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on the environment of listed activities must be considered, investigated, assessed and reported on to the competent authority charged by this Act with granting the relevant environmental authorisation.

(2) The Minister, and every MEC with the concurrence of the Minister, may identify –
 (a) activities which may not commence without environmental authorisation from the competent authority;
 (b) geographical areas based on environmental attributes in which specified activities may not commence without environmental authorisation from the competent authority....

(5) The Minister, and every MEC with the concurrence of the Minister, may make regulations consistent with subsection (4) -
 (a) laying down the procedure to be followed in applying for, the issuing of and monitoring compliance with environmental authorisations....

(6) An MEC may make regulations in terms of subsection (5) only in respect of listed activities or areas in respect of which the MEC is the competent authority.’

The power to identify activities and geographical areas is discretionary – section 24(2) provides that the Minister and each MEC ‘may’ identify activities and areas. It is surprising that Parliament regards the regulatory system contemplated by section 24 as optional.²⁸ Furthermore, the fact that an MEC requires the concurrence of the Minister to exercise its powers under NEMA raises questions regarding the consistency of this provision with the constitutional framework for the implementation of national legislation. This is discussed further in part III of this dissertation.

Authorisations for identified activities and activities within identified areas are issued by a ‘competent authority’, which is defined as follows:

“**competent authority**” in respect of a listed activity or specified activity, means the organ of state charged by [NEMA] with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity.’²⁹ (Emphasis added.)

²⁸ However, it is arguable that the Minister and the MEC have a duty to implement section 24 of NEMA in order to give effect to the constitutional right to the protection of the environment contained in section 24 of the Constitution

²⁹ Section 1(1) of NEMA.

This definition is misleading, as NEMA does not charge any organ of state with these duties, except in certain instances where it stipulates that the Minister must be identified as the competent authority.³⁰ Instead, section 24 provides as follows:

‘When listing activities in terms of section 24(2) the Minister, or the MEC with the concurrence of the Minister, must identify the competent authority responsible for granting environmental authorisations in respect of those activities.’³¹ (Emphasis added)

The concurrence of the Minister is required before an MEC may identify a competent authority. Again, this raises questions about the appropriateness of this approach in the overall constitutional framework. These questions are discussed further in part III.

The recent draft regulations published under NEMA by the Minister identify provincial authorities as competent authorities tasked with issuing environmental authorisations for activities listed in the regulations.³² Specifically, the regulations provide that:

‘[t]he competent authority shall be the environmental authority in the province in which the activity is to be undertaken unless it is an application for an activity contemplated in section 24C(2) of the Act, in which case the competent authority shall be the Minister [of Environmental Affairs and Tourism].’³³ (Emphasis added.)

The ‘environmental authority’ referred to above is not defined in the regulations or in NEMA. It is a vague term and could refer either to the department responsible for environmental matters in each of the provinces or to the MEC. What is clear is that the Minister has allocated responsibility for the implementation of section 24 to the provinces, within a framework of identified activities determined by the Minister. Furthermore, the draft regulations contain extensive directions about the way in which this responsibility must be exercised.³⁴ Presumably, compliance with the regulations is to be achieved using provincial resources and institutions, in the absence of any contrary indications in NEMA or the regulations.

III. ASSESSMENT OF SECTION 24 OF NEMA WITHIN THE CONSTITUTIONAL FRAMEWORK

As noted above, section 24 of NEMA empowers both the Minister and each MEC to identify activities that require environmental authorisation and geographical areas in which specified activities require authorisation. Furthermore, section 24 empowers the

³⁰ These are set out in section 24C(2) and include, by way of example, where an activity has implications for national environmental policy.

³¹ See section 24C(1) of NEMA.

³² See note 7 for publication details of the draft regulations.

³³ Regulation 7(7) of the second set of draft regulations (note 7).

³⁴ In particular, the draft regulations specify the form of applications for authorisation, the types of considerations that may or must be taken into account by the competent authority and the conditions upon which authorisations may be issued.

Minister and each MEC to identify a competent authority that is responsible for issuing environmental authorisations. While none of the MECs have exercised their powers under section 24, draft regulations published by the Minister³⁵ identify a range of activities and designate the ‘environmental authority in each province’ as the competent authority.

This raises several interesting questions. The first is whether the allocation of responsibility to provinces by the Minister is consistent with section 125 of the Constitution, which addresses the implementation of national legislation by the provincial executives. Section 125 must be read together with section 85 of the Constitution,³⁶ as well as the specific provisions of section 24 of NEMA. The latter section provides an indication of where Parliament intended to place the responsibility for the implementation of the regulatory system contained in Chapter 5. A further issue is whether the identification of provinces by the Minister is consistent with the constitutional framework, which contemplates the allocation of powers and functions by means of delegation, agency and assignment. This question requires consideration of what the concepts of delegation, agency and assignment mean, within the context of the Constitution, and whether the act of identification fits within one of these concepts.

These questions concern the relationship between the national government and the provinces, which must be looked at within the framework of multi-sphere co-operative government that is established by the Constitution.

(1) Constitutional allocation of responsibility for the implementation of NEMA

(a) Broad conceptual background to the constitutional framework

Before looking at the specific provisions of the Constitution, there are some preliminary observations to be made about the constitutional context and the broad choices that had to be made between different models of government. The establishment of a constitutional democracy in South Africa was preceded by much debate about whether the new democratic government should be unitary or federal.³⁷ This sounds deceptively simple. In fact, as Watts notes, there is no single model of either system that is universally applicable.³⁸ Rather, there is much variation in both federal and unitary systems regarding the ‘degree of decentralisation and the characteristics of the central

³⁵ Regulation 7(7) (note 7).

³⁶ Section 85 allocates responsibility to the national executive for the implementation of national legislation.

³⁷ Those favouring a unitary, strongly centralised state were led by the African National Congress, which argued that the apartheid regime and its establishment of ‘independent’ Bantustans had discredited federalism. Those political parties representing minorities or other groups seeking greater political autonomy advocated federalism. The Inkatha Freedom Party exemplified this in relation to the Zulu people. See Simeon and Murray (note 2) at 66.

³⁸ R Watts ‘Is the New Constitution Federal or Unitary?’ in B De Villiers (ed) *Birth of a Constitution* (1994) 75 at 75.

institutions'.³⁹ In general though, a 'federal political system' refers to a type of political arrangement that provides for a combination of shared rule and regional self-rule.⁴⁰ The label 'federal system' can accommodate a range of more specific government structures, including a federation, which is the purest example of a federal system.⁴¹

Although there is no closed list of federal systems, a clear distinction can be drawn between divided federalism and integrated federalism. The divided federalism model sets up the central and regional governments as entirely separate, independent political institutions with clearly divided responsibilities that provide for minimal or no overlapping or concurrent powers and functions.⁴² Interactions between these institutions involve bargaining in a manner similar to that employed by independent countries negotiating with one another.⁴³ The clearest manifestation of divided federalism is Canada.⁴⁴ In contrast, the model of integrated federalism (on which the German system is based) is designed to integrate and bring together central and regional politics at all levels and confers wide areas of concurrent powers on the central and regional governments.⁴⁵ This arrangement requires a high degree of consensus-building and co-operative behaviour to achieve co-ordination and avoid duplication of effort.⁴⁶

Possibly due to the political differences of opinion regarding whether South Africa should be constituted as a unitary or federal democracy, no reference to either term appears in the Interim Constitution or the final Constitution. Watts assesses the Interim Constitution against the criteria of federal systems and federations and finds that it falls within the broad category of a 'federal political system' and that it displays some elements typical of a federation.⁴⁷ However, he notes that other elements of the system are more consistent with a 'regionalised unitary system': these elements include the distribution of legislative and executive powers and financial resources between the national and provincial governments.⁴⁸ For this reason, Watts concludes that the Interim

³⁹ Ibid.

⁴⁰ Watts (note 38) at 76.

⁴¹ A federation is one of the strongest or purest examples of a federal state. It does not require the regional governments to be subordinated to the central government. In contrast, the constitutional relationship between central and regional governments in a unitary system involves a degree of subordination of regional governments to the national one. See Watts (note 38) at 77.

⁴² R Simeon 'Considerations on the Design of Federations: The South African Constitution in Comparative Context' (1998) 13 *SA Public Law* 42 at 51.

⁴³ Ibid.

⁴⁴ Simeon (note 42) at 54.

⁴⁵ Simeon (note 42) at 55.

⁴⁶ Ibid.

⁴⁷ Watts (note 38) at 85.

⁴⁸ Ibid.

Constitution creates a hybrid system that, while predominantly displaying the features of a federation, contains elements of a more centralised, unitary system.⁴⁹

The leaning towards federalism is echoed in the Constitutional Principles, which underpin the final Constitution.⁵⁰ In particular, Principle XIX provides that national and provincial government shall have both exclusive and concurrent powers and Principle XXI states that decisions shall be taken at the level that is ‘most responsible and accountable’, thus incorporating the principle of subsidiarity.⁵¹ These two Principles, taken together with elements of the other Principles, are regarded by many as providing for a federal structure in the South African constitutional democracy.⁵² Indeed, the general consensus is that the final Constitution does contain many elements of the federal systems found in other jurisdictions and therefore it is regarded as creating a federal system but one that is highly centralised.⁵³ In the *First Certification* judgment,⁵⁴ the Constitutional Court highlighted the fact that the Constitutional Assembly chose a system of co-operative government in terms of which important functional areas are allocated concurrently to the national and provincial levels of government.⁵⁵ This is an important aspect of the Constitution that has a bearing on the manner in which the powers and functions of the national and provincial governments should be exercised.

(b) The implementation of NEMA in the context of multi-sphere government

Understanding the South African constitutional system in the context of the available choices is helpful but it is no substitute for an analysis of the system itself. The Constitutional Court noted in the *First Certification* judgment that the provinces are not sovereign states: they were established by the Interim Constitution and derive their powers from it.⁵⁶ Similarly, the Constitutional Principles that provided a foundation for the drafting and certification of the final Constitution do not intend to create sovereign

⁴⁹ Watts (note 38) at 86 and 88. Watts revised his analysis of the Interim Constitution with reference to the amendments effected in 1994. He concluded that the amendments made the Constitution more federal in nature; however, he reiterated the conclusions drawn in his analysis of the initial text to the effect that the national government retains strong powers including the ability to encroach upon areas of provincial competence, within certain limits. Thus, it is aligned with strongly centralised federations elsewhere.

⁵⁰ These 34 Principles are referred to repeatedly in the *First Certification* judgement and the full text of the Principles is appended to the judgment. See *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (1) SA 744 (CC)* at para 287.

⁵¹ Simeon and Murray (note 2) at 67.

⁵² *Ibid.* And see K Hailbronner and C Kreuzer *Implementing Federalism in the Final Constitution of the Republic of South Africa* (1995) Konrad Adenauer Stiftung at 7, referred to by Simeon and Murray (note 2) at 67.

⁵³ See Simeon (note 42) at 71 where it is stated that South Africa has a multi-level system of government that incorporates many elements of other federal constitutions. See further, Simeon and Murray (note 2) at 65.

⁵⁴ The *First Certification* judgment (note 50).

⁵⁵ The *First Certification* judgment (note 50) at para 287.

⁵⁶ *First Certification* judgment (note 50) at para 270.

and independent provinces. Rather, they intend the final Constitution to create one sovereign state and they envisage that the provinces will have only those powers and functions allocated to them by the Constitution.⁵⁷ Thus, the Constitution is the starting point when seeking to clarify the relationship between the national government and the provinces and the role of the provinces in the implementation of legislation.

Chapter 1 of the Constitution begins with an affirmation of several important principles. First, it states that South Africa is one sovereign state,⁵⁸ rather than a confederation of sovereign regions. This hints at a centralised approach to federalism. Second, Chapter 1 confirms the application of the rule of law and the position of supremacy of the Constitution in the legal system.⁵⁹ Further, perhaps self-evidently, it states that all obligations imposed by the Constitution must be fulfilled.⁶⁰ The emphasis on a unitary state in Chapter 1 is not absolute.⁶¹ It must be read in context with other constitutional provisions, which demonstrate that government power is not confined to national institutions. In particular, section 40 records that government is ‘constituted as national, provincial and local spheres of government’ and that these spheres are ‘distinctive, interdependent and interrelated’.⁶² Simeon notes that the terminology of ‘spheres’ is deliberately chosen, as it suggests that the South African government is a single regime acting through multiple institutions.⁶³ In contrast, the more commonly used terms ‘levels’ and ‘orders’ of government denote a divided or competitive sovereignty that is inconsistent with a co-operative approach to government.⁶⁴ It follows that the conferral of powers on different spheres of government is coupled with an obligation to respect the requirements of co-operative government set out in Chapter 3 of the Constitution: all other constitutional provisions must be read and understood in light of those requirements.⁶⁵ These requirements are discussed further in part V of this dissertation.

In keeping with a co-operative approach to government, the Constitution allocates wide areas of concurrent or shared powers to the national and provincial spheres of

⁵⁷ *First Certification* judgment (note 50) at para 259.

⁵⁸ Section 1 of the Constitution.

⁵⁹ Section 1(c) and 2 of the Constitution.

⁶⁰ Section 2 of the Constitution.

⁶¹ That emphasis is evident mainly from references to a sovereign state. Cameron AJ makes the point that this emphasis is not absolute, with reference to the provisions of Chapter 3 of the Constitution, in the *Liquor Bill* case. (See *Ex parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill 2000* (1) BCLR 1 at para 40.

⁶² Section 40(1) of the Constitution.

⁶³ Simeon (note 42) at 45 (fn 11).

⁶⁴ *Ibid.* Simeon does not actually suggest that the idea of divided sovereignty is inconsistent with the principle of co-operative government. However, this conclusion is a corollary of his point that the reference to ‘spheres’ is more consistent with the constitutional principle of co-operative governance.

⁶⁵ *Liquor Bill* case (note 61) at para 40 and para 41.

government in addition to the exclusive powers of each sphere.⁶⁶ There are two broad categories of powers conferred on the spheres of government: legislative power and executive power.

Self-evidently, legislative power is the power to pass laws. Parliament and the provincial legislatures share concurrent competence to make legislation in the functional areas listed in Schedule 4 of the Constitution.⁶⁷ Those functional areas include the environment.⁶⁸ Parliament and the provincial legislatures also have concurrent legislative power to make legislation ‘with regard to a matter that is reasonably necessary for or incidental to the effective exercise of a power concerning any matter listed in Schedule 4’.⁶⁹

Furthermore, provincial legislatures have the power to make legislation in the functional areas listed in Schedule 5 of the Constitution.⁷⁰ This power is virtually exclusive, subject to one proviso. The Constitution permits Parliament to encroach on the exclusive provincial legislative competency in relation to Schedule 5 matters by passing legislation with regard to a functional area listed in that Schedule in prescribed circumstances.⁷¹ These circumstances include where the national legislation is necessary to establish minimum standards required for the rendering of services or to maintain essential national standards. This demonstrates the fact that the Constitution intends the national government to play the central role in setting standards that apply uniformly. This was noted in the *Premier, Western Cape* case,⁷² which referred to the constitutional structure as being one that makes provision for framework legislative provisions to be set by the national sphere of government.⁷³ The same intention is evident in section 146 of the Constitution.⁷⁴

Provincial legislatures may pass legislation in relation to a matter outside of the functional areas listed in Schedules 4 and 5 only if the matter has been expressly assigned to the provinces by national legislation.⁷⁵ In contrast, Parliament has plenary

⁶⁶ Simeon (note 42) at 55 to 56.

⁶⁷ Section 44(1)(a)(ii) confers this power on Parliament and section 104(1)(b)(i) does the same for provinces.

⁶⁸ The functional area of ‘environment’ is listed in Part A of Schedule 4.

⁶⁹ Section 44(3) confers this legislative competency on Parliament. Section 104(1)(b)(i) read with section 104(4) confers these legislative competencies on provinces.

⁷⁰ Section 104(1)(b)(ii) of the Constitution.

⁷¹ Section 44(2) of the Constitution.

⁷² *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC).

⁷³ At para 50.

⁷⁴ For example, section 146(2)(b) provides for the national legislation to prevail over the provincial legislation where the national legislation deals with a matter that provides uniformity and provides that uniformity by establishing, among other things, norms and standards or frameworks. Section 146 is discussed further in part IV of this dissertation.

⁷⁵ Section 104(2)(b)(iii) of the Constitution.

legislative powers and may make legislation in any functional areas not listed in Schedule 4 or Schedule 5.⁷⁶

The second category of constitutional powers is executive power, which encompasses activities such as the preparing and initiating of legislation, the development of policy, the co-ordination of government departments and the implementation of legislation and policy.⁷⁷ In the national sphere of government, executive authority is vested in the President who exercises it collectively with the other Cabinet members.⁷⁸ The ways in which executive authority may be exercised are set out in section 85 of the Constitution.⁷⁹ One important way in which the national executive exercises its authority is by implementing all national legislation (including legislation pertaining to Schedule 4 functional areas) ‘except where the Constitution or an Act of Parliament provides otherwise’.⁸⁰ The Constitution does provide otherwise – this is evident from section 125 of the Constitution, which regulates provincial executive authority.

Provincial executive authority is vested in the Premier who exercises the authority with the other members of the Executive Council.⁸¹ The ways in which provincial executive authority may be exercised are set out in section 125 of the Constitution.⁸² In terms of section 125(2)(b), provincial executive powers include the implementation of all national legislation within the functional areas listed in Schedules 4 and 5 ‘except where the Constitution or an Act of Parliament provides otherwise’.⁸³ Therefore, section 125(2)(b) limits the ambit of the executive authority conferred on the national executive in terms of section 85. While section 85 confers a general authority on the national

⁷⁶ This is evident from the reference to ‘any matter including ...’ in section 44(1)(a)(ii).

⁷⁷ In this regard, see *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 1999 (10) BCLR 1059 at para 139. This is also evident from the types of activities listed in relation to national and provincial executive powers in sections 44 and 104 of the Constitution respectively.

⁷⁸ Section 85(1) and (2) of the Constitution. Section 92(2) of the Constitution provides that members of the Cabinet are ‘accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.’

⁷⁹ The fact that it is a closed list is evident from section 85(2)(e), which provides for the performance of any other executive function provided for in the Constitution or national legislation. In other words, there is no source of residual executive powers and functions other than the Constitution and national legislation.

⁸⁰ Section 85(2)(a) of the Constitution. The reference to ‘national legislation’ in section 85(2)(a) is not qualified in any way. In addition, there is no other reference to the implementation of national legislation in section 85. Thus, it seems clear that the reference to ‘national legislation’ includes legislation made under the concurrent competency to legislate in Schedule 4 areas.

⁸¹ Section 125(2) of the Constitution.

⁸² Section 125(2) of the Constitution. The fact that it is a closed list is evident from section 125(2)(g), which provides for the performance of any other executive function assigned to the provincial executive in the Constitution or national legislation. Note that this is distinct from the powers conferred on the Premier in terms of section 127 of the Constitution.

⁸³ Section 125(2)(a) and (b) of the Constitution.

executive in relation to the implementation of all national legislation, section 125(2)(b) confers a more specific power on provincial executives in relation to a subset of national legislation – namely national legislation within Schedule 4 and 5 functional areas.

Like section 85, section 125(2)(b) is subject to any qualification contained in the Constitution. An express qualification is contained in section 125(3) of the Constitution, which provides that the provinces must have the administrative capacity to implement the national legislation in question.⁸⁴ A further tacit qualification of the provincial power to implement national legislation is that the provinces must have the necessary financial resources.⁸⁵ Because provinces have very limited powers to raise revenue,⁸⁶ they are reliant on their allocated share of revenue raised by the national government. Chapter 13 of the Constitution entitles provinces (and local government) to an equitable share of the revenue raised by the national government in order to facilitate the performance of allocated functions and the provision of basic services.⁸⁷ Chapter 13 also provides for the provinces (and local government) to receive further allocations from national government revenue on a conditional or unconditional basis although there is no entitlement to these allocations.⁸⁸ The equitable division of national revenue and the distribution of further allocations are provided for annually in the Division of Revenue Bill, which specifies the share of national revenue allocated to each sphere of government.⁸⁹ The Bill is passed in terms of section 76 of the Constitution.⁹⁰ Consequently, the provinces have the opportunity to deliberate on its provisions through their collective representation in the National Council of Provinces ('NCOP').

⁸⁴ Section 125(3) of the Constitution. A dispute about whether a province has the necessary administrative capacity must be referred to the National Council of Provinces ('NCOP') for resolution in terms of section 125(4). Furthermore, the national government is obliged to assist provinces in developing the administrative capacity for the effective exercise and performance of all their executive powers and functions in terms of section 125(3).

⁸⁵ Returning to the identification of provinces under section 24 of NEMA, discussed in part II of this dissertation, it seems unlikely that the provinces would be able to rely on either of these qualifications. This is due to the fact that the provinces are currently responsible for the implementation of section 22 of the ECA, which is soon to be replaced by section 24 of NEMA. Both Acts provide for a regulatory system of environmental authorisations: presumably the administrative and financial resources required to implement NEMA are much the same as those currently employed in relation to the ECA.

⁸⁶ In terms of section 228(1) of the Constitution, provinces are prohibited from imposing taxes, levies or duties that fall into the category of income tax, value-added tax, general sales tax, customs duty or rates on property. The entitlement to impose rates on property is reserved to local government in terms of section 229(a), which is also permitted to levy surcharges on fees for services provided by or on behalf of the municipality. By implication, the entitlement to impose all other forms of rates, taxes and levies referred to in section 228(1) is reserved to the national government.

⁸⁷ Section 227(1)(a) of the Constitution.

⁸⁸ Section 227(1)(b) of the Constitution.

⁸⁹ Section 9 of the Intergovernmental Fiscal Relations Act 97 of 1997 provides for the annual introduction of a Division of Revenue Bill in Parliament. See also section 214(1)(b) of the Constitution.

⁹⁰ This appears from section 76(4) read with section 77(1)(d) of the Constitution.

Furthermore, like section 85, section 125(2)(b) is subject to any qualification contained in an Act of Parliament. Determining whether an Act of Parliament qualifies the position in terms of section 85 read with 125(2)(b) can only be determined on a case-by-case basis, with reference to a specific Act. In the present context, the relevant Act is NEMA. As noted in part II of this dissertation, section 24 of NEMA puts in place a regulatory system in relation to activities that may impact detrimentally on the environment. Pursuant to this, section 24 empowers both the Minister and the MEC to do the following:

1. identify activities that require environmental authorisation and geographical areas in which specified activities require authorisation;⁹¹
2. identify the competent authority responsible for granting environmental authorisations in respect of those activities;⁹² and
3. make regulations that prescribe, among other things, the procedure applicable to applications for authorisation, the issuing of authorisations and the monitoring of compliance with the conditions of authorisations.⁹³

How does section 24 fit into the framework of section 125(2)(b) and, in particular, the meaning of the phrase ‘an Act of Parliament provides otherwise’? It seems clear that section 24 of NEMA intends to empower both the national and provincial executives to implement its provisions. Therefore, it provides an exception to the default position under section 85 of the Constitution read with section 125, in terms of which the provincial executives are given the authority to implement national legislation in the functional area of the environment, to the exclusion of the national executive.

However, executive authority for the implementation of NEMA is not evenly distributed in terms of section 24, as the powers conferred on the MECs are limited. In particular, each MEC may exercise the power to identify activities, areas and competent authorities only with the concurrence of the Minister. There is a clear distinction between a requirement to consult with the Minister and a requirement to obtain the concurrence of the Minister. The latter allows the Minister to control the manner in which each MEC exercises his or her powers. It is debatable whether this form of control is consistent with the constitutional framework, which envisages the provincial executives exercising their powers in consultation with, rather than under the dictates of, the national executive.⁹⁴ This is particularly so where the MEC is identifying an authority within the provincial sphere of government. Moreover, it is not immediately apparent why

⁹¹ Section 24(2) of NEMA.

⁹² See section 24C(1) of NEMA.

⁹³ Section 24(5) empowers the Minister, and every MEC, with the concurrence of the Minister, to make these regulations.

⁹⁴ While Chapter 3 of the Constitution exhorts organs of state in the national and provincial spheres of government to consult one another and co-ordinate their actions and legislation, it does not envisage the national government having the final say in how co-ordination is achieved.

there is a need for this form of Ministerial control. It may be intended to ensure that a high standard of environmental protection is maintained, so as to avoid a situation where industries wishing to undertake environmentally harmful activities engage in forum shopping between the various provinces. But expanding on the identified activities in national regulations and providing for these to apply uniformly across all the provinces could achieve this outcome. It seems likely that the powers conferred on each MEC are intended to assist with regulating activities that are specific to one region. Such activities could include mining of a mineral that occurs only in one region. Similarly, regional listing of geographical areas by an MEC allows each province to amplify the protection of sensitive areas within its region. If this is the purpose of the regional listing, it is unclear why the Minister should have a veto power in relation to the activities and areas that are identified by a province.

These limitations on the powers of MECs suggest that the national executive will take the leading role in determining how section 24 is implemented. Two questions flow from this. The first is whether the allocation of a leading role to the Minister is consistent with the constitutional framework for the implementation of national legislation. Section 125(2)(b) does envisage that provincial executive authority may be limited by an Act of Parliament, such as NEMA. Furthermore, the provinces do have some control over limitations of this nature as legislation within Schedules 4 and 5 must be passed in accordance with the procedure set out in section 76 of the Constitution.⁹⁵ Through their collective representation in the NCOP, the provinces can propose amendments to the draft legislation or reject it. In these circumstances, the National Assembly may only pass the draft 'with a supporting vote of at least two thirds of its members'.⁹⁶ This provides a limited safeguard for provincial autonomy. Therefore, it seems that the leading role given to the national executive in terms of section 24 is not inconsistent with the constitutional framework for the implementation of legislation.⁹⁷ Of course, the effectiveness of this process in safeguarding provincial autonomy depends on the ability of the NCOP to fulfil its role as representative of provincial interests.⁹⁸

The second question raised by section 24 is whether a leading role entitles the Minister to allocate all the responsibility for implementation to the provinces and issue directions as to how that responsibility should be fulfilled. This is clearly what the Minister seeks

⁹⁵ Section 76(3) provides for national legislation that falls within a functional area to be passed in terms of section 76(1). Section 76(4) contains a similar provision in relation to national legislation that falls within a functional area in Schedule 5 and is made by the national government in terms of its powers under section 44(2) of the Constitution to encroach on this exclusive area of provincial legislative competency.

⁹⁶ Section 76(1)(e) of the Constitution.

⁹⁷ The Constitutional Court made out this argument, when certifying the Constitution. In particular, the Court pointed out that although the executive authority conferred on the provinces by section 125(2)(b) could be limited by an Act of Parliament, that Act would require the assent of the NCOP. See the *First Certification* judgment (note 50) at para 252.

⁹⁸ Steytler notes that the NCOP has not performed this role adequately. See N Steytler 'Concurrency and co-operative government: The law and practice in South Africa' (2001) 16 *SA Public Law* 241 at 245.

to achieve in terms of the regulations made under section 24.⁹⁹ The allocation of responsibility in this way could have significant administrative and financial implications for the provinces.¹⁰⁰ Therefore, the allocation must be contemplated in terms of NEMA. If section 24 of NEMA makes it clear that the provinces bear full responsibility for the implementation of the regulatory system, the provinces would have had the opportunity (in theory)¹⁰¹ to raise any concerns about this through the NCOP, at the time when NEMA was tabled in Parliament as a section 76 Bill. Furthermore, the provinces (through the NCOP) are given the opportunity to raise concerns about the financial resources necessary to implement section 24 when the Division of Revenue Bill is tabled.¹⁰² This provides a potential mechanism for provinces to obtain further funding for the year in which the regulations are due to be finalised and the years following thereafter.

However, section 24 of NEMA does not contemplate that all the responsibility for implementation will be allocated to the provinces by the national government. It empowers both the national and the provincial executives to implement its provisions. In certain circumstances, section 24 identifies the Minister as the competent authority;¹⁰³ and in all other circumstances, section 24 does not specify who the competent authority should be. In light of this, it seems logical to assume that the Minister would identify national agencies to implement regulations made by the Minister and that the provinces would identify provincial agencies. In discharging their obligations, both spheres would need to act in a manner that is consistent with the Constitution and, in particular, the principles of co-operative government. These principles impose a duty on the national executive and the provincial executives to consult one another and co-ordinate their actions in the implementation of section 24.¹⁰⁴

Furthermore, the allocation of full responsibility to provinces by the Minister must be done in a manner that is consistent with the constitutional mechanisms for allocating responsibility. The Constitution recognises three ways in which the national executive

⁹⁹ As outlined in part II of this dissertation, the provinces are identified as the competent authorities, albeit in vague terms – the competent authority is defined in the regulations as the ‘environmental authority in the province in which the activity is to be undertaken’. Furthermore, the competent authority is responsible for considering applications for authorisation and deciding whether to grant authorisation, in accordance with extensive directions issued by the Minister.

¹⁰⁰ The provinces currently are responsible for the implementation of the ECA. However, to the extent that the new regulatory system imposes more onerous obligations on the provinces, fiscal considerations remain relevant.

¹⁰¹ The ability of the provinces to raise concerns in relation to national legislation that is adopted in terms of section 76 of the Constitution is dependent on the effectiveness of the NCOP in representing provincial interests.

¹⁰² The Division of Revenue Bill must be passed in accordance with section 76 of the Constitution. This is apparent from section 76(4) read with section 77(1)(d) of the Constitution.

¹⁰³ Those circumstances are described in section 24C(2) of NEMA.

¹⁰⁴ The application of co-operative governance principles in this context is discussed further in part V of this dissertation.

may allocate responsibility for the implementation of executive powers and functions. These are delegation, agency and assignment. Accordingly, it is necessary to consider what these terms mean in the constitutional context and whether the act of identification falls within one of these categories.

(2) Delegation, agency arrangements and assignment under the Constitution

(a) Delegation of executive authority

In the public law context, delegation is understood to mean the transfer of powers conferred on a functionary in order to facilitate the exercise of those powers by the transferee.¹⁰⁵ It is a very different concept to a delegation that takes place in the private law realm.¹⁰⁶

Prior to the adoption of the Interim Constitution and, subsequently, the final Constitution, authority for delegation was derived from the common law rule of *delegatus delegare non potest*, which holds that executive bodies may not delegate their powers unless the empowering legislation authorises them to do so.¹⁰⁷ In terms of the standard form of delegation at common law, the delegating functionary (or *delegans*) retains responsibility for the power exercised and may at any time revoke the delegation or withdraw any decision taken under the delegated power.¹⁰⁸ It is clear from this formulation that a functionary can only delegate a power that he or she holds.

Delegation is provided for in section 238 of the Constitution:

An executive organ of state in any sphere of government may –

- (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided that the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
- (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

¹⁰⁵ WA Joubert (ed) *LAWSA* vol 20, part 2 (2000) at para 179.

¹⁰⁶ The act of delegation in the private law context refers to the transfer of a debt or other obligation irrevocably to a new debtor, with the agreement of the original debtor, the new debtor and the creditor. It brings about a novation of the debt: a new debtor is substituted for the original one and the debt between the original debtor and the creditor is extinguished. See R H Christie *The Law of Contract* 4ed (2001) at 536 and 537.

¹⁰⁷ IM Rautenbach and EFJ Malherbe *Constitutional Law* 4ed (2004) at 209.

¹⁰⁸ The standard form of delegation in the context of public administration is referred to as deconcentration. See Joubert (note 105) paragraph 179.

Section 238 does not define what is meant by a delegation under the Constitution. In the *Executive Council, Western Cape* case,¹⁰⁹ the Constitutional Court explained delegation as ‘a revocable transmission of subsidiary authority’.¹¹⁰ Although the Court was referring to delegation under section 144 of the Interim Constitution, there is no rationale for distinguishing it from delegation under the final Constitution.¹¹¹ Furthermore, in commenting on delegation under section 238 of the Constitution, Currie and De Waal note that it does not deprive the *delegans* of the power to perform the relevant function while the delegation is in force.¹¹²

Subsection (a) of section 238 echoes the common-law rule of delegation by requiring the delegation to be consistent with the empowering legislation. It is debatable whether this is met in circumstances where the empowering legislation neither prohibits nor authorises delegation.¹¹³ However, the consensus appears to be that the empowering legislation must authorise the delegation, either expressly or by implication.¹¹⁴ This accords with the common law approach and is echoed in the Promotion of Administrative Justice Act, which provides that a delegation of power must be authorised by the empowering legislation.¹¹⁵ Overall, it appears that the constitutional version of a delegation is consistent with the common law meaning.

Section 238 is a very wide empowering provision when it is read with the constitutional definition of an organ of state, which includes any functionary or institution exercising a public power or performing a public function in terms of legislation, other than a court and a judicial officer.¹¹⁶ A relevant consideration is whether section 238 is framed widely enough to permit an executive organ of state to delegate a power or function to an executive organ of state in another sphere of government. The exercise of a delegated power or the performance of a delegated function is likely to require administrative and financial resources. Thus, if one sphere of government could shift obligations to another sphere of government by means of delegation, this could have significant fiscal implications. Allowing the shifting of responsibility to take place between spheres in an *ad hoc* way seems to go against the order inherent in the constitutional framework, which contemplates an equitable allocation of revenue between the spheres that is done on an annual basis and with reference to the powers and

¹⁰⁹ *Executive Council, Western Cape Legislature and others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC).

¹¹⁰ At para 173. See also the commentary on section 238 in I Currie & J De Waal *The New Constitutional & Administrative Law* vol 1 (2001) 247.

¹¹¹ Section 144(2) of the Interim Constitution provided that a province ‘shall have executive authority over ... matters delegated to it by or under any law.’

¹¹² Currie and De Waal (note 110) at 247.

¹¹³ JR De Ville *Judicial Review of Administrative Action in South Africa* (2003) 141.

¹¹⁴ JR De Ville (note 113) at 141. See also Rautenbach and Malherbe (note 107) at 210.

¹¹⁵ Act 3 of 2000. Section 6(1)(a)(ii).

¹¹⁶ An organ of state is defined in section 239 of the Constitution.

functions allocated to each sphere of government by the Constitution and national legislation.¹¹⁷ An additional consideration is that the common law formulation of delegation does not contemplate a requirement for the consent of the functionary to whom a power or function is delegated and the Constitution does not make provision for the requirement of consent either.

In addition to these concerns with delegation, it is important to consider the purpose of a delegation. As noted by the Constitutional Court in the *Executive Council, Western Cape* case, delegation confers ‘a subsidiary authority’.¹¹⁸ Thus, the *delegans* may continue to exercise the power or perform the function that has been delegated. Furthermore, the *delegans* may revoke the delegation at any stage. This seems to be used most appropriately in the context of a relationship between two parties where one is subordinated to the other. The most obvious form of such relationship is an employment relationship. In light of this, the concept of delegation does not lend itself readily to application in the relationship between the spheres of government. In this regard, if a delegation can occur between different spheres of government, a municipal council could delegate a power or function to the national Cabinet. Despite the language of spheres not levels set out in the Constitution, this form of delegation does not sit comfortably within the constitutional framework.

Thus, it is necessary to impose some restrictions on delegation between different spheres of government. One means of doing this is to take a strict interpretation of section 238 and, in particular, the phrase that the delegation must be ‘consistent with the legislation in terms of which the power is exercised or the function is performed’. The phrase could be interpreted to mean that the delegation of powers and functions between different spheres of government must be authorised expressly by the legislation.¹¹⁹ Moreover, a further restriction is imposed by the principles of co-operative governance.¹²⁰ These apply to the actions of executive organs of state and therefore there is an inherent requirement for a *delegans* to consult with the organ of state to which a power or function is to be delegated, prior to effecting the delegation. It is doubtful whether the obligation to consult in terms of co-operative governance principles equates to a requirement to obtain consent for a delegation. However, there are other principles of co-operative governance that can be brought to bear on the situation in order to avoid a delegation that imposes an unacceptable burden on another sphere of government. In particular, the principles require all organs of state to exercise their powers in a manner that ‘does not encroach on the geographical, functional or institutional integrity of government in another sphere...’.¹²¹ A decision to delegate a function or power to a sphere of government that does not have the capacity or resources to administer it would

¹¹⁷ In particular, see the reference to the Division of Revenue Bill in section 1(b) of this part III.

¹¹⁸ *Executive Council, Western Cape* (note 109) para 173.

¹¹⁹ This approach is suggested by several commentators. See De Ville (note 113) at 141.

¹²⁰ Of course these principles apply equally to a delegation that takes place between executive organs within the same sphere of government.

¹²¹ Section 41(g) of the Constitution.

fall foul of this obligation. Furthermore, a delegation of this nature would also fall foul of the obligation to support and assist other spheres of government.¹²²

In summary, delegation in the public law context is a revocable act by which an organ of state transfers a power or function, vested in it by legislation, to another organ of state. The *delegans* retains ultimate responsibility for the exercise of the power or performance of the function and consequently, may intervene at any stage by revoking the delegation or amending the acts of the delegated authority. The delegation must be authorised, expressly or by implication, in terms of the legislation under which the power or function is to be exercised. The power to delegate is restricted further by the limitations imposed by the principles of co-operative governance, discussed above, which apply to all forms of delegation.

Returning to section 24 of NEMA, discussed in part II of this dissertation, it appears that the identification of a competent authority by the Minister could constitute a delegation. For example, in circumstances where the Minister identified an organ of state within the national Department of Environmental Affairs and Tourism as the competent authority, that organ of state would exercise the power under the control and supervision of the Minister. However, the identification of the provinces as the competent authority does not fit comfortably into the concept of a delegation. This is due to the fact that it involves the transfer of responsibility between different spheres of government. Furthermore, in terms of section 24 of NEMA read with the Constitution, the Minister is not intended to retain any residual responsibility for the functions performed by the provinces when the latter are acting as competent authorities, other than the oversight role ordinarily attributed to the national executive in relation to the obligations of every provincial executive.¹²³ Similarly, the Minister is not in a position to withdraw an authorisation issued in terms of section 24 of NEMA, should he or she dispute the manner in which a province has exercised its discretion in granting that authorisation.

(b) Agency arrangements in respect of executive authority

Section 238(b) of the Constitution also authorises an organ of state in any sphere of government ‘to exercise any power or perform any function for any other executive organ of state on an agency ... basis’. In terms of the classical agency relationship, the agent fulfils a mandate on behalf of the principal and subject to directions issued by the principal or agreed to at the outset of the arrangement.

A possible distinction between delegation and agency is that, in terms of the latter arrangement, the principal is precluded from acting while the agent is acting on behalf of the principal, unless the agreement between them provides otherwise. Furthermore, because the agent acts on behalf of the principal, the resources allocated to the principal for the fulfilment of the power or function in question can be utilised by the agent in the performance of its mandate. However, there are similarities between the two concepts.

¹²² This is imposed by section 41(f)(ii) of the Constitution.

¹²³ In terms of section 100 of the Constitution.

As with a delegation, there is a relationship of subordination between the agent and the principal. In addition, the principal may withdraw the agency in circumstances where the agent does not fulfil the mandate adequately or at all. For these reasons, an agency arrangement may be more appropriate between organs of state within the same sphere of government.¹²⁴ Thus, the identification of provinces as competent authorities under section 24 of NEMA does not fit comfortably into the agency category, for much the same reasons as those applicable in relation to a delegation.

(c) *Assignment of executive authority*

Although the concept of assignment is referred to repeatedly in the Constitution, unlike delegation it is not a well-defined term in the public law context. Is the concept of assignment distinct from delegation? In a recent judgment, the Constitutional Court appeared to suggest that powers assigned to Cabinet ministers constituted a form of delegated authority.¹²⁵ However, the Constitution does use the terms delegation and assignment in different contexts and therefore the concept of assignment must be explored further.

It is helpful to begin by considering the ordinary meaning of assignment:

[A]n act of making a legal transfer of a right or liability: *an assignment of leasehold property*.
 Allocate (a job or duty): *Congress had assigned the task to the agency*;
 Appoint (someone) to a job, task or organisation: *she has been assigned to a new job*.¹²⁶

The first definition is more suited to the private law context.¹²⁷ The other two definitions fit more easily into the context of public law because they contemplate the allocation of powers or functions rather than the conferral of rights or liabilities.

These definitions provide a backdrop against which the constitutional references to assignment can be considered. For present purposes, the focus is on assignment of powers and functions by executive organs of state within the national and provincial

¹²⁴ In contrast, the relationship between the national and provincial spheres of government is one in which the Constitution is at pains to limit the circumstances in which the national sphere may intervene in the exercise of executive authority by the provinces. Those circumstances are set out in section 100 of the Constitution.

¹²⁵ This was suggested in the matter of *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC) at para 13 where the Court stated that '[t]he Constitution provide[s] in s 92(1) that 'Ministers are responsible for the powers and functions of the executive assigned to them by the President'. This highlights the fact that Ministers exercise no more than subordinate, delegated authority when they make regulations in terms of Acts of Parliament or perform other ministerial duties.' The term 'delegated authority' may have been used fairly loosely in this context to refer to all ministerial duties when in fact the term is only really appropriate in the context of making regulations.

¹²⁶ C Soanes and A Stevenson *The Concise Oxford English Dictionary* 11ed (2004) at 95.

¹²⁷ In the private law context the act of assignment refers to the transfer of rights and obligations. See Christie (note 106) at 537. This does not translate readily into the public law realm, as private law rights are not equivalent to public law powers and statutory privileges. Equally, private law liabilities are not akin to public law functions and duties.

spheres of government, as this is consistent with the facts at hand. Local government is not considered in any detail; nor is assignment of legislative powers and functions.

Broadly speaking, the Constitution contemplates two broad categories of assignment by and between executive structures. The first is lateral or horizontal assignment, which takes place between the members of the same executive organ of state. The second is vertical assignment, which takes place between members of executive structures in different spheres of government.

In the broad category of lateral assignment, the term ‘assignment’ is used in three contexts. The first context is the allocation of portfolios to the individual members of the national and provincial executives. In the national sphere, the Constitution vests the executive authority of the Republic in the President who exercises it together with the other members of Cabinet.¹²⁸ Section 92 of the Constitution provides that the President assigns executive powers and functions to the Cabinet members; it also stipulates that those members are responsible for the powers assigned to them.¹²⁹ However, the Cabinet members are accountable to Parliament collectively as well as individually for the exercise of their powers and the performance of their functions.¹³⁰ Similarly, the executive authority of a province is vested in the Premier who exercises it together with the other members of the Executive Council.¹³¹ Section 133 provides for the assignment of executive functions by each Premier to the members of his or her provincial Executive Council who are responsible for those assigned powers.¹³² Again, members of the Council are accountable collectively and individually to the provincial legislature for the exercise of their powers and the performance of their functions.¹³³

The second context in which lateral assignment is used is the temporary re-allocation of powers and functions between members of the executive, to resolve a situation when one member is unable to perform his or her duties for some reason. In these circumstances, the President (or the Premier) may assign to a member of the Cabinet (or a member of the Executive Council) the power or function of another member who is absent from office or unable to exercise the power or perform the function in question.¹³⁴ The

¹²⁸ Section 85(1) of the Constitution.

¹²⁹ The President is empowered to assign as a necessary corollary of the provision in section 92(1) to the effect that the Cabinet members are responsible for powers and functions assigned to them by the President.

¹³⁰ In terms of section 92(2) of the Constitution.

¹³¹ Section 125(1) of the Constitution.

¹³² The Premier is empowered to assign as a necessary corollary of the provision in section 133(1) to the effect that the Executive Council members are responsible for the functions assigned to them by the Premier. It is interesting to note that reference is made to executive functions in section 133; in contrast, section 92 refers to powers and functions in relation to Cabinet members. Nothing turns on the distinction for the purposes of this dissertation.

¹³³ Section 133(2) of the Constitution provides for this.

¹³⁴ Section 98, for Presidential assignment, and section 138, for assignment by the Premier.

assignment is denoted as temporary by the use of the section heading ‘Temporary assignment of functions’.¹³⁵

The third context in which lateral assignment is used is to re-allocate or shuffle powers and functions between different members of the executive on a more permanent basis. In this regard, the Constitution empowers the President to transfer to a Cabinet member the administration of any legislation entrusted to another member or any power or function entrusted by legislation to another member.¹³⁶ The Premier has similar powers of transfer.¹³⁷ The term ‘transfer’ is used instead of ‘assignment’. It is doubtful whether anything turns on this.

The second broad category of assignment is vertical assignment. This has very different implications to lateral assignment because it allows for executive powers and functions to be transferred between different spheres of government. Section 99 of the Constitution empowers Cabinet members to assign any power or function to be exercised in terms of an Act of Parliament to a member of any provincial Executive Council.¹³⁸ Similarly, a provincial Executive Council member may assign to a Municipal Council powers or functions to be exercised or performed in terms of an Act of Parliament or provincial Act.¹³⁹ There is no provision for assignment to take place in the reverse order. Thus, a Municipal Council may not assign a power or function to a provincial (or the national) executive and a member of an Executive Council may not assign a power or function to the national executive.

The focus in this dissertation is on vertical assignments by a member of the national executive to a member of a provincial Executive Council in terms of section 99. A vertical assignment must comply with two requirements: it must be made in terms of an agreement between the assignor and the assignee and ‘it must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed’.¹⁴⁰ The Constitution does not elaborate further on either of these requirements.

The requirement for agreement between the assignor and the assignee gives the assignee a level of autonomy that is not provided for in relation to delegation under the Constitution. However, the entitlement to withhold consent must be understood against the backdrop of co-operative government. Among other things, the principles of co-operative governance require organs of state ‘to co-operate with one another in mutual

¹³⁵ This is the heading to section 98 and section 138.

¹³⁶ Section 97 of the Constitution.

¹³⁷ Section 137 of the Constitution.

¹³⁸ Assignments may also be made by Cabinet members to a Municipal Council in terms of section 99.

¹³⁹ Section 126 of the Constitution.

¹⁴⁰ Section 99(b) of the Constitution.

trust and good faith'.¹⁴¹ If there is no objective reason for withholding consent and the assignee is engaging in a form of power play, it may be necessary to introduce a mechanism that can break the deadlock. In these circumstances, the entitlement to withhold consent to an assignment may not be absolute. This is discussed further on.¹⁴²

Klaaren and Chaskalson suggest that the requirement of consistency can be interpreted in two ways.¹⁴³ The first interpretation is that the relevant Act must expressly or tacitly authorise the assignment. Alternatively, there is consistency where the Act does not expressly or tacitly prohibit the assignment. The second interpretation is regarded as better aligned with a constitutional system of co-operative governance.¹⁴⁴

Because vertical assignment takes place between different spheres of government, it allows for the redistribution of powers and functions between the spheres to varying degrees. This can have a dramatic effect on the way in which powers and functions are allocated between the spheres of government and, consequently, on the resources needed by the respective spheres of government. Thus, further implicit requirements for a vertical assignment to a province are that the province has the necessary administrative capacity and the financial resources to exercise or perform the assigned power or function.¹⁴⁵ The equitable division of national revenue is based on factors that include the need to ensure that provinces (and municipalities) are able to perform the functions allocated to them.¹⁴⁶ Thus, the allocation or re-allocation of functions in terms of a vertical assignment may require a recalculation of the equitable share of national revenue that has been allocated to a province in terms of the applicable Division of Revenue Act. Due to the potential impact of vertical assignments on the intergovernmental fiscal allocation, the Financial and Fiscal Commission Act seeks to regulate this form of assignment.¹⁴⁷ It requires the assignor to notify the Financial and Fiscal Commission ('FFC') of the 'financial and fiscal implications' of the assignment on matters that include 'the future division of revenue raised nationally between the spheres of government' and 'the fiscal power, fiscal capacity and efficiency' of the

¹⁴¹ Section 41(h) of the Constitution.

¹⁴² In part V of the dissertation, which discusses the application of co-operative governance in the context of implementing national legislation.

¹⁴³ J Klaaren & M Chaskalson 'Executive Government' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (Rev 5, 1999) 3.4(b)(ii).

¹⁴⁴ Currie and De Waal (note 110) at 247 (fn 123).

¹⁴⁵ In terms of section 125(3), a province only has executive authority to the extent that it has administrative capacity to assume effective responsibility. The provision for allocation of adequate financial resources is discussed below.

¹⁴⁶ Section 214(2)(d) of the Constitution read with section 10(5)(a) of the Intergovernmental Fiscal Relations Act 97 of 1997.

¹⁴⁷ Act 99 of 1997. The Act applies to both forms of vertical assignment, in other words, vertical assignment between the national executive and a provincial executive and between the provincial executives and a municipal council. See section 3(2A)(a) in this regard.

assignee province.¹⁴⁸ The FFC is required to make a recommendation on the assignment, after receipt of the notification. The Act provides that assignments are of no force or effect unless the assignor has considered the advice or recommendations of the FFC.¹⁴⁹

These tacit requirements qualify the constitutional power of assignment provided for in section 99. However, they do not appear to be inconsistent with the Constitution. In particular, the principles of co-operative governance in Chapter 3 of the Constitution require all organs of state to exercise their powers in a manner that ‘does not encroach on the geographical, functional or institutional integrity of government in another sphere...’.¹⁵⁰ Once the parties have received the information regarding the financial and fiscal implications of the assignment and the recommendations of the FFC, they are better placed to make a decision about whether a particular assignment will encroach on the integrity of an organ of state in another sphere of government.

Is an assignment revocable? Brand argues that it must be regarded as an irrevocable act, as there is no constitutional provision for its reversal.¹⁵¹ However, this is not always the case. In the context of lateral assignments, the President may reverse an assignment of a power or function to a particular Cabinet member at any time by utilising the powers under section 97 of the Constitution. As noted above, this section empowers the President to transfer to a Cabinet member the administration of any legislation entrusted to another member or any power or function entrusted by legislation to another member. In the case of a vertical assignment, the Constitution does not empower a member of a provincial Executive Council to assign a power or function to a Cabinet member. Therefore, it is not possible to reverse an assignment by using section 99 of the Constitution or any other constitutional provision. However, there may be a mechanism for assignment in terms of other legislation that provides for a vertical assignment to be reversed. For example, the Land Administration Act empowers the President to reassign the administration of a law that had previously been assigned to a Premier in terms of the Act.¹⁵² Thus, a vertical assignment is not irrevocable in all cases.

Unlike the position with a delegation, there is no principle that allows the assignor to continue to exercise the power or function that has been assigned. However, the national executive would retain some degree of responsibility for the function performed by the assignee due to its oversight role in relation to the executive obligations of every

¹⁴⁸ Section 3(2A)(i) of the Financial and Fiscal Commission Act.

¹⁴⁹ Section 3(2A)(c) of the Financial and Fiscal Commission Act. However, if the FFC does not make a recommendation within the period of 180 days specified in section 3(2A)(b), the organ of state may proceed with the assignment after consultation with the National Treasury, if the assignment takes into account the implications that were highlighted in the submissions to the FFC in terms of section 3(2A)(a)(i) of the Act.

¹⁵⁰ Section 41(g) of the Constitution.

¹⁵¹ D Brand ‘Development of Concurrent Legislation – A New South African Perspective’ (1999) *Seminar Report: Subnational Constitutional Governance* Konrad Adenauer Stiftung 37 at 39.

¹⁵² Act 2 of 1995, in terms of section 2(2)(b).

provincial executive.¹⁵³ This role entitles the national executive to step in and take over the exercise or fulfilment of an assigned power or function where the provincial executive is unable to do so.

To conclude, assignment of executive authority in the public law context constitutes the allocation or re-allocation of powers and functions, including the obligation to administer legislation. It may be temporary or permanent. An assignment may be a lateral assignment, between different members of the executive structure in one sphere of government, or it may be a vertical assignment that takes place between executive structures in different spheres of government. In terms of vertical assignment, a national executive organ of state may assign a power or function to an executive organ of state in the provincial sphere; however, the reverse does not apply. For this reason, a vertical assignment is regarded as irrevocable or irreversible in general. The only manner in which it can be reversed is in terms of national legislation. Agreement between the assignor and the assignee is a requirement for a vertical assignment. In the context of co-operative government, it is arguable that a provincial executive organ of state may not withhold its agreement without any reason. Tacit requirements for a vertical assignment are that the provincial organ of state has the necessary administrative and financial capacity. These requirements are intended to ensure that the assignment does not undermine the integrity or functioning of the province. Linked to this, a vertical assignment is subject to consideration by the FFC, with reference to the impact it may have on the equitable distribution of national revenue to the province in question.

Returning to the provisions of section 24 of NEMA, the identification of the provinces clearly involves a transfer of responsibility between different spheres of government. Furthermore, section 24 does not envisage that the Minister would retain the entitlement to exercise the powers and functions entrusted to the competent authority in terms of regulations. While the retention of this power may be a tacit term in circumstances where the competent authority is located within the national sphere of government, the same term cannot be implied in the relationship between the Minister and the provinces.¹⁵⁴ For these reasons, the identification of the provinces as a competent authority by the Minister seems to fit more comfortably into the category of assignment than that of delegation. Therefore the identification of a competent authority must be consistent with section 99 of the Constitution. Section 99 does not allow the Minister to assign powers or functions to anyone in a province other than the MEC. Accordingly, section 99 does not allow the Minister to identify ‘the environmental authority in the province’ as the competent authority.

Assuming that the Minister had identified the MECs, section 99 imposes two requirements for a valid assignment. The first is that it must be consistent with the Act of Parliament in question. This requirement is met by the fact that NEMA makes

¹⁵³ In terms of section 100 of the Constitution.

¹⁵⁴ Except in the narrowly circumscribed scenario contemplated in section 100 of the Constitution.

specific reference to assignment in terms of section 99.¹⁵⁵ The second is that the agreement of each MEC is required for the assignment. As noted above, the principles of co-operative governance are relevant to the question of assignment and, in particular, the manner in which the requirement of agreement should be interpreted. It may be that, in certain circumstances, the entitlement to withhold consent to an assignment is not absolute. However, it is helpful to defer the discussion of co-operative governance principles until after part IV below, which clarifies the nature of the proposed provincial legislation and the potential problems of duplication associated with it. Accordingly, the application of co-operative governance principles is discussed in part V.

IV. DUPLICATION BETWEEN NEMA AND THE PROPOSED PROVINCIAL LAW

As noted in part I, the Province has identified problems with the current approach to environmental regulation and is developing provincial legislation to address these problems. It is likely that certain of the provisions in the proposed provincial legislation would overlap with the system of environmental authorisations provided for in section 24 of NEMA and the regulations made under NEMA. This would create a problem of duplication. Section 146 deals with the conflict between national and provincial legislation that falls within the functional areas in Schedule 4 and 5. This part considers whether the meaning of ‘conflict’ within the context of section 146 includes a situation of duplication between national and provincial legislation. Before the discussion on section 146, some background to the proposed provincial legislation is set out below.

(1) Background to the proposed provincial legislation

(a) Concerns with the current approach to environmental regulation

A primary problem of the current approach contained in the ECA and perpetuated in NEMA is the lack of integration in environmental regulation. Under the current legislative regime, there may be up to three application and decision-making processes (followed by three separate appeal processes). One of these is the authorisation for activities listed under the ECA, which is soon to be replaced with authorisations issued under section 24 of the NEMA. The other processes facilitate approvals for one or more land use rights and approvals for activities that impact on heritage resources.¹⁵⁶ The existing regulatory framework is set out in various general and sectoral pieces of national legislation, including the ECA, NEMA, the National Heritage Resources Act¹⁵⁷

¹⁵⁵ Section 41 of NEMA makes reference to assignments made in terms of section 99 of the Constitution.

¹⁵⁶ In particular, section 38 of the NHRA. These include projects that do not require an environmental impact assessment or ‘EIA’ (in which case a comment from the decision-maker is required) or projects that require approval in terms of other sections of the NHRA, such as section 34.

¹⁵⁷ Act 36 of 1998.

(‘NHRA’) and the Development Facilitation Act,¹⁵⁸ as well as various provincial planning laws.¹⁵⁹ All three spheres of government and different sectoral institutions are involved in the implementation of this legislation.

On a conceptual level, the lack of integration seems inappropriate. Since all the legislation is dealing with something that is inherently integrated,¹⁶⁰ it makes little sense to regulate individual components separately. In practice, the lack of integration means that decision-making processes overlap, which can result in duplication and in inconsistencies in decision-making. For example, the conditions attached to decisions by the respective decision-makers may be contradictory or otherwise inconsistent with one another. From the perspective of the general public, the different approval processes are confusing and many civil society organisations find that they cannot cope with the number of processes in which they are requested to participate.

A further problem is that the planning laws pre-date the Constitution and have not been updated so as to ensure that plans for land use incorporate constitutional principles such as the need for sustainable development and the protection of the environment for present and future generations.¹⁶¹ While NEMA requires development to be sustainable, it does not provide sufficient guidance on what is meant by this term.¹⁶² Furthermore, NEMA approaches the identification of activities for which authorisation is required on a list basis. The list is to be contained in the regulations made under section 24 of NEMA by the Minister. It specifies thresholds (such as project size and capacity) below which authorisation is not required. While having a list of specified activities for which authorisation is required promotes certainty, it allows activities not identified to slip through the regulatory cracks. For example, new technologies such as nanotechnology that are unknown at the time when regulations are made would be excluded from the list despite their potential environmental impacts. The use of a list also means that activities falling below the thresholds but taking place in a very sensitive area would not be regulated.

¹⁵⁸ Act 67 of 1995.

¹⁵⁹ The Land Use Planning Ordinance 15 of 1985 (‘LUPO’) is the provincial planning law applicable in the Western Cape.

¹⁶⁰ The different aspects of the environment regulated under the applicable legislation function as a whole.

¹⁶¹ Section 24 of the Constitution entrenches the right to environmental protection for both present and future generations and mandates the State to put in place reasonable measures that, among other things, secure ecologically sustainable development.

¹⁶² Section 1 of NEMA defines sustainable development as ‘the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations’. An environmental management principle in section 2(4)i) of NEMA requires that the ‘social, economic and environmental impacts of activities’ must be ‘considered and evaluated and decisions must be appropriate in the light of such consideration and assessment’. However, NEMA provides no criteria that can assist decision-makers in determining when a development would be considered sustainable from an environmental, economic or social perspective.

(b) *The objectives of the proposed provincial legislation*

In light of the problems with the current regulatory system, the Province has initiated a law reform process, relying on its concurrent legislative competency for environmental matters.¹⁶³

A key objective of the law reform is to integrate the decision-making processes related to land use, the environment and heritage resources. Among other things,¹⁶⁴ the proposed provincial legislation would provide for a single process that covers the application, investigation, decision-making and appeals stages of a proposal. In terms of that process, anyone who wishes to undertake a project affecting land or involving a change in the way land is used and which is caught by the legislation would be required to conduct an assessment process in order to obtain a land use permit. The application would be allocated to one of three levels of assessment, depending on the type of proposal and its location. Public participation would be required, with all aspects of the application being covered within a single consultation process. There would be a single decision-making process that provides for joint decision-making, where more than one decision-maker is involved in an application. There would also be an appeal to the MEC (or the Municipal Council in certain circumstances) with an independent body of appropriate specialists providing recommendations on the merits of the appeal.

In circumstances where there is a lack of integration between different decision-making processes, a potential solution is for the decision-makers empowered in terms of the different legislation to agree on an integrated approach. The decision-making powers would be delegated to one designated organ of state and, where this was not possible, consultative processes would be agreed upon at the outset in relation to each development application received. If this could be achieved in a workable manner,¹⁶⁵ it would obviate the need for the proposed provincial law. However, there are other important objectives of the integrated legislation that cannot be achieved in this way. For example, the integration of land use, environmental and heritage legislation cannot

¹⁶³ In terms of section 104 of the Constitution read with Schedule 4. The proposed provincial legislation has not yet been published for public comment. The observations about the proposed legislation, contained in this dissertation, are taken from a Discussion Document dated July 2005, that was prepared by the drafting team and circulated to various stakeholders in preparation for consultation on the law reform process.

¹⁶⁴ The proposed provincial legislation would also provide for strategic planning and the assessment of individual applications for authorisation against strategic plans.

¹⁶⁵ There are doubts about whether this could be achieved in a workable manner. There has been uncertainty in the past about whether the municipality should issue rezoning or subdivision approvals under LUPO (note 159) prior to the issue of authorisation under the ECA by the Province. There is fairly recent persuasive authority for the view that rezoning applications should only be considered after a decision has been made under the ECA, in order to ensure that municipalities do not issue approvals for activities that are revealed to be in conflict with the findings of a subsequent EIA undertaken in terms of the ECA. (See the unreported case of *Wildlife and Environment Society of SA v Provincial Minister of Finance and Development Planning (Western Cape)*, *Provincial Minister of Environmental and Cultural Affairs (Western Cape)*, *Municipality of Stellenbosch and Paradyskloof Golf Estate (Pty) Ltd* (unreported) case no 2620/2000 for which an order was granted by Nel J on 11 February 2002.)

be undertaken in isolation of broader strategies and policies for environmental protection and development, including constitutional imperatives.

Thus, an objective of the provincial law reform process is to ensure that the integrated legislation fulfils constitutional imperatives and that the criteria and principles underlying decisions taken in each of the three sectors are defensible.¹⁶⁶ The Constitution refers in section 24 to the duty of the state to take reasonable legislative and other measures that, among other matters, ‘secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development’. The concept of ‘sustainable development’ or ‘ecologically sustainable development’ is multi-faceted. In order to determine whether or not a proposed activity will contribute to, or detract from, the achievement of this long-term objective, it is necessary for decision-makers to consider a wide range of factors. These include the potential impacts of a proposal on the health and well being of people, on cultural heritage and on the environment as a whole. In order to capture these considerations within a single concept, the test of the ‘wise use’ of land would be used in the proposed provincial law.¹⁶⁷ In this way, the provincial law would give substance to concepts such as sustainable development.

Another objective of the proposed provincial legislation is to ensure that integrated planning in relation to land use, the environment and heritage resources is undertaken at both the provincial and municipal level. While some integrated planning processes are in place, it is envisaged that the proposed new law would set out the minimum requirements for integrated planning, in order to ensure that plans are developed in a way that gives effect to sustainable development. In practical terms, the provincial law would stipulate content requirements derived from sustainable development principles for municipal Integrated Development Plans and Spatial Development Frameworks as well as the Provincial Growth and Development Strategy and the Provincial Spatial Development Framework.

A further objective of the proposed provincial legislation is to ensure that all activities that may impact detrimentally on the environment are captured within the regulatory framework. Instead of the list system proposed by NEMA, the provincial law would establish authorisation triggers that cover land use, heritage resources and environment. In developing the triggers, account would be taken of the characteristics of the location of the proposed development and the receiving environment, in order to exclude

¹⁶⁶ The three sectors are environmental resources, land use and heritage resources.

¹⁶⁷ Suggestions for specific criteria that could be applied (as appropriate to a particular proposal) in determining whether a use is wise or not include the following: it is compatible with provincial and municipal policies and spatial planning (updated to incorporate sustainable development); it improves access to water, sanitation or energy for impoverished communities; there is no disruption of the functioning of an ecological or biodiversity corridor as shown on a recognized plan (i.e. fine scale biodiversity plan or provincial or municipal spatial development framework); there is no loss of critically endangered habitat; it does not prejudice public access to natural resources; it promotes the integration of communities and space; it is economically compatible with other land uses; it provides long-term employment opportunities across categories.

applications that are of no material importance. Reference to the characteristics of the location of a proposal is considered to be more effective than the use of thresholds in determining whether authorisation is required or not.

(c) Duplication between NEMA and the proposed provincial legislation

In order for the proposed provincial legislation to be implemented effectively, it would be necessary for the Minister to exempt the Province from implementing and complying with the regulations made under section 24 of NEMA, except insofar as certain activities that will have national implications are concerned.¹⁶⁸ If this does not happen, it will give rise to many instances of duplication. Activities that are identified in the national list made under NEMA and captured by the triggers contained in the provincial legislation would be subject to double regulation. In practice, proponents undertaking those activities in the Province would have to apply for authorisation under the national and the provincial legislation. If the Province is identified as the competent authority by the Minister in terms of the regulations made under section 24 of NEMA, the Province would be responsible for administering both regulatory systems.

Complying with the national legislation would not cause a proponent to be in breach of the provincial legislation and the converse applies equally. The proponent would be entitled to proceed with the relevant activity once authorisation had been granted under both laws. However, this form of duplication would squander resources and administrative capacity for those complying with, as well as those administering, the dual systems. Inevitably, there would be resistance from the private sector to the double-layered regulation of new developments and it is likely that economic growth in the Province would be undermined. It is therefore undesirable to have a situation in which both NEMA and the proposed provincial legislation are operative simultaneously in the Province.

The problem of duplicated regulatory systems raises several constitutional issues. The first is the extent to which the problem could be avoided by the application of the co-operative governance principles; in particular, the requirement for spheres of government to co-ordinate the implementation of legislation. This is discussed in part V below. In the event that the duplication cannot be averted by means of co-operative governance principles, the second issue is whether the Constitution provides any mechanism for resolving the problem. In this regard, section 146 of the Constitution addresses conflicts between national and provincial legislation and provides criteria that guide the court in determining which legislation should prevail. The references to national and provincial legislation include subordinate legislation made under an Act of

¹⁶⁸ In the course of preliminary discussions between the Province and the national Department of Environmental Affairs and Tourism, the latter indicated that it would be unwilling to suspend the operation of regulations made under section 24 of NEMA in the Province. However, subsequently, the Minister has agreed to suspend the operation of the section 24 regulations in the Province, subject to certain conditions, once the provincial legislation comes into effect.

Parliament or a provincial Act respectively.¹⁶⁹ Accordingly, section 146 would also apply to a conflict between the provincial legislation and the regulations made by the Minister under section 24 of NEMA. Because the application of the section presupposes the existence of a conflict, it is necessary to consider what constitutes a conflict within the context of section 146. Does a conflict include duplication between two regulatory systems in circumstances where compliance with one of the systems does not place a person in contravention of the other system?

(2) The meaning of ‘conflict’ in section 146

There are two obstacles to the application of section 146 of the Constitution. The first of these is section 45 of the Intergovernmental Relations Framework Act (‘IGR Act’).¹⁷⁰ This section prohibits a sphere of government or organ of state from instituting judicial proceedings to settle an intergovernmental dispute unless the dispute has first been declared a formal intergovernmental dispute in terms of section 41 of the IGR Act and all efforts to settle it in terms of Chapter 4 of that Act have failed.¹⁷¹ Does ‘instituting judicial proceedings’ include approaching a court in terms of section 146 of the Constitution? The Constitution does not indicate how a matter is to be brought before the court for resolution in terms of section 146. Presumably, any party may apply to a court once both sets of legislation have been passed for a declaratory order that determines which legislation prevails in terms of section 146.¹⁷² In the absence of such an application, there is no mechanism that triggers a determination by a court in terms of section 146.¹⁷³ Thus, there seems to be no ground on which to distinguish between ‘instituting judicial proceedings’ within the meaning of section 45 of the IGR Act and approaching a court to resolve a dispute in terms of section 146 of the Constitution. It follows that the requirements of section 45 of the IGR Act must be met before either party to a dispute may approach the court in terms of section 146 of the Constitution. This represents a limitation on the right of access to the courts contained in section 34 of the Constitution; however, the IGR Act falls under section 41 of the Constitution, which contemplates a limitation on this right in the context of intergovernmental disputes.¹⁷⁴

¹⁶⁹ See the definitions of ‘national legislation’ and ‘provincial legislation’ in section 238 of the Constitution.

¹⁷⁰ Act 13 of 2005.

¹⁷¹ Section 45(1) of the IGR Act.

¹⁷² An application could be brought by the organs of state involved in the matter or by private parties with an interest in having the problem of duplication resolved.

¹⁷³ Presumably, in light of the requirements in section 41 of the Constitution for the co-ordination of legislation and actions by different organs of state and spheres of government, there is a duty to ensure that a situation of conflicting legislation does not persist indefinitely. However, a thorough consideration of whether the parties would have a duty to approach the court in the context of a section 146 conflict is beyond the scope of this dissertation.

¹⁷⁴ See, in particular, section 41(3) of the Constitution.

Section 146 provides the second obstacle to its own application – the section only applies when there is a conflict between national and provincial legislation. Thus, in circumstances where there is no conflict section 146 does not apply. What is meant by ‘conflict’? The Constitution does not define the term. Section 150 of the Constitution provides that ‘when considering an apparent conflict between national and provincial legislation’ a court must prefer ‘any reasonable interpretation of the legislation ... that avoids a conflict, over any alternative interpretation that results in a conflict’. However, this does not shed any light on what is meant by the term ‘conflict’. It simply asks the courts to find ways of interpreting legislation so as to avoid identifying a conflict. This is not helpful in the context of the duplication presented by the simultaneous application of NEMA and the proposed provincial legislation. For example, it is likely that both laws would require a person wishing to develop a residential housing estate alongside an estuary to apply for authorisation. Under NEMA, the application would be made to the competent authority and under the proposed provincial legislation it would be made to the integrated decision-making body established for this purpose. Assuming that the ordinary meaning of the legislation is clear, the court has no leeway to interpret it in any other way. Thus, the developer is faced with the obligation of making duplicated applications and resources are wasted by the two spheres of government in the implementation of parallel regulatory systems. The critical question is whether this situation amounts to a conflict that triggers the application of section 146, thereby allowing the court to determine which regulatory system should prevail.

The ordinary meaning of ‘conflict’ as a noun is ‘an incompatibility between opinions, principles and so forth’; when used in its adjective form ‘conflicting’ refers to an incompatibility, variance or clash.¹⁷⁵ Currie and De Waal suggest that a conflict in the context of section 146 refers to an inconsistency between laws.¹⁷⁶ The authors explain this to mean that an inconsistency exists where the laws cannot be obeyed at the same time.¹⁷⁷ In other words, provisions of two laws will not be inconsistent where it is possible to obey each without disobeying the other.¹⁷⁸ In support of this, they refer to the construction of conflict adopted by the Constitutional Court in the *KwaZulu-Natal Certification* matter.¹⁷⁹ The difficulty with this approach is that it means that unless a law contradicts another, there is no conflict. In other words, the Constitution allows the two laws to exist side-by-side. In the context of the proposed provincial law, this places a huge burden on the Province, as it must implement the regulatory system under section

¹⁷⁵ Soanes and Stevenson (note 126) at 300. The full definition of ‘conflict’ is: ‘**n.** a serious disagreement or argument. a prolonged armed struggle. an incompatibility between opinions, principles, etc...as *adj* **conflicting**] be incompatible or at variance; clash’.

¹⁷⁶ Currie and De Waal (note 110) at 221.

¹⁷⁷ Currie and De Waal (note 110) at 222.

¹⁷⁸ Ibid. And see *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996* 1996 (4) SA 1098 (CC) at para 24 where the Constitutional Court stated that provisions of laws are inconsistent where they cannot stand at the same time, or cannot stand together, or cannot be obeyed at the same time.

¹⁷⁹ See note 178.

24 of NEMA as well as the proposed provincial law, if the latter is passed. Clearly this discourages any provincial initiative in legislating on subject matter within a functional area that has already been legislated on by the national government. Should a province do so, it is faced with the task of having to implement two parallel systems. If this were the effect that the Constitution intended to achieve, it would have made far more sense to adopt the approach taken in the German Basic Law. In terms of the Basic Law, the *Länder* may legislate on matters for which they share concurrent competency with the federation only as long as, and to the extent that, the federation does not exercise its powers to legislate.¹⁸⁰ Accordingly, it is necessary to cast the net wider in seeking to interpret the term ‘conflict’ in a manner that accords with the South African constitutional framework.

De Ville has explored the meaning of legislative inconsistency in the context of the Interim Constitution.¹⁸¹ The Interim Constitution does not require conflict to be established as a precondition to the application of its provisions for determining the paramountcy of provincial and national laws that regulate the same subject matter.¹⁸² However, it states that 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.’¹⁸³ De Ville explains that express inconsistency exists where it is impossible for a person to comply with both the provisions of an Act of Parliament and a provincial Act.¹⁸⁴ Inconsistency by necessary implication is interpreted more widely: in the author’s view, it exists where the purpose of the parliamentary or provincial Act is to regulate the subject matter exhaustively.¹⁸⁵ This would be a question of interpreting the relevant Act. These explanations of consistency do not resolve the issue that arises in the context of duplicating laws, except in circumstances where only one of the laws is intended to regulate the subject matter exhaustively. In other words, it cannot assist where, on a proper construction, both laws intend to regulate the subject matter exhaustively.

There is an alternative and wider interpretation of inconsistency or conflict within the context of section 146 that is more in keeping with the broader constitutional framework than the explanations discussed above. The golden rule of interpreting statutes has been formulated as follows:

‘We are to take a whole statute together and construe it altogether, giving the words their ordinary signification, unless when so applied they produce an inconsistency... so as to justify the Court in

¹⁸⁰ Article 72(1) of the German Basic Law.

¹⁸¹ J De Ville ‘Guidelines for Judicial Review on ‘Division of Powers’ Grounds’ (1995) 2 *Stellenbosch Law Review* 139.

¹⁸² This appears from section 126(3) of the Interim Constitution.

¹⁸³ Section 126(5) of the Interim Constitution.

¹⁸⁴ De Ville (note 181) at 157.

¹⁸⁵ De Ville (note 181) at 159.

placing on them some other signification, which though less proper is one which the Court thinks the words will bear.’¹⁸⁶

This places the greatest emphasis on the ordinary meaning, read within the context of the relevant statute as a whole. Building on that, the intention of the legislature is also recognised as an important factor. Thus, the test for interpretation of statutes is that the intention of the legislature must be determined with reference to the ordinary grammatical meaning of the words used, unless that would lead to an inconsistency or an absurdity, in which case the ordinary meaning may be modified.¹⁸⁷ An inconsistency or absurdity should be determined primarily with reference to the context of the statute as a whole. Applying these principles to the interpretation of ‘conflict’ in section 146, there are several important observations. First, the Constitution reflects a model of co-operative federalism as opposed to competitive federalism. For this reason, it confers broad areas of concurrency on the national and provincial governments. However, unlike the German constitutional system on which it is primarily modelled, the Constitution does not preclude provinces from legislating in those concurrent areas once the national government has done so. The converse applies equally: the national government may legislate in concurrent areas where a provincial legislature has already done so. In order for this to work successfully, considerable efforts at co-operation are required. For this reason, the Constitution specifically requires different spheres of government to co-ordinate their legislation and the Constitutional Court has underscored the importance of a co-operative approach when it comes to the making and implementation of legislation.¹⁸⁸

Second, section 146 only becomes applicable when co-operative governance fails. In fact, in terms of section 45 of the IGR Act, the parties to a dispute are precluded from approaching a court in terms of section 146 unless they have exhausted all other options provided for in the IGR Act and Chapter 3 of the Constitution. Therefore, the provision dealing with ‘conflict’ is the last resort and should be given a wide enough reading to resolve all disputes that relate to a failure to co-ordinate legislation in a workable manner. This leads on to the third observation. The purpose of the constitutional framework is to establish a government that can serve the interests of its electorate. Having duplicated, parallel regulatory systems increases the resources needed for administration purposes. It is not in the public interest to have financial and other resources squandered in this manner. Moreover, duplicated systems may inhibit economic development, particularly where the systems provide for regulatory approvals, increasing the obligations of those wishing to undertake activities for which authorisation is required.

¹⁸⁶ In *Grey v Pearson* 6 HLC 106. It has been quoted with approval in many cases, including *Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape v Poswa and others* 1999 (8) BCLR 9393 (Ck) at page 946.

¹⁸⁷ This is confirmed in the *Poswa* case (note 186) at 946.

¹⁸⁸ See the discussion of co-operative governance principles in part V of this dissertation.

If section 146 does not apply in these circumstances, the likelihood is that both national and provincial governments will be reluctant to innovate or seek to improve on existing regulatory systems in areas of concurrent legislative competency. This could not have been the intention behind the Constitution, in giving concurrent powers to the national and provincial government without an automatic national override, such as that which applies in the German system. Again, this would also not serve the interests of the electorate. Ultimately, the best laws should be in place and section 146 provides a mechanism for determining this. Thus, it is suggested that ‘conflict’ should be interpreted generously so as to include duplication between two regulatory systems. In this context, the ‘inconsistency’ or ‘conflict’ between the two systems would be interpreted to refer to the fact that it is not the intention of the Constitution to authorise and facilitate the implementation of duplicated regulatory systems.¹⁸⁹

(3) A brief discussion of certain aspects of section 146

Two assumptions must be made for the purposes of discussing section 146. The first is that the proposed provincial law and the regulations under NEMA have both become operative, as this triggers the application of section 146. The second is that these laws are in conflict with one another within the meaning of ‘conflict’ in section 146. On the strength of these assumptions, the provisions of section 146 become relevant.

Section 146 provides for national legislation to prevail over provincial legislation in two broad sets of circumstances. In all other circumstances, provincial legislation prevails.¹⁹⁰ The burden of proof rests on the party seeking to assert that the national legislation should prevail.¹⁹¹ Once it has been determined which legislation should prevail, the other legislation is rendered inoperative to the extent of the conflict between the two.¹⁹²

The first set of circumstances is where the national legislation applies uniformly to the country as a whole and the national legislation meets one or more specified conditions, which include the following:¹⁹³

¹⁸⁹ The only alternative to a wide interpretation of ‘conflict’ in the context of duplicated regulatory systems is for the sphere of government that legislates second to build in an express conflict between its law and the pre-existing one, such that it is factually impossible to comply with them simultaneously.

¹⁹⁰ Section 146(5).

¹⁹¹ This follows from a construction of the relevant provisions. The default position is that the provincial legislation prevails, unless the conditions in section 146(2) are met. Thus, a party seeking to allege that the default position does not apply must prove that section 146(2) is applicable.

¹⁹² Currie and De Waal (note 110) at 223.

¹⁹³ The requirement of uniformity is referred to in the introduction to section 146(2) and the further conditions that must be met are specified in subsections (a), (b) and (c) of section 146(2).

1. 'the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually';¹⁹⁴
2. the matter regulated by the national legislation requires uniformity for effective regulation and 'the national legislation provides that uniformity by establishing norms and standards; frameworks or national policies';¹⁹⁵
3. the national legislation is necessary for one or more objectives that include 'the protection of the environment'.¹⁹⁶

The second set of circumstances in which national legislation prevails is where it is 'aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security interests of another province or the country' or that 'impedes the implementation of national economic policy'.¹⁹⁷

Where a court cannot resolve a dispute concerning a conflict, the national legislation prevails over the provincial legislation.¹⁹⁸

The application of section 146 involves a two-stage enquiry.¹⁹⁹ The first stage is to examine the national and provincial legislation individually in order to determine whether they are both competent: in other words, does the legislation fall within the constitutional competency of the respective legislatures?²⁰⁰ The second stage is to determine how section 146 applies to resolve the particular conflict. As noted above, a pre-condition for this two-stage enquiry is that there is in fact a conflict between the national and provincial legislation. Both stages require a consideration of the specific provisions of the legislation in question. An assessment of the regulations made under NEMA and the proposed provincial legislation with reference to the provisions of section 146 is beyond the scope of this dissertation. However, I would like to comment on one aspect of section 146 in the context of the regulations and the proposed provincial legislation.

¹⁹⁴ Section 146(2)(a).

¹⁹⁵ Section 146(2)(b).

¹⁹⁶ In terms of section 146(2)(c)(vi). The other objectives in that subsection are the following: the maintenance of national security; the protection of the common market in respect of the mobility of goods, services, capital and labour; and the promotion of economic opportunity or equal access to government services.

¹⁹⁷ Section 146(3).

¹⁹⁸ In terms of section 148 of the Constitution. The Constitutional Court has questioned the meaning of this provision, pointing out that the resolution of disputes of this nature is an inherent part of the judicial function. *First Certification* judgment (note 50) at para 246.

¹⁹⁹ V Bronstein 'Legislative Competence' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* 2ed (Original Service, June 2004) at 15-5.

²⁰⁰ Bronstein (note 199) at 15-2.

In terms of section 146, the first set of circumstances in which the regulations would prevail is if they apply uniformly to the country as a whole and meet one or more of the further conditions specified in section 146 (and outlined above). Section 24 of NEMA does apply uniformly to the country as a whole, as will the regulations made under section 24 once they come into effect. Therefore I have assumed for the purposes of this discussion that the regulations currently do apply uniformly to the country as a whole.

One of the further conditions that, if met, will cause the regulations to prevail, is where the regulations are necessary for the protection of the environment. A key question is whether the necessity of the national legislation must be gauged with reference to the provisions of the provincial legislation. In other words, it may be sufficient to consider whether the national legislation (taken in isolation) is necessary for the protection of the environment. If it meets the test, then it would prevail (subject to meeting the uniformity requirement). The alternative interpretation of this condition is that the national legislation must be considered with reference to the provisions of the provincial legislation. The latter interpretation is not supported expressly by the text of section 146.²⁰¹ However, it is not excluded by the constitutional text. Furthermore, applying the first interpretation in relation to legislation falling within the functional area of the environment would lead to an absurdity. If the national legislation is considered in isolation, it will always result in a conclusion that it is necessary for the protection of the environment, unless the national legislation is so inappropriately framed that it actually undermines environmental protection. This could not have been the intention of the legislature, as it negates the conferral of concurrent powers on the provinces in relation to the functional area of the environment. Thus, the latter interpretation should be adopted, as it is more consistent with the constitutional framework. On this interpretation, the necessity of the national legislation for environmental protection must be assessed with reference to the necessity of the provincial legislation for that same purpose. This can only be done on a section-by-section comparison of the two sets of legislation, which is beyond the scope of this dissertation.

V. CO-OPERATIVE GOVERNANCE IN THE IMPLEMENTATION OF NEMA

The joint allocation of power to the national government and the provinces for the implementation of NEMA is a consequence of the co-operative federal system established by the Constitution. The principles of co-operative governance apply to all three spheres of government, which are obliged to observe and adhere to the principles and conduct their activities within the parameters of the Chapter.²⁰² Specifically, the

²⁰¹ Section 146(2)(c)(vi) provides: '[t]he national legislation is necessary for ... the protection of the environment.'

²⁰² Section 40(2) of the Constitution.

principles bind all organs of state within each sphere: this includes the national Cabinet members and the members of the provincial Executive Councils.²⁰³

Thus, the principles of co-operative governance are relevant to the implementation of legislation. This includes the decision by the Minister to assign the responsibility for the implementation of NEMA to the provinces. Furthermore, co-operative governance principles apply in the context of seeking to avoid a situation where there is duplication between the regulatory systems provided for in section 24 of NEMA and the proposed provincial legislation.

For present purposes, the following principles set out in Chapter 3 are worth highlighting:

- ‘41 (1) All spheres of government and all organs of state within each sphere must –
 - (a) to (d)
 - (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
 - (f) not assume any power or function except those conferred on them in terms of the Constitution;
 - (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;
 - (h) co-operate with one another in mutual trust and good faith by –
 - (i) to (ii)
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v)
 - (vi) avoiding legal proceedings against one another.
- (2)
- (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
- (4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.’

It is helpful to consider the manner in which the Constitutional Court has interpreted Chapter 3. Section 40 states that the spheres of government are distinctive yet interdependent and interrelated. This was elaborated on in the *Premier, Western Cape* case as follows:

‘The principle of co-operative government is established in s 40 where all spheres of government are described as being “distinctive, inter-dependent and inter-related”. This is consistent with the way powers have been allocated between different spheres of government. Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is “one sovereign, democratic state”, and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government. These provisions vest concurrent legislative competencies in respect of important matters in the national and provincial spheres of

²⁰³ S Woolman, T Roux and B Bekink ‘Co-operative Government’ in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* 2ed (Original Service, June 2004) at 14-11.

government, and contemplate that provincial executives will have responsibility for implementing certain national laws as well as provincial laws.’²⁰⁴

In the *Langeberg Municipality* case²⁰⁵ the Constitutional Court noted, also in the context of section 40, that the interrelatedness and interdependence of the different spheres requires them to ‘ensure that, while they do not tread on each other’s toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole’.²⁰⁶

Co-operation is particularly important in relation to powers and responsibilities that are allocated concurrently to different spheres of government. In the *Premier, Western Cape* case, the Constitutional Court noted that Chapter 3 is designed to ensure that the different spheres of government co-operate with each other ‘to secure the implementation of legislation in which they all have a common interest’.²⁰⁷ The Court went on to explain why this is particularly important in areas of concurrent competency:

‘Co-operation is of particular importance in the field of concurrent law-making and implementation of laws. It is desirable where possible to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made, and to ensure that adequate provision is made therefor in the budgets of the different governments.’²⁰⁸

The observation made by the Court in the *Premier, Western Cape* case underscores section 41(1)(h)(iv), which mandates organs of state to co-ordinate their actions and legislation.

In the *Education Policy Bill* case,²⁰⁹ the Constitutional Court noted that consultation and co-operation appears to be essential in circumstances where both Parliament and the provincial legislatures have exercised or wish to exercise concurrent competencies:

‘It is necessary to enable the national government to obtain the information it may require to enable it to take decisions in regard to educational matters falling within the ambit of ss 126(3)(a)-(e) of the Constitution; it is necessary to avoid conflicting legislative provisions and to rationalise the legislation applicable to Schedule 6 matters; and it is necessary to enable provincial and national governments to formulate their plans, including budgetary allocations, for the future. The setting up of parallel national administration in a province to procure the information that the national government needs, and to implement legislation enacted pursuant thereto, would be neither cost-

²⁰⁴ *Premier, Western Cape* (note 72) at para 50

²⁰⁵ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC).

²⁰⁶ At para 26.

²⁰⁷ *Premier, Western Cape* (note 72) at para 54.

²⁰⁸ *Premier, Western Cape* (note 72) at para 55.

²⁰⁹ *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC).

effective nor efficient, and moreover, would be likely to be more intrusive of provincial structures than legislation which calls for co-operation.’²¹⁰

Therefore it is quite clear that co-operation and consultation are fundamental requirements of co-operative government and that these requirements apply to the making and implementation of legislation in areas of concurrent competency shared between different spheres of government. Woolman *et al* extract two basic principles that underlie co-operative government.²¹¹ First, a sphere of government or organ of state must not use its powers in a way that undermines the effective functioning of another sphere or organ of state.²¹² Second, the integrity of each sphere of government and organ of state (referred to in section 41(1)(g)) must be understood in light of the powers and purpose of that entity.²¹³ These principles are applicable equally in the context of a divided federal model. However, in light of the *Langeberg Municipality* case,²¹⁴ I would add that the different spheres and organs of state must be guided constantly by the obligation to exercise their powers collectively for the benefit of the country as a whole. This requires a high degree of co-operation: all the parties involved in a matter must be open to alternative view points and willing to reconsider their position in the course of consultation that is undertaken in good faith. As was stated in the *Gambling Board* case,²¹⁵ each party to an intergovernmental dispute has an obligation to re-evaluate its position fundamentally.²¹⁶

The application of this co-operative approach is relatively straightforward in circumstances where the parties to a dispute are able to identify common ground. What happens in the opposite scenario where neither party is prepared to compromise its position after extensive rounds of consultation and negotiation? Taking the example of section 24 of NEMA, it is evident that there are diverging views on its implementation. The Minister sees the provincial executives as the appropriate organs of state to implement the regulatory system of environmental authorisations provided for in section 24. The Province regards the regulatory system as problematic and wants to replace it with an alternative provincial law. On this basis, the Province would be likely to withhold its agreement to being identified as a competent authority under NEMA, particularly once the proposed provincial legislation has been passed. In these circumstances, more concrete principles than the obligation to consult and co-operate are needed to break the deadlock.

²¹⁰ At para 27.

²¹¹ Woolman *et al* (note 203) at 14-6.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ Note 205.

²¹⁵ *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) BCLR 156 .

²¹⁶ At para 36.

Chapter 3 of the Constitution requires that appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes must be provided for in an Act of Parliament.²¹⁷ The Act intended to fulfil that obligation is the IGR Act, referred to in part III of this dissertation. Chapter 4 of the IGR Act outlines a procedure for declaring a dispute and engaging in negotiations, facilitated by a neutral third party, if necessary. However, the key shortcoming of Chapter 4 is that it does not actually provide mechanisms that can be used to break a deadlock, once the process of consultation and negotiation has failed to reconcile divergent views. This is particularly problematic in the context of concurrent powers, as more than one organ of state has the responsibility and power to determine the manner in which it should be exercised.

A mechanism of potential value for breaking a deadlock is to identify the organ of state or sphere of government that is ultimately responsible for the performance of a particular function or the exercise of a particular power. The *Grootboom* case²¹⁸ provides a useful example in this regard. The facts made reference to the establishment and implementation of a co-ordinated state housing program. The right of access to adequate housing is entrenched in Chapter 2 of the Constitution, which contains the Bill of Rights.²¹⁹ In the *Grootboom* matter, the Constitutional Court made the following statement:

‘[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chap 3 of the Constitution... Each sphere of government must accept responsibility for the implementation of particular parts of the program but the national sphere of government must assume responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State’s s 26 obligations.’²²⁰

This emphasises the fact that the responsibility to ensure that legislation meets the obligations imposed by the Bill of Rights falls on the national government. This responsibility goes hand in hand with the responsibility of national government to make framework legislation that sets norms and standards.²²¹ Thus, while the Constitution avoids giving the national government the upper hand when engaging with provinces in the consultative and co-operative approach mandated by Chapter 3,²²² the constitutional

²¹⁷ Section 41(2) of the Constitution.

²¹⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

²¹⁹ Section 26(1) of the Constitution.

²²⁰ *Grootboom* (note 218) at para 40.

²²¹ This responsibility is highlighted in the discussion of the legislative competency of national government in part III of this dissertation and, in particular, its power to encroach in areas of exclusive provincial competency or override provincial legislation in concurrent areas, where this is necessary to establish or maintain norms and standards.

²²² In this regard, it is noted that Woolman *et al* holds the view that the Constitution enables the national government to override provincial and local government decisions. The reasons for this view are not elaborated on sufficiently for the purposes of understanding the basis for this view. (See Woolman *et al* (note 203) at 14-2.)

framework envisages the national government playing the leading role when it comes to ensuring that legislation is in place to give effect to the rights in the Bill of Rights. The national government is also mandated with establishing framework legislation or legislation that applies uniformly for the purposes of setting norms and standards or maintaining standards.²²³ This role applies primarily when making legislation but it is also relevant in the context of implementing legislation, as this is the stage at which legislation is given its intended effect.

An analogy can be drawn between the *Grootboom* matter²²⁴ and the implementation of section 24 of NEMA. Like the functional area of housing, ‘environment’ is a functional area of concurrent competency between the national and provincial governments in terms of Schedule 4 of the Constitution. Furthermore, the right to an environment not harmful to ‘health or well-being’ and the protection of the environment ‘for the benefit of present and future generations’ is entrenched in Chapter 2.²²⁵ This mirrors the constitutional protection of the right to adequate housing. On this basis, it can be argued that the national government bears the primary responsibility for ensuring that NEMA is implemented.²²⁶ This responsibility extends to ensuring that the implementation occurs in a manner that fulfils or is likely to fulfil the environmental right in the Bill of Rights. In the process of meeting this responsibility, there is no doubt that the Minister is required to consult the Province (and the other provinces) and co-ordinate the actions of the national executive with proposed actions by the provinces that are also directed at the implementation of the legislation in question. This follows from the principles set out in Chapter 3.²²⁷ However, after a process of consultation, the national executive may form a view that the proposed provincial legislation will not meet the environmental objectives underpinning section 24 of NEMA. For example, there may be concerns about the uncertainty associated with the provincial system of triggers for determining when an authorisation is required.²²⁸ Unscrupulous persons could use those uncertainties in order to avoid making applications for authorisation in circumstances where there is doubt as to whether an application is required.

²²³ See further the discussion in part III of this dissertation and, in particular, the view expressed by the Constitutional Court in the *Premier, Western Cape* case (note 72) regarding the leading role played by the national government in standard setting.

²²⁴ *Grootboom* (note 218).

²²⁵ Section 24 of the Constitution.

²²⁶ The manner in which section 24 of NEMA is framed also places the primary responsibility on the national executive, by providing that the MECs must obtain the concurrence of the Minister when exercising their powers.

²²⁷ Section 41(1)(h)(iii) requires organs of state and spheres of government to inform one another of and consult one another on matters of mutual interest while (iv) requires them to co-ordinate their actions with one another.

²²⁸ These aspects of the proposed provincial legislation are discussed in part IV of this dissertation.

Following the analogy in the *Grootboom* case²²⁹ to its logical conclusion, it could be argued that the Minister could override the Province and identify it as the competent authority, despite the refusal of the Province to consent to this allocation of responsibility. The only proviso would be that the Province has the administrative capacity and the financial resources to administer section 24 and the regulations. There are several problems with this argument. Firstly, it does not conform in any way to the requirement of agreement to an assignment in terms of section 99 of the Constitution. Secondly, it effectively allows the Minister to treat the provinces as national agencies, which is not what the Constitution contemplates. Furthermore, this approach does not necessarily give rise to the best outcome from an objective perspective. The Minister is not an independent or impartial third party and may choose NEMA over the provincial legislation on political grounds rather than on the basis that NEMA gives effect to the environmental right most effectively.

What are the possible alternative mechanisms for breaking a deadlock between the Minister and the Province? Would it be acceptable for the Minister and the Province to appoint an independent expert to evaluate the merits of the regulatory system encapsulated in section 24 of NEMA against the regulatory system envisaged in the proposed provincial legislation? As part of the evaluation, both parties could prepare a written motivation for persisting with their viewpoints, after having re-evaluated their respective positions as exhorted by the *Gambling Board* case.²³⁰ Drawing on the views expressed in the *Langeberg Municipality* case,²³¹ the purpose of the evaluation would be to determine the regulatory system that best serves the interests of the Province (without detracting from the interests of the country as a whole).

Arguably, additional factors relevant to the evaluation would include those set out in section 146 of the Constitution. These factors determine the circumstances in which national legislation should prevail over provincial legislation. Although it is contemplated that a court in resolving a conflict between national and provincial legislation would ordinarily apply these factors,²³² there is no reason why the factors could not be applied by the parties to a dispute, prior to the matter having been referred to a court for resolution. In fact, it seems prudent for the parties to bear them in mind, knowing that ultimately these are the factors that a court would apply.

The findings of the evaluation would determine what constitutes reasonable behaviour on the part of the parties to the dispute. The written motivations could then be reviewed by independent experts and weighed against one another. Reasonableness is an important factor in Chapter 3 of the Constitution.²³³ If the proposed provincial

²²⁹ *Grootboom* (note 218).

²³⁰ *Ibid.*

²³¹ Note 205.

²³² See, for example, the references to a court in section 146(4) and section 148 of the Constitution.

²³³ Section 41(3) of the Constitution requires organs of state to make all reasonable efforts to settle their disputes.

legislation were regarded as a more effective form of environmental management than section 24 of NEMA, reasonableness would dictate that the Minister should be willing to suspend the operation of section 24 in the Province. Equally, if NEMA were regarded as a more effective regulatory system and solutions could be found to the concerns identified by the Province in relation to its implementation, it would be unreasonable for the Province to withhold its agreement to an assignment of the responsibility for implementing NEMA.

In these circumstances, the requirement for agreement in terms of section 99 of the Constitution does not equate to the voluntary consent contemplated in the private law realm of contract. Rather, it refers to the conclusion of an arrangement, in terms of a good faith consultative process that culminates (if necessary) in the intervention by an independent third party that is appointed to determine how the matter should be resolved. While this may seem to be stretching interpretations of ‘agreement’ in the context of section 99 too far, it is worth noting that, in the context of assignment by provincial executives to local government, it has been suggested that deadlocks should be referred to the Minister of Provincial and Local Government.²³⁴ The Minister then takes a decision on whether the assignment should proceed.²³⁵

VI. CONCLUSION

An assessment of aspects of NEMA and the proposed provincial legislation raises several interesting issues. It is evident from section 24 of NEMA, read with sections 85 and 125 of the Constitution, that both the national executive and the provincial executives have a responsibility to implement section 24. However, the powers of the provincial executives are curtailed by the requirement to act with the concurrence of the Minister. While this suggests that the national executive is given the leading role in implementing NEMA, it does not constitute a blank cheque. In particular, it is trite that any attempt to allocate full responsibility for implementation to the provinces must be consistent with the Constitution, particularly in circumstances where NEMA does not contemplate such allocation expressly.

As noted in part III, the Constitution contemplates three forms of allocating responsibility. Agency arrangements and delegation are more suited to a relationship of subordination, as the principal or *delegans* (as the case may be) retains responsibility for, and a varying degree of control over, the exercise of the allocated power or function. Thus, these arrangements do not apply readily in the context of NEMA and, more

²³⁴ Ashira Consulting/Palmer Development Group ‘Framework for the assignment of powers and functions: Discussion Document: Towards the Development of a Policy Framework for the Assignment of Powers and Functions to Local Government’ (December 2002) Commissioned by the Department of Provincial and Local Government. See para 93 on page 32. Assignment to a Municipal Council is provided for in section 126 of the Constitution. As in the case of section 99, there is a requirement for agreement to be reached between the assignor and assignee.

²³⁵ *Ibid.*

broadly, the constitutional relationship between the national and provincial spheres of government. Furthermore, the requirements for an assignment are more suited to the transfer of powers and functions between different spheres because they take into account the administrative and financial implications of such transfers. Consequently, the allocation to provinces of full responsibility for the implementation of NEMA fits most comfortably into the category of an assignment.

Section 99 of the Constitution requires an assignment to the provincial executive to be done in terms of an agreement. Agreement in this context is not necessarily synonymous with the voluntary consent envisaged in the private law realm. It must be understood in light of the co-operative governance principles that apply to the implementation of legislation and, the obligation of all spheres of government to choose outcomes that further the interests of the country as a whole. In that context, it is arguable that the provinces may not withhold their consent to an assignment that achieves the optimal outcome. In other words, the requirement of agreement is not absolute and a province cannot withhold its agreement unreasonably. For the purposes of determining an optimal outcome, a potential mechanism is to obtain an independent assessment of the various options by a third party.

In terms of the case study, assuming a failure to resolve the matter co-operatively, the likely outcome is the simultaneous operation of section 24 of NEMA and the proposed provincial legislation in the Province. This creates the potential for duplication in areas where the regulatory systems overlap. The provisions of section 146 of the Constitution apply to conflicts between national and provincial legislation. The question is whether the duplication between the regulatory systems amounts to a conflict within the meaning of section 46. Relying on principles of interpretation intended to avoid an absurdity in outcome, it is arguable that conflict should include duplication between legislation. The alternative is that such duplication stands, placing an onerous burden of implementation on the Province and requiring double hurdles of compliance for those wishing to undertake regulated activities in the Province. This would discourage any further provincial initiatives, which could not have been the intention of the Constitution.

REFERENCES

Cases referred to

Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (1) SA 744 (CC)

Ex parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill 2000 (1) BCLR 1

Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996 1996 (4) SA 1098 (CC)

Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC)

Executive Council, Western Cape Legislature and others v President of the Republic of South Africa and others 1995 (4) SA 877 (CC)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC)

Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape v Poswa and others 1999 (8) BCLR 9393 (Ck)

Minister of Home Affairs v Liebenberg 2002 (1) SA 33 (CC)

National Gambling Board v Premier of KwaZulu-Natal and Others 2002 (2) BCLR 156

Premier, Western Cape v President of the Republic of South Africa 1999 (3) SA 657 (CC)

President of the Republic of South Africa v South African Rugby Football Union (SARFU) 1999 (10) BCLR 1059

Wildlife and Environment Society of SA v Provincial Minister of Finance and Development Planning (Western Cape), Provincial Minister of Environmental and Cultural Affairs (Western Cape), Municipality of Stellenbosch and Paradyskloof Golf Estate (Pty) Ltd (unreported) case no 2620/2000 11 February 2002 (Nel J).

Legislation referred to

Constitution of South Africa Act 200 of 1993

Constitution of South Africa, 1996

Development Facilitation Act 67 of 1995

Environment Conservation Act 73 of 1989

Financial and Fiscal Commission Act 99 of 1997

Intergovernmental Fiscal Relations Act 97 of 1997

Intergovernmental Relations Framework Act 13 of 2005

Land Administration Act 2 of 1995

(Western Cape) Land Use Planning Ordinance 15 of 1985

National Environmental Management Act 107 of 1998

National Heritage Resources Act 36 of 1998

Regulations under section 21 of the Environment Conservation Act entitled 'Identification under section 21 of activities which may have a substantial detrimental effect on the environment' published in GN R1182 in *Government Gazette 18261* of 5 September 1997

Regulations entitled 'Proposed regulations under section 24(5) of the National Environmental Management Act, 1998 (Act No. 107 of 1998) as amended' published in General Notice 12 of 2005 in *Government Gazette 27163* of 14 January 2005

Other sources

Ashira Consulting/Palmer Development Group 'Framework for the assignment of powers and functions: Discussion Document: Towards the Development of a Policy Framework for the Assignment of Powers and Functions to Local Government' (December 2002) *Commissioned by the Department of Provincial and Local Government.*

D Brand 'Development of Concurrent Legislation – A New South African Perspective' (1999) *Seminar Report: Subnational Constitutional Governance* 37 39 Konrad Adenauer Stiftung http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_5112_2.pdf (Accessed December 2005)

V Bronstein 'Legislative Competence' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* 2ed (Original Service, June 2004) Juta.

R H Christie *The Law of Contract* 4ed (2001) LexisNexis Butterworths.

I Currie & J De Waal *The New Constitutional & Administrative Law* vol 1 (2001) Juta.

J De Ville 'Guidelines for Judicial Review on "Division of Powers" Grounds' (1995) 2 *Stellenbosch Law Review* 139.

JR De Ville *Judicial Review of Administrative Action in South Africa* (2003) Butterworths.

WA Joubert (ed) *LAWSA* vol 20, part 2 (Durban: Butterworths, 2000) at para 179.

J Klaaren & M Chaskalson 'Executive Government' in M Chaskalson J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* (Rev 5, 1999) Juta.

IM Rautenbach and EFJ Malherbe *Constitutional Law* 4ed (2004) Butterworths.

R Simeon 'Considerations on the Design of Federations: The South African Constitution in Comparative Context' (1998) 13 *SA Public Law* 42.

R Simeon and C Murray 'Multi-Sphere Governance in South Africa: An interim assessment' (2001) 31 *Publius: The Journal of Federalism* 65.

C Soanes and A Stevenson (eds) *Oxford Dictionary of English* 2ed (2003) Oxford University Press.

N Steytler 'Concurrency and co-operative government: The law and practice in South Africa' (2001) 16 *SA Public Law* 241.

A Tarr 'Controlling Competency Conflicts Subnational Constitutions, National Constitutions and the Allocation of Authority' *Seminar Report: Subnational Constitutional Governance* (1999) Konrad Adenauer Stiftung 37 39. Available at: <http://www.kas.de> (Accessed December 2005)

R Watts 'Is the New Constitution Federal or Unitary?' in B De Villiers (ed) *Birth of a Constitution* (1994) Juta 75.

S Woolman, T Roux and B Bekink 'Co-operative Government' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) *Constitutional Law of South Africa* 2ed (Original Service, June 2004) Juta.