

Chapter 28

Transitional Provisions On Executive Authority, Assets and Liabilities

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28.1 Introduction

Much of the legislation on the South African statute books is 'old order' legislation that was enacted before 27 April 1994. Accordingly, it confers powers on executive authorities created by the constitutional regimes that governed South Africa prior to the enactment of the Interim Constitution.¹ In terms of Interim Constitution s 229 and Final Constitution² Schedule 6, Item 2(1), all old order legislation that has not been repealed continues in force subject to its consistency with the Interim and Final Constitutions respectively. The Interim Constitution regulated in some detail the transfer of executive power in respect of this old order legislation to the national and provincial executive authorities it created. The Interim Constitution also made corresponding provision for the transfer of State assets and liabilities from the old order executive authorities to the new national and provincial authorities. The transitional scheme of the Interim Constitution in respect of old order executive powers and old order State assets and liabilities was recognised and carried over into the period after 4 February 1997 by the Final Constitution. In order to understand the current position with respect to executive powers created by old order legislation and State assets and liabilities which existed prior to 27 April 1994, it is necessary to examine the transitional provisions of the Interim Constitution. This laborious exercise remains of relevance to contemporary constitutional law and

1 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

2 Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

litigation for two reasons. First, it determines whether national or provincial executive authorities may now lawfully exercise particular executive powers created by old order legislation, and whether national or provincial executive authorities have succeeded to specific old order assets. Second, it determines whether national or provincial legislatures may lawfully repeal or amend particular provisions of old order legislation. The latter consequence flows from the decision by the Constitutional Court in *DVB Behuising* that old order legislation may be amended or repealed by a provincial legislature only if it is legislation that was administered by provincial executive authorities immediately prior to the commencement of the Final Constitution.³ As a result, the national or provincial succession under the Interim Constitution to executive authority in respect of old order legislation determines, under the Final Constitution, the legislative competence of Parliament and the provincial legislatures to repeal or amend the old order legislation in question.⁴

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28.2 The succession to executive authority in relation to old order legislation

(a) Transitional provisions in the Interim Constitution relating to executive authority⁵

(i) Assignments of executive authority

Under the Interim Constitution, the succession to executive authority in respect of old order legislation was governed by IC s 235. Section 235 reads, in relevant part, as follows:

(1) A person who immediately before the commencement of this Constitution was —

- (a) the State President or a Minister or Deputy Minister of the Republic within the meaning of the previous Constitution;
- (b) the Administrator or a member of the Executive Council of a province; or
- (c) the President, Chief Minister or other chief executive or a Minister, Deputy Minister or other political functionary in a government under any other constitution or constitutional arrangement which was in force in an area which forms part of the national territory,

shall continue in office until the President has been elected in terms of s 77(1) (a) and has assumed office . . .

. . .

3 *Western Cape Provincial Government and Others: in Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) ('*DVB Behuising*') at paras 18–34.

4 See further Victoria Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

5 The transitional provisions relating to executive authority are discussed in *Executive Council, Western Cape Legislature, & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) ('*Executive Council, Western Cape*') at paras 66–98 (Chaskalson P) and paras 162–89 (Krieglner J) and in *DVB Behuising* (supra) at paras 18–34.

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

- (a) All laws with regard to matters which -
- (i) do not fall within the functional areas specified in Schedule 6; or
 - (ii) do fall within such functional areas but are matters referred to in paras (a)-(e) of s 126(3) . . .

shall be administered by a competent authority within the jurisdiction of the national government . . .

- (b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paras (a)-(e) of s 126(3) shall -
- (i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in ss (1) (a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under ss (8) to a competent authority within the jurisdiction of the government of such province; or

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- (ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in ss (1) (c), subject to ss (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this subparagraph shall not apply to policing matters, which shall be dealt with as contemplated in para (a).

- (c) In this subsection and ss (8) 'competent authority' shall mean -

- (i) in relation to a law of which the administration is allocated to the national government, an authority designated by the President; and
- (ii) in relation to a law of which the administration is allocated to the government of a province, an authority designated by the Premier of the province.

. . .

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

(b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may -

- (i) amend or adapt such law in order to regulate its application or interpretation;
- (ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in

subpara (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and

- (iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to ss 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of State, administration, force or other institution.

(c) . . .

(d) Any reference in a law to the authority administering such law, shall upon the assignment of such law in terms of para (a) be deemed to be a reference *mutatis mutandis* to the appropriate authority of the province concerned.

(9) (a) If for any reason a provincial government is unable to assume responsibility within 14 days after the election of its Premier, for the administration of a law referred to in ss (6) (b), the President shall by proclamation in the Gazette assign the administration of such law to a special administrator or other appropriate authority within the jurisdiction of the national government, either generally or to the extent specified in the proclamation, until that provincial government is able to assume the said responsibility.

(b) Subsection (8) (b) and (d) shall *mutatis mutandis* apply in respect of an assignment under para (a) of this subsection.

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Section 235 was designed to deal with the practical reality that, on 27 April 1994, a new constitutional framework was superimposed on a public administration that was not yet federal. According to IC s 235, most executive powers vested in the national government. Executive powers relating to 'provincial matters' (ie the functional areas listed in IC Schedule 6 which defined the ambit of provincial legislative authority) were to be assigned to the provinces as they developed the administrative capacity to deal with these powers. To this end, IC s 235 distinguished four categories of existing legislation:

- (1) laws with regard to matters which did not fall within the functional areas specified in IC Schedule 6 (IC s 235(6)(a)(i));
- (2) laws with regard to matters which fell within the functional areas specified in IC Schedule 6, but which fell within the ambit of the national government legislative override covered by IC s 126(3)(a)-(e) (IC s 235(6)(a)(ii));
- (3) laws with regard to matters which fell within the functional areas specified in IC Schedule 6, which were not covered by the national government legislative override, and were, immediately prior to 27 April 1994, administered by provincial or national authorities within South Africa (IC s 235(6)(b)(i)); and
- (4) laws with regard to matters which fell within the functional areas specified in IC Schedule 6, which were not covered by the national government legislative override, and were, immediately prior to 27 April 1994, administered by homeland authorities (IC s 235(6)(b)(ii)).

In terms of IC s 235(6), executive authority in respect of the first three categories of existing laws was allocated on 27 April 1994 to the national government. Executive authority in respect of the fourth category of laws was allocated to the relevant

provincial governments. However, by virtue of Proclamation R102 of 1994,⁶ promulgated by the President under IC s 235(9) on 4 June 1994, executive authority over the fourth category of laws was removed from the relevant provincial governments and assigned to the national government. Accordingly, the effect of IC s 235(6) and Proc. R102 was that executive authority over all old order legislation was initially reserved for the national government. The only way in which provincial governments could acquire executive authority over old order legislation was by presidential assignment under IC s 235(8). The express allocation of executive authority in respect of laws under IC s 235(6) was therefore superceded in all practical respects by the discretionary power of assignment of executive authority in respect of laws under IC s 235(8).⁷

IC s 235(8)(a) addressed only laws contemplated by IC s 235(6)(b). These laws fell within the third and fourth categories described above (ie laws with regard to matters which fell within the functional areas specified in IC Schedule 6, and

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which were not covered by the national government legislative override in IC s 126(3)). IC s 235(8)(a) provided that once the provinces had the necessary administrative capacity, the President was able, and, if requested by the Premier, was obliged, to assign by proclamation the administration of IC s 235(6)(b) laws to 'a competent authority within the jurisdiction of the government of a province'.⁸

Because IC s 235(8)(a) was confined in its operation to laws contemplated by IC s 235(6)(b), the validity of any assignment under IC s 235(8)(a) could be challenged on the grounds that the law assigned falls outside the scope of IC s 235(6)(b). In *Executive Council, Western Cape & Others v President of the Republic of South Africa & Others*⁹ a majority of the Constitutional Court held that the purported assignment to the provinces under IC s 235(8) of the Local Government Transition Act¹⁰ was invalid because the Act did not fall within the categories covered by IC s 235(6) (b). Similarly, in *Western Cape Provincial Government & Others: in Re DVB Behuising (Pty) Ltd v North West Provincial Government & Another*,¹¹ a majority of the Court held that the purported assignment of certain provisions of Proclamation R293 of 1962 was invalid because the provisions in question did not fall within the categories covered by IC s 235(6) (b). Both *Executive Council Western Cape* and *DVB Behuising* illustrate some of the difficulties of categorizing legislation for the purposes of IC ss 235(6) and 235(8).¹² Nevertheless, it is possible to identify certain general principles applicable to the categorisation exercise. First, it is not necessary, for the purposes of IC ss 235(6) and 235(8), to fit the whole of a given statute within

6 Regulation Gazette 5344, Government Gazette 15781, 3 June 1994.

7 The categorisation of laws under IC s 235(6) remains important only insofar as IC ss 235(6) (b) (i) and (ii) identify which laws may be assigned to the provinces under IC s 235(8).

8 IC s 235(6)(c)(ii) defined 'competent authority' as 'an authority designated by the Premier'.

9 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC).

10 Act 209 of 1993.

11 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC).

a single category. If, within a single statute, there are some provisions which fall within the categories contemplated by IC s 235(6) (b) and others which do not, the former provisions will be capable of assignment under IC s 235(8) but the latter provisions will not.¹³ Second, when classifying a law or provision for the purposes of IC s 235(6)(a) and (b), the purpose of the legislation is the critical component of the inquiry. A law, the subject matter of which *prima facie* appears to fall outside IC Schedule 6, may nevertheless be classified as an IC s 235(6) (b) law if its true purpose is to regulate a matter within IC Schedule 6. The converse is equally true.¹⁴ Finally, although IC s 235(6) (b) refers only to provisions falling within functional areas specified in IC

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Schedule 6 and not to provisions which are necessary or incidental to such matters,¹⁵ the Constitutional Court has held that such necessary or incidental provisions are also to be categorised as IC s 235(6) (b) provisions.¹⁶

(ii) Administrative responsibility, executive authority and the interpretation of assigned legislation

(aa) Administration of laws and power to exercise executive authority

The use of the terms 'administration of a law'¹⁷ and 'power to exercise executive authority' in IC s 235 is potentially confusing. The terms may appear to have been used interchangeably in the section. This, however, is not the case. 'Power to exercise executive authority' is the authority to exercise powers conferred by law. 'Administration of laws' refers to political responsibility for the implementation of the laws in question. In *Zama v Minister of Safety and Security*,¹⁸ Levinsohn J distinguished the two concepts in the following manner:

The concepts of 'power to exercise executive authority in terms of laws' and 'laws administered by a competent authority within the jurisdiction of a national government' seem to me to be different . . . Both [paras] (6)(a) and (b) provide for these laws to be

12 These difficulties are, in essence, those raised by the processes of categorising legislation for the purposes of determining provincial legislative competence and determining whether national or provincial legislation prevails in particular cases of legislative conflict. See Victoria Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

13 *DVB Behuising* (supra) at para 23.

14 *Ibid* at paras 37-38.

15 See IC s 126(2) in which legislative competence over matters incidental to the exercise of their legislative competence over schedule 6 matters expressly vest in the provinces.

16 *DVB Behuising* (supra) at paras 55-59.

17 Section 235(8) refers to 'administration of a law'. Section 235(6)(a) and (b) refer to 'laws [which] . . . shall be administered'.

18 1994 (4) SA 699 (D) ('*Zama*').

administered by 'competent authorities' within the jurisdiction of the national government or the provincial government, whatever the case may be. This appears to confer management functions upon the particular 'competent authority' rather than investing them with executive powers . . . In my view [subsec] (6) does not confer executive authority in terms of the existing laws upon the 'competent authorities' designated by the president. The subsection seeks to allocate the administration of the laws to either the national government or to a province.¹⁹

As Levinsohn J points out, the 'competent authorities' contemplated by IC s 235 do not necessarily acquire all the executive powers created by the laws in respect of which they were designated. The laws in question may have conferred different executive powers on a range of functionaries. The 'administration of the law' cannot therefore have meant the exercise of executive power under that law. Rather, it referred to the managerial control of the exercise of executive powers created by that law. Thus the significance of the designation of the competent authority was that he or she was the member of the Executive Council or Cabinet Minister under whose portfolio an assigned law would fall, and he or she became the party who was held politically responsible for the proper administration of the law in question.

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(bb) Interpretation of assigned legislation

The IC s 235(8) proclamation assigning administration of laws to a province could amend any law to regulate its application or interpretation.²⁰ The extent of this power of amendment by proclamation was never clarified. In *Executive Council, Western Cape Legislature*²¹ the Constitutional Court split evenly between judges who construed this power narrowly and those who construed this power broadly. The former read the power to embrace those amendments objectively necessary to achieve functional efficiency in the administration of the assigned laws.²² The latter read the power to encompass any amendments that the President *bona fide* considered necessary for the efficient carrying out of an assignment.²³

Where any relevant IC s 235(8) proclamation did not amend assigned legislation, the allocation of executive powers created by such legislation was a matter of statutory interpretation. Here the crucial transitional provisions of the IC were IC s 232(1)(c) and s 235(8)(d). Where the administration of an old order law was assigned to a province,²⁴ IC s 232(1)(c) provided that a reference in that law to 'a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council' should, 'unless it is inconsistent with the context or clearly inappropriate', be construed as a reference to the Premier acting

19 Ibid at 703C-F.

20 Section 235(8)(b).

21 *Executive Council, Western Cape* (supra) (Didcott, Kriegler and Langa JJ did not express a view on this issue).

22 Ibid at paras 96-8 (Chaskalson P). Ibid at paras 146 and 198 (Ackermann, O' Regan and Sachs JJ concurring).

23 Ibid at paras 144-6 (Mahomed DP)(Mokgoro J concurring). Ibid at paras 228-30 (Madala and Ngoepe JJ).

in accordance with the Constitution.²⁵ Thus, all executive powers in laws assigned to a province which vested in a person or body referred to in IC s 232(1)(c) ordinarily vested in the Premier. IC s 232 provided no guidance on how references to Cabinet Ministers were to be construed. However, IC s 235(8)(d) provided that any reference in a law assigned to a province under IC s 235(8)(a) should 'be deemed to be a reference *mutatis mutandis* to the appropriate authority of the province concerned'.²⁶ Accordingly, where executive powers in old order

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laws vested in Cabinet Ministers, the new order assignment by President of the laws in question to a province meant that executive powers vest in the relevant member of the Executive Council.²⁷ Likewise, where powers in old order laws vested in the administrative head of a department, under the new dispensation the administrative head of the relevant department of the provincial administration exercised the requisite power.

(b) Transitional provisions in the Final Constitution relating to executive authority

FC Schedule 6 gives continuing effect to any assignments effected under IC s 235(8). FC Schedule 6, Item 2(2) provides that pre-1994 legislation continues in force and is administered by the authorities that administered it when the Final Constitution took effect.²⁸ Thus assignments of administrative authority under IC s 235(8) of the Interim Constitution endure.

FC Schedule 6, Item 14 is the successor to IC s 235(8). It provides for the assignment to provinces of executive powers under legislation that (a) relates to

24 The allocation of laws takes place under s 235(6). The assignment of laws takes place under s 235(8). See § 28.2 (a) (i) above. See *President of the Republic of Bophuthatswana & Another v Milsell Chrome Mines (Pty) Ltd & Others* 1995 (3) BCLR 354, 366E-G (B). Waddington J seems to suggest that all old order legislation relating to IC Schedule 6 matters was, for the purposes of IC s 232(1), allocated to the provinces by IC s 147(2). With respect, that reading cannot be correct. IC s 232 contemplated only allocations effected by virtue of IC s 235(6).

25 This would mean a reference to the Premier acting in consultation with the Executive Council because IC s 147(2) provided that, with some specified exceptions, none of which are relevant for present purposes, the President was to exercise his or her powers in consultation with the Executive Council.

26 IC s 235(8)(d).

27 There was no tension between IC s 232(1)(c) and IC s 235(8)(d) because the Premier was usually the 'appropriate authority' in respect of powers which vested in any person or body referred to in IC s 232(1)(c). In *Zama*, Levinsohn J stated:

'In my judgment, once it is found that the KwaZulu Police Act is a law which in terms of the Constitution has been allocated to the national government, then the situation which was envisaged in s 232(1)(c)(i) comes into effect and "Cabinet" is construed as a reference to "the President acting in accordance with this Constitution". In my view, the intention was that the President should assume the executive functions which were invested in those erstwhile functionaries. *That, to my mind, is totally consonant with the President's position as the principal arm of executive government.*'

Zama (supra) at 703J-704B (emphasis added). Where the Premier is not the appropriate authority in respect of powers which vested in a s 232(1)(c) body or functionary, the section will not operate to construe references to that body or functionary as references to the Premier because that would, of necessity, be 'clearly inappropriate'.

Schedule 4 or 5 matters and (b) pre-dates the Final Constitution. The President is given the discretion to make such assignments by proclamation. Unlike IC s 235(8), Item 14 does not give the provinces the right to demand the assignment. The President may refuse to assign the relevant powers. Another significant difference is that Item 14 permits the assignment of *any* executive powers conferred by Schedule 4 or 5 legislation. It is not limited to matters in respect of which the national legislative override does not operate.

28.3 The transfer of old order state assets and liabilities

IC s 239 regulated the allocation of state assets and liabilities existing on 27 April 1994 between the national and provincial governments. The first principle was that assets²⁹ associated with the administration of a particular law vested, at any given time, in the authority that had been allocated or assigned administrative responsibility in respect of that law in terms of IC s 235.³⁰ Assets not associated with the administration of any particular law were divided into two categories. In the first category, those assets that were to be applied in connection with a matter referred to in IC Schedule 6 that was not subject to the national government legislative override vested in the relevant provincial governments.³¹ In the second category, those assets that were to be applied in connection with matters not covered by IC Schedule 6 or matters covered by IC Schedule 6 but subject to the national government legislative override vested in the national government.³² IC s 239(1) (d) provided that, where assets could not be classified according to these principles, disputes between a provincial government and the national government were to be referred to the Commission on Provincial Government.³³ All public debts and liabilities that existed on 27 April 1994 were assumed by the national government.³⁴

28 FC Schedule 6 Item 2(2) reads, in relevant part, as follows: 'Old order legislation that continues in force . . . continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.'

29 'Assets' were defined by IC s 239(1) to include funds and administrative records. The broad use of the term suggests that it covered all debts owed to a government. See *Government of the Republic of South Africa v Malevu* 1995 (8) BCLR 995, 998I-J (D).

30 IC s 239(1)(c). The provisions relating to the assignment of administrative responsibility over existing legislation are discussed above at . . . 28.2(b). The relationship between these provisions and IC s 239, the transitional provision relating to state assets, was described by Kriegler J in *Executive Council, Western Cape* (supra) at para 176.

31 Section 239(1)(b). The wording of s 239(1)(b) was confusing. The section referred to any 'matter which is not a matter referred to in paragraphs (a) to (e) of section 126(3)', but it obviously ought to have referred to 'any matter falling within a functional area specified in Schedule 6 which is not a matter referred to in paragraphs (a) to (e) of section 126(3)'. Cf the wording of IC s 239(1)(a).

32 IC s 239(1)(a).

33 IC s 239(1)(d).

34 IC s 239(3)(a) as amended by s 11 of the Constitution of the Republic of South Africa Second Amendment Act 44 of 1995.

The Final Constitution contains no provisions relating to the succession to public assets that vested in governments disestablished by the Interim Constitution.³⁵ Ordinarily this textual silence will not create any difficulties. The national and provincial governments under the Final Constitution succeed the identical governments that existed under the Interim Constitution. Thus assets that were owned by any particular government under the Interim Constitution will remain the property of that government under the Final Constitution. Where, however, a public asset that pre-dated the Interim Constitution was not capable of allocation

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in terms of the rules of IC ss 239(1)(a)–(c), and was not allocated in terms of s 239(1)(d), a problem arises. IC section 239(1)(d) no longer exists and the Final Constitution contains no procedure comparable to IC s 239(1)(d) by which to allocate such an asset. In such a situation, while the asset would vest in the State, there would be no obvious mechanism for its allocation to the provincial or national governments as agents of the State.³⁶

The Final Constitution does not regulate the succession to public liabilities that pre-date 27 April 1994. Unlike assets, however, there is no need for it to do so. The Interim Constitution provided that all these liabilities were assumed by the national government.³⁷

35 It appears to have been drafted on the assumption that all such questions of succession to assets would have been resolved under the Interim Constitution, either by operation of law in terms of ss 239(1)(a)–(c), or by agreement in terms of s 239(1)(d).

36 In the absence of any legislation regulating the issue, the allocation of the asset between provincial and national governments would have to be negotiated between the governments concerned, having regard to the principles of co-operative government set out in Chapter 3 of the Final Constitution.

37 IC s 239(3)(a) as amended by s 11 of the Constitution of the Republic of South Africa Second Amendment Act 44 of 1995.