L'etat, C'est Moi: Why provincial Intra-governmental disputes in South Africa remain ungoverned by the final constitution and the Intergovernmental Relations Framework Act – and how we can best resolve them

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1 INTRODUCTION: THE LACUNA IN THE LAW

For years, lawyers, jurists and academics bemoaned a great gaping hole in our law: the Final Constitution had promised to establish a legal regime to mediate and to resolve intergovernmental conflicts. (Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)("Final Constitution" or "FC").[1] During

1 Constitution of the Republic of South Africa, 1996 Chapter 3, Co-operative Government, reads as follows:

40 (1) In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated. (2) All spheres of government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the chapter provides.

41 Principles of co-operative government and intergovernmental relations: (1) All spheres of government and all organs of state within each sphere must: (a) preserve the peace, national unity and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic; (c) provide effective, transparent, accountable and coherent government for the Republic as a whole; (d) be loyal to the Constitution, the Republic and its people; (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; and (h) co-operate with one another in mutual trust and good faith by: (i) fostering friendly relations; (ii) assisting and supporting one another; (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) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another. (2) An Act of Parliament must (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. (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.

the first decade of post-apartheid South African life (1996–2005), Parliament failed to make good FC s 41(2)'s guarantee that intergovernmental disputes would be resolved by legislation that prevented different spheres of government and opposing organs of state from going to war (or court) over vital policy matters.

The courts did their part in holding things together. Although initially vexed by Parliament's failure to produce FC s 41(2)'s constitutionally mandated super-ordinate legislation, the Constitutional Court gradually became less sanctimonious about this lacuna in the law.[2]

In the absence of FC s 41(2) legislation, the Court did the best with what it had. In *First Certification Judgment*, the Constitutional Court held that FC s 41(1)(h)(vi) had to be read together with FC s 41(3).[3] It seemed to imply that the latter provision was the primary source of the duty to avoid litigation. In particular, FC s 41(3) meant that "disputes should where possible be resolved at a political level rather than through adversarial litigation."[4] The inclusion of this provision did not, however, oust the courts' jurisdiction to hear intergovernmental disputes or "deprive any organ of government of the powers vested in it under [the Constitution]."[5] In *National Gambling Board*, the Court effectively reversed the normative hierarchy it had established between FC s 41(1)(h)(vi) and FC s 41(3) in *First Certification Judgment*.[6] The stated reason for the reversal was that, in the five years separating the two decisions, the Act of Parliament contemplated in FC s 41(2) had not been passed and no formal "mechanisms and procedures" were put in place to resolve intergovernmental disputes. Given the absence of such mechanisms and procedures, some doubt was expressed as to whether, in the absence of FC s 41(2) legislation, the Court could enforce FC s 41(3). In order to avoid having to decide this point, the Court held that the duty to avoid litigation could be independently founded on FC s 41(1)(h)(vi).[7] The Court then enunciated what this duty entailed.[8] The first two judgments on the duty to avoid litigation can be reconciled by reading *National Gambling Board* as giving content to the Court's statement in *First Certification Judgment* that intergovernmental disputes should be resolved at a "political level". In both decisions, the Court drew a line between political and legal forms of dispute resolution. The ques-

2 *National Gambling Board v Premier of KwaZulu-Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC)("National Gambling Board") at para 32 ("I]t could be argued that the failure of Parliament to comply with its obligations in terms of [FC s 41(2] has rendered the important provisions of [FC ss 41(3) and 41(4)] inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasizes the urgent need for the envisaged legislation. Co-operative government is foundational to our constitutional endeavor. The fact that the Act envisaged in section 41(2) has not been passed requires the attention of the Minister for Justice and Constitutional Development.")

3 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1458 (CC)("*First Certification Judgment*") at para 291.

4 Ibid.

5 Ibid.

6 *National Gambling Board* (supra) at para 33.

7 Ibid at para 31.

8 Ibid at paras 35-36.

tion as to whether or not FCs 41(1)(h)(vi) has been violated, and by extension whether the requirements of FC s 41(3) have been met, depends on whether all extra-judicial avenues (or remedies) for resolving the dispute have been exhausted.[9] Three factors are relevant to this inquiry: (1) the seriousness of

9 I have consciously chosen to avoid the use of the term remedies – as it appears in s 41(3). Peter Birks taxonomy of remedies captures five different denotations of the term in English law: "a cause of action", to "a right born of a wrong", to "a right born from a court order", "a right born of an injustice" and "right born of a court's order issued on a discretionary basis." P Birks "Rights, Wrongs and Remedies" (2000) 20 *Oxford Journal of Legal Studies* 1, 9–17 (The two meanings not mentioned in the text are or grievance, and.) See also R Zakraewski *Remedies Reclassified* (2005). A panoply of purposes for the term exist in South African law: a statutory right (*Fedsure Life Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 2: "The 1956 Act … created a statutory remedy for the commission of what was referred to as an "unfair labour practice" which was soon interpreted by the Courts to C include the unfair dismissal of an employee"); a common-law right (*Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811, 821A (A)("Its remedy, if any, was to sue Oneanate by way of a condictio"); an order of summary judgment (*First National Bank of SA Ltd v Myburgh* 2002 (4) SA 176 (C) at para 8 ("Summary judgment is designed to give plaintiff a speedy and cost-effective remedy in the case where the defendant does not disclose a valid and bona fide defence. It is an extraordinary and stringent remedy"); a right of appeal (*S v Dzukuda & Others; S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) at para 48 ("If the provisions are misapplied the accused has an appeal remedy or may use the special entry mechanism of the CPA in case of irregularity"); a the court's order (*Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 21 ("The Starke sisters argue that reading words into section 1(1) as ordered by the High Court is not the appropriate remedy in this case"). See, generally, M Bishop "Remedies" in S Woolman et al (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9. See also I Currie and J de Waal *The Bill of Rights Handbook* (5th Edition 2005). As the case law and the denotations of medies above suggests, a remedy generally requires a specific dispute resolution process that parties much exhaust before moving on to the next process – or to court. The IGFRA does not specify a remedy – but leaves it open to the parties to use informal "political structures" – MINMECS, Premier Councils, for example – to secure a positive outcome. The reasons are obvious: normal dispute resolution mechanisms – in adversary structures like courts – often generate zero sum outcomes out of their zero sum games. Political solutions are to be preferred as a normative matter for two reasons: (1) deliberation and conversation may elicit more information and produce better outcomes; (2) multiple stakeholder processes create greater normative legitimacy. On information deficits: A growing contingent of constitutional law scholars have recognized that problems of information deficit, lack of cross-cultural understanding and limited institutional competence can be "solved" by a subtle recasting of existing constitutional doctrines and judicial remedies that extract better information and thereby achieve *more mindful* results. See, e g, M Dorf & C Sabel "A constitution of democratic experimentalism" (1998) 98 *Columbia LR* 267; M Dorf & B Friedman "Shared Constitutional Interpretation" (2000) *Supreme Court Review* 61; C Sabel & W Simon "Destabilization Rights: How public law litigation succeeds" (2004) 117 *Harvard LR* 1015. For the application of experimental constitutionalism to South African jurisprudence, see S Woolman "Application" in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS March 2005) Chapter 31; S Woolman & H Botha "Limitations" in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS July 2006) Chapter 34; S Woolman *The Selfless Constitution: Experimentation and Flourishing as the Foundations of South Africa's Basic Law* (forthcoming 2009). On normative legitimacy: see R Post & R Seigal "*Roe* Rage: Democratic Constitutionalism and Backlash" (2007) 42 *Harvard Civil Rights-Civil Liberties LR* 373, 377 and 391–406: […] Democratic constitutionalism suggests … that controversy provoked by judicial decision-making might even have positive benefits for the [a] constitutional order. Citizens who oppose court decisions are politically active. They enact their commitment to the importance of constitutional meaning. They seek to persuade other Americans to embrace their constitutional understandings. These forms of engagement lead citizens to identify with the Constitution and with one another. Popular debate about the Constitution infuses the memories and principles of [a] constitutional tradition with meanings that command popular allegiance and that would never develop if a normatively estranged citizenry were passively to submit to judicial judgments….[I]t is a mistake to imagine the relationship between constitutional adjudication and democracy as a zero-sum game in which the augmentation of one necessarily entails the diminishment of the other…. Minimalism [as defended by Cass Sunstein or Iain Currie] does not consider this possibility. It views controversy as a simple threat to social cohesion and recommends severing the connection between constitutional adjudication and constitutional meaning in order to avoid conflict. Miminalism would thus undercut the very practices of deliberative engagement that

each party's commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike comprises (i.e. each party's duty "to re-evaluate its position fundamentally") and by extension whether the requirements of FC s 41(3) have been met, depends on whether all extra-judicial avenues for resolving the dispute have been exhausted. Three factors are relevant to this inquiry: (1) the seriousness of each party's commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike comprises (i.e. each party's duty "to re-evaluate its position fundamentally").[10] The *National Gambling Board* Court wrote that disputes about "questions of interpretation" should be resolved "amicably"… "[O]rgans of state's obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of state [involved in the dispute] to re-evaluate its position fundamentally."[11]

In *Uthekela District Municipality v President of the Republic of South Africa*, the Constitutional Court endorsed its previous holdings in *First Certification Judgment* and *National Gambling Board*. In short, all extra-judicial avenues for resolving a dispute had to have been exhausted before they became justiciable. It then added the proposition that FC s 41(1)(h)(vi), when read with FC s 41(3), obliged organs of state "to avoid litigation against one another irrespective of whether special structures [for dispute resolution] exist or not".[12] The *Uthekela District Municipality* Court's change in heart can be explained by a belief shared by many parties: the state should allow a significant period to pass in order for various government actors and sectors to develop a regime of "best practices" upon which any FC s 41(2) legislation might draw.[13]

democratic constitutionalism identifies as potential sources of social stability." See C Sunstein *One Case at a Time* (1996); I Currie "Judicious avoidance" (1999) 15 *SAJHR* 138. For more on the possibility of normative legitimacy arising out of conflict about the fundamental norms undergirding a heterogeneous society, see R Cover "Nomos and Narrative" (1983) 97 *Harvard LR* 42. More importantly, perhaps, the novelty of South Africa's constitutional design – as reflected in Chapter 3 and in the IGRFA -- is that it tries through both constitutional provisions and a subordinate piece of legislation to ensure that politics remains relatively cabined, and that disputes that courts are ill-equipped to handle remain in the political domain. See C Murray and R Simeon "Recognition without Empowerment: Minorities in a Democratic South Africa" (2007) 5 *ICON* 699 (The authors pay particular attention to the manner in which "South African constitutional design, … gives strong recognition to diversity and difference in private life, while seeking to the greatest extent possible to prevent ethnocultural differences entering the public sphere … [and] trace this through the fundamental principles set out in the Constitution, the Bill of Rights, the designation of a multisphere [and co-operative] government.")

10 *National Gambling Board* (supra) at paras 35-36.

11 Ibid. See, further, S Woolman, T Roux & B Bekink "Co-operative Government" in S Woolman et al (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14; R Simeon & C Murray "Multilevel Government in South Africa: An Interim Assessment" (2001) 31 *Publius: The Journal of Federalism* 65.

12 2003 (1) SA 687 (CC)("*Uthekela District Municipality*") at para 22.

13 See Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999); C Mentzel & J Fick "Transformaion Perspectives on Policy Management: Dynamics of Intergovernmental Relations with Specific Reference to the Eastern Cape" (1996) 2 *Africanus* 26.

The Intergovernmental Relations Framework Act reflects the wisdom of the Constitutional Court's patient approach and, in many respects, adopts many of the Court's views on how intergovernmental conflicts should be resolved.[14] For the purposes of this article, what is important is that the Act defines intergovernmental relations as a "relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs."[15] The Act is silent with regard to the problem of how co-operation between provincial departments within any given province should be regulated. I will call this "horizontal intra-governmental relations".[16] Neither the Final Constitution's provisions on Co-operative Gov-

14 Act 13 of 2005 ("IGFRA" or "the Act"). According to its long title, the IGRFA was designed to establish a framework for the different spheres of government – national, provincial and local – to "promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for any matters connected therewith. The IGRFA is super-ordinate legislation that Parliament was obliged to pass by the Final Constitution Chapter 3, "Co-operative Government", FC 41(2). With respect to the resolution of intergovernmental disputes the Act reads:

Duty to avoid intergovernmental disputes

40. (1) All organs of state must make every reasonable effort-*(a)* to avoid intergovernmental disputes when exercising their statutory powers or *(b)* to settle intergovernmental disputes without resorting to judicial proceedings. (2) Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute.

Declaring disputes as formal intergovernmental disputes

41. (1) An organ of state that is a party to an intergovernmental dispute with another government or organ of state may declare the dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing. (2) Before declaring a formal intergovernmental dispute the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.

Consequences of declaring formal intergovernmental disputes

42. (1) Once a formal intergovernmental dispute has been declared, the parties to the dispute must promptly convene a meeting between themselves, or their representatives-(a) to determine the nature of the dispute, including-(i) the precise issues that are in dispute; and (ii) any material issues which are not in dispute; *(b)* to identify any mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist them in settling the dispute, including any mechanism or procedure provided for in legislation or any agreement between the parties; (c) to agree on an appropriate mechanism or procedure to settle the dispute, subject to subsection **(2);** and (d) to designate a person to act as facilitator. (2) Where a mechanism or procedure is specifically provided for in other legislation or in an agreement between the parties, the parties must make every reasonable effort to settle the dispute in terms of such mechanism or procedure. (3) If the parties to a dispute fail to convene a meeting in terms of subsection (1) the Minister may convene the meeting if- (a) a national organ of state is involved in the dispute;(b) the dispute is between different provinces or provincial organs of state from different provinces; or **(c)** the dispute is between organs of state from different governments that do not fall under paragraph (a) or *(b)* of this subsection or subsection **(4). (4)** If the parties to a dispute in a province fail to convene a meeting in terms of subsection (1) the MEC for local government in the province may convene the meeting if the dispute is- (a) between a provincial organ of state and a local government or a municipal organ of state in the province; or (b) between local governments or municipal organs of state from different local governments in the province. (5) If the parties fail to attend a meeting convened by the Minister or MEC or to designate a facilitator referred to in subsection (l)(d), the minister or MEC may designate a facilitator on behalf of the parties.

15 IGRFA s 1.

16 "Horizontal intra-governmental disputes" is my neologism. The denotation is clear. We have constitutional and statutory provisions regarding "intergovernmental relations" – but none specifically aimed at intra-governmental disputes. I simply want to highlight that they exist, that there is a lacuna in the law and that a couple of constructive ways of mediating those disputes exist.

ernment in FC ss 40 and 41 nor the Act speak directly to these "horizontal intra-governmental relations".[17] The Final Constitution's muteness and the Act's silence with regard to "horizontal intra-governmental relations" are important for two primary reasons. First, departments within the same sphere of government are often required to co-operate with respect to the discharge of their functions. Second, as I shall show, it is simply not possible to regulate horizontal relations through contracts or binding agreements between departments. Why? Provincial departments lack autonomous legal personality.

One object of this paper is to determine whether the Act and its mechanisms for formalizing relationships and resolving disputes between organs of state by way of implementation protocols could be employed to manage intra-governmental relationships. This determination turns, in large part, on what constitutes an intergovernmental dispute for the purposes of the Act and the Final Constitution. Again, my reading of the constitutional provisions on co-operative government and the apposite provisions of the Act is that they are not meant to address or to resolve horizontal provincial intra-governmental conflict. However, both of these constitutional and statutory frameworks – and the case law that has arisen under them – suggest a set of best practices that might assist provincial departments in crafting documents that should ensure greater cooperation between departments and that could assist provincial MECs and the Premier with the resolution of any disputes that might arise between provincial departments.

The second and more important object of this paper is to note that the silence of the Final Constitution and the Act is an unavoidable consequence of how provincial power is allocated. In terms of the Final Constitution, all authority over provincial departments, agencies and organs vests within the Premier. Disputes that arise within and between departments, agencies and organs must be resolved by the Premier or other members of the Executive Council.

As we shall see, the constitutional powers of the Premier – along with recent statutory developments and a venerable line of case law – determines the entire landscape for the resolution of provincial horizontal intra-governmental disputes. If the Premier, or the MEC responsible for the implementation of a given policy, wish to hold heads of department or other senior officials culpable for their actions, or their failure to act, they can do so. I would contend that the most powerful tools for this purpose are performance agreements with heads of department and senior officials. Co-operation between provincial departments can, therefore, be regulated by making satisfaction of co-operation protocols or implementation protocols a management performance component in performance agreements. In addition, the Premier can establish dispute resolution principles and intra-governmental forums, akin to those contemplated by the Final Constitution and the Act. Ultimately,

17 The Act does engage co-operation between distinct municipalities. For the purposes of this article, however, horizontal co-operation is restricted to co-operation – or lack thereof -- between departments within a province.

however, the power to resolve provincial intra-governmental disputes lies wholly within the hands of the Premier.

2 EXECUTIVE AUTHORITY OF PROVINCES

FC s 125 tells us that "executive authority is vested in the Premier of the Province." In particular, it tells us that

> "The Premier exercises the executive authority, together with the other members of the Executive Council, by (a) implementing provincial legislation in the province; (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise; … (d) developing and implementing provincial policy; (e) co-ordinating the functions of the provincial administration and its departments."

The language of FC s 125 leads, almost inexorably, to the conclusion that the Premier – along with members of the Executive Council (whom he may appoint and fire at will) – may determine how policy is implemented and how various departments are to work together to realize that policy. Should the Premier and his various line managers wish to establish dispute resolution mechanisms, there is nothing within the Final Constitution to prevent them from doing so. However, in the absence of such dispute resolution mechanisms – say in the form of provincial legislation or internal guidance documents or policy – the responsibility for deciding how disputes are resolved ultimately rests with the Premier and his deputies.

In sum, contrary to intergovernmental disputes in which the courts may, ultimately, be asked to resolve conflicts between organs of state within different spheres of government, the resolution of horizontal intra-governmental disputes between organs of state within the same province will remain the sole prerogative of the Premier. As we shall see in the next section, this result is legally necessary because different departments do not have separate legal personality and cannot contract with each other or litigate against each other. Should a Premier wish to rearrange Departments – through merger, through disaggregation of responsibilities or through the shifting of portfolios – she has the constitutional power to do so.[18] A department that exists and functions largely at the behest of the Premier can hardly be expected to contest decisions taken by another department that exists and functions largely at the behest of the Premier. Both departments not only exist to serve the Premier. The departments are, at their most basic level, merely different manifestations of the Premier. The Premier can hardly be expected to contract with herself or sue herself for some breach of performance.[19]

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18 C Murray & O Ampofo-Anti "Provincial Executive Authority" in S Woolman et al (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2007) Chapter 21.

19 One anonymous referee asked whether it was "legally correct" to state that the Premier may determine the manner in which disputes will be resolved. The referee pointed to disputes between individuals or unions over labour rights and due process requirements. The referee is quite right to note that such requirements bind the Premier. However, this article is not focused on individual disputes with recalcitrant employees or collective bargaining processes. The focus of this piece is on how provincial departments relate to one another. In that respect, mere mention of labour disputes or due process requirements are red herrings. Having been a consultant in intra-provincial department disputes, I can say, with some degree of certainty, that it is a pretty unregulated – and unguided – space.

And yet, differences between provincial departments are commonplace, and many departments operate under the misapprehension that they can enter legally binding, and judicially enforceable contracts with one another. In the next section, I attempt to further demonstrate exactly why provincial departments lack, under South African law, the legal personality necessary to enter contracts with other provincial departments in the same province. Having shown that provincial departments lack the legal personality to enter contracts with other intra-provincial departments, I will turn to the practical question that that animates the last portion of this paper: How might a Premier might establish mechanisms for the resolution of disputes between entities that are, in the end, manifestations of her authority?

3 A LACK OF DEPARTMENTAL PERSONALITY

The Final Constitution does not create provincial departments. Instead it creates nine provinces.[20] Each province, as FC s 125 declares, has a single executive headed by the Premier. Departments themselves are created by section 7(2) of the Public Service Act ("PSA").[21] Departments can be established or abolished by the President (of the national government). He or she may do so simply by amending Schedule 2 of the PSA by proclamation. Amendments of this kind are made "at the request of the Premier of a province".[22]

As a day-to-day matter, provincial departments function relatively autonomously. Each department, for example, has its own accounting officer.[23] Were the Premier to have to sign off on every decision, provincial government would grind to a halt. However, despite the appearance of departmental autonomy, the province produces consolidated finance statements for all its Departments, has a single provincial revenue fund controlled by the provincial treasury,[24] and has a single budget which controls the expenditure of Departments.[25]

The case law buttresses my contention that provincial departments lack the legal personality to contract legally and formally with other provincial Departments within the same province.[26] In *Natal Provincial Administration v South African Railways and Harbours*, the Natal Provincial Administration

20 See FC s 103(1).
21 Proclamation No. 103 of 1994.
22 PSA s 7(5)(a)(ii).
23 See Public Finance Management Act 1 of 1999 ("PFMA") s 36(1). It is also accountable for its own financial management. See PFMA s 38.
24 PSA s 21.
25 PSA s 39(1)(a).
26 I'm not suggesting that departments lack the capacity to take decisions and enter into various contracts (but they do so on behalf of the Premier). Intragovernmental service agreements – unlike other service contracts -- are not subject to resolution through litigation. The power to resolve these disputes vests in the Premier. The Premier may create or disband the entities in question.

attempted to sue the South African Railway.[27] The railway was, at the time, at another department within the "Crown". The Province's claim was dismissed by the court because, given that both the province and the railway were departments of the Crown, the suit would be tantamount to the Crown suing itself.

Years later – in *Government of the Republic of South Africa v Government of KwaZulu* – the Appellate Division confirmed the "general principle of our law that one organ of the State cannot sue another organ of the State.".[28] Despite this general statement of the law, the *KZN* Court permitted KwaZulu, a self-governing territory or "Homeland" to sue the South African government. The Appellate Division found, in the instant matter, that "there is sufficient separation in identity between the [the South African government], on the one hand, and … [KwaZulu], on the other hand, to entitle [KwaZulu], … to approach the Court for relief."[29] However, the result in KZN is the exception – a natural anomaly thrown up by the absurdities of apartheid. The notion of "indivisible sovereignty" is a doctrine that will not, therefore, always dispose of internecine conflicts. Indeed, today's South Africa is not an indivisible sovereign. Municipalities, provinces, and public entities have separate legal personality.[30] Thus, while the outcome of *KZN* seems incontrovertible, its principle applies only within a given organ of state.

The IGRFA, as we have seen, defines an "intergovernmental dispute" as "a dispute between different governments or between organs of state from different governments". "Government", in turn, is defined in IGRFA s 1, as "(a) the

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27 1936 NPD 643. The courts have been clear that pre-1994 case law that coheres with the Constitution is still good law. In a number of relatively recent cases, the Constitutional Court and the Supreme Court of Appeal have deployed the doctrine of *stare decisis* in a manner that dramatically curtails the ability of High Courts to use the Bill of Rights, for example, and FC s 39(2), in particular, to develop the common law or to re-interpret legislation in ways that depart from Constitutional Court, Supreme Court Appeal, or Appellate Division precedent. The Constitutional Court in *Walters* restricted its conclusions about *stare decisis* to precedent handed down by the Constitutional Court, the Supreme Court of Appeal and the Appellate Division in the (rather ambiguously described) "constitutional era." *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)("*Walters*") at para 61. The Supreme Court of Appeal in Afrox extended binding precedent — backwards — past the very beginning of even the most controversial understanding of the "constitution era". *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) ("*Afrox*"). The *Afrox* Court recognized that High Courts could retain constitutional jurisdiction for any direct attack on a rule of law grounded in a preconstitutional decision of the Appellate Division. However, where a High Court is persuaded that a pre-constitutional decision of the Appellate Division should be developed, through FC s 39(2), so that it accords with the spirit, purport and objects of the Bill of Rights (true indirect application), its hands are tied. The High Court is bound to follow the pre-constitutional decisions of the Appellate Division. Brand JA, for the Afrox Court, writes: "Die antwoord is dat die beginsels van stare *decisis* steeds geld en dat die Hooggeregshof nie deur artikel 39(2) gemagtig word om van die beslissings van hierdie Hof, hetsy pre- hetsy post-konstitusioneel, af te wyk nie. Ibid at para 29. There can be no doubt, as the law currently stands, about the continued binding authority of pre-1994 decisions handed down by South African courts. See further S Woolman & D Brand "Is There a Constitution in This Courtroom: Constitutional Jurisdiction after *Afrox* and *Walters*" (2003) 18 *SA Public Law* 38.

28 1983 (1) 164, 205 (AD)("*KZN*").

29 Ibid at 205A – 206 A (Emphasis added).

30 Local Government: Municipal Systems Act 32 of 2000 s 2(d). For more on the legal personality of municipalities, see N Steytler & J de Visser *Local Government Law of South Africa* (2007); see N Steytler & J de Visser "Local Government" in S Woolman et al (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 22.

national-government; (b) a provincial government; or (c) a local government." IGRFA s 40 contemplates a "formal agreement between two or more organs of state in different governments" (emphasis added) and regulates dispute resolution between those governments. But no provision is made whatsoever for agreements or disputes within a provincial government between provincial departments. This silence, read against the background of the Final Constitution, and the pre-constitutional case law, is a powerful indication that such agreements are, strictly speaking, not legally enforceable.

Moreover, the existence of a single provincial revenue fund means that the result of any such disputes would be that the unsuccessful party would make a payment from the provincial revenue fund to the successful party, who, in turn, would place the payment back into the revenue fund. Any intention to reallocate funds between the two departments – for whatever reason – could be more efficiently and less awkwardly achieved through a provincial adjustment in the budget.[31] The presence of a single revenue fund for both "potential" litigants is one more strong indication that there is an insufficient separation in juristic identity for two governmental entities in the same province to sue each other.[32]

Furthermore, if provincial Departments could be established or abolished merely by amending the schedule to the Public Service Act, and provincial departments were treated as independent entities, then it would throw into doubt the status of all contractual claims against all abolished provincial departments. Who would pick up the tab if the department were abolished? As a matter of law, no provision is made in the PSA or the PFMA for the succession of departments. In addition, when provincial departments enter into contracts with third parties, they do so "on behalf of" the province. Indeed, the State Liability Act states that the Minister or MEC of a department concerned with contractual litigation will be cited as the "nominal defendant or respondent."[33]

The Final Constitution, the IGRFA, the PSA, the PFMA, the State Liability Act, the extant case law, the organization of provincial revenue funds and the ability of a Premier to chop and to change departments at will points to a single conclusion. Provincial departments lack the legal personality necessary to enter formal legal agreements and to sue when other provincial departments – in the same province – fail to uphold their end of a bargain.

4 FINDING A LEGAL NEXUS

Inter-departmental co-operation is a necessary feature of effective provincial government. Even though provincial departments are not legally separate from each other, they develop their own performance requirements and their own organisational identity. They tend to interact with one another

31 See PFMA s 31.

32 See *South African Railways v Kemp* 1916 TPD 174, 177 (The existence of a separate Railway Fund undermined the notion of a unified sovereign.)

33 Act 20 of 1957 s 2.

on an "arm's length basis". These practices have generated pressure for legally-binding protocols or memoranda that regulate inter-departmental co-operation. In other words, some provincial departments would like to be able to sue other provincial departments that fail to discharge obligations under inter-departmental memoranda – or at least to deal with disputes in a legally formal manner.

As I have already noted, the manner in which power vests within different spheres of government precludes the treatment of intra-governmental disputes between departments in the same province as formal legal disputes. Because departments are a creation of the provincial premier, and may be rationalised, re-organised, established or abolished at the discretion of the Premier, they do not possess separate legal identity. Hence, contracts with a provincial department of health are, in fact, contracts with the province, and litigation against a provincial department of health is, in fact, litigation against the province. Thus, just as it is impossible for a person to litigate against himself, so too is it impossible for provincial departments to litigate against each other.

There are two possible responses to this problem. The first response is to develop protocols that regulate intra-governmental co-operation and are enforced by the Premier or the executive of the province. In the next section, I suggest how the Act can be used as a guide in developing such protocols for resolving intra-governmental disputes. (Of course, it follows from the logic of my argument that such disputes can also be resolved by the Premier by fiat.) The second (and related) response is to develop performance-based contracts of employment with senior officials within the Province. Compliance with memoranda of co-operation or intra-governmental implementation protocols can be made a key performance area monitored by MECs or the Premier. Failure to achieve key performance indicators within this performance area can result in reduced bonuses, lack of promotion, re-assignment or even dismissal. In short, because it is not possible to create binding agreements between provincial departments, one compelling alternative is to use the employment agreements of heads of departments or senior officials within the province to enforce memoranda of co-operation. The most effective legal mechanism for provincial inter-departmental co-operation is to be found in employment contracts – and nowhere else.

If a provincial department intends to pursue this second response, it will be necessary to review current employment contracts with senior officials and obtain labour advice on the possibility of amending these contracts to insert additional performance requirements. Further elaboration of this rather novel legal mechanism falls beyond the scope of this article.

5 USING THE IGRFA AS A GUIDE TO INTRA-GOVERNMENTAL DISPUTES

Although the Act cannot resolve a dispute between two or more departments of the same provincial government, I wish to suggest that it may serve as a "guide" to the formation of documents that might assist the province in the

resolution of such conflicts. Section 35 of the Act introduces the concept of implementation protocols ("IPs"). IPs have, heretofore, often been referred to as memoranda of co-operation. The advent of the Act has refined the meaning and the scope of such agreements. Section 35(1) of the Act emphasises that where the implementation of a policy, the exercise of a statutory power or the performance of a statutory function, or the provision of a service is dependant on different state organs acting in concert, the state actors involved must coordinate their actions. They may do so by entering into an implementation protocol. This proviso means that while an IP is not compulsory, some form of agreement of cooperation is necessary. Section 35(2) demands that an IP must be considered in the following situations:

> "an implementation protocol will materially assist the organs of state participating in the provision of a service in a specific area to co-ordinate their actions in that area; or an organ of state to which primary responsibility for the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service has been assigned lacks the necessary capacity."[34]

6 DISPUTE SETTLEMENT

As I have been at pains to point out, neither FC Chapter 3 nor the Act provide mechanisms for the resolution of intra-governmental provincial dispute resolution. The power to determine such mechanisms vests in the Premier.

However, both FC Chapter 3 and the Act suggest how government officials might best resolve such disputes. One non-judicial mechanism might be an intra-governmental forum. Such a forum could be composed of designated officials from the relevant departments, the appropriate MECs and the Premier. The Act also suggests the following dispute resolution mechanisms: (a) the provincial Premier or relevant MECs could provide a facilitator; and/or (b) the facilitator could submit a non-binding report to the Premier.

7 CONCLUSION: ENFORCEMENT

Neither Chapter 3 of the Final Constitution nor the Act speak to intra-governmental dispute resolution. The reason for this silence – as I have noted – is that intra-governmental disputes between provincial departments do not generate justiciable constitutional or legal conflicts. The power to resolve such disputes vests solely in the Premier of the province.

That the power to resolve such disputes vests solely in the Premier of the province does not mean that the Premier lacks the capacity to prevent intra-governmental conflicts. The Premier has an array of tools at his disposal to prevent – and to resolve – such conflicts. Agreements between departments – though not contracts in the normal justiciable sense – can be crafted in a manner that permits third parties to determine whether the provincial departments in question have discharged their duties. The Act's provisions regarding Implementation Protocols offer a reasonably good template for such agreements.

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34 IGRFA s 35(2)(c)-(d). The Act then elaborates, in IGFRA 35(3), the features that an IP must possess.

Ultimately, however, an intra-governmental agreement is only as good as the penalties in place for non-compliance. Such penalties for non-compliance might range from the withholding of performance bonuses for the parties responsible for the breach to the actual discharge of officials who repeatedly failed to comply with their statutory, ministerial or IP responsibilities. Agreements between provincial departments in the same province must make absolutely certain that all parties concerned understand that failure to discharge their duties may result in the imposition of such severe penalties.

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