A176

THE LAW REVIEW PROJECT
DIE REGSHERSIENINGSPROJEK

(an Association incorporated under Section 21 - No. 92 01100/08)

PO Box/Posbus 47390
Parklands 2121
Tel (011) 484-3429
Fax (011) 484-3396
Johannesburg

(176)

The Chairman
Technical committee on constitutional issues
Multi-Party Negotiating Process
World Trade Centre
Jones Street
KEMPTON PARK

Your Ref/U Verw: Dr F Venter

Our Ref/Ons Verw: Prof Louise Tager

Date/Datum: 18 October 1993

By hand

Dear Sir,

Proposal that environmental health should be exclusively a national matter under the constitution

The national Health Act makes provision for regulations relating to communicable diseases, conditions dangerous to health, food, and nuisances. But there is a local government ordinance in each province which authorises local authorities to make bylaws on the same matters. Under the present constitutional arrangements that there is no repugnancy between such national and provincial measures, by reason that public health is included among the powers of local governments.

This means that there are in force in urban areas both national health regulations and local health bylaws. The courts have held that local health bylaws are not repugnant to national regulations, because effect can usually be given to both measures. Often a local authority enacts and enforces its own health bylaws, even though national regulations on the same matter also apply in that local area. The result is that in different areas different legislative requirements are imposed in relation to sanitation, communicable infections, foodstuffs and other environmental health matters.

It is submitted that this situation should not be maintained. Health knows no boundaries. It is proposed that the power to make laws on environmental health matters should be reserved exclusively to the central government.

We enclose a detailed memorandum motivating this proposal. Briefly, this memorandum states that public health was not mentioned in the 1909 Act of union. Colonial laws empowered local authorities to make bylaws relating to sanitation and the control of infectious diseases. After the 1918 flu epidemic there was a national conference which led to the enactment of the 1919 Health Act. This Act allowed provincial administrations to retain their powers relating to local government and hospitals (see part 2 of the enclosed memorandum).

The ordinances of a provincial council are classed under the category of statutes, not of mere regulations. A matter on which a provincial council may make ordinances includes all powers reasonably required to deal fully and effectively with that matter (see part 3 of the memorandum).

Provincial councils had no powers to make ordinances on public health, but the matters on which a provincial council was empowered to make ordinances could incidentally deal with fields which strictly speaking lay beyond its powers (see part 4).

A provincial council could make ordinances in relation to municipal institutions (part 5).

Local authorities are organs of government which enable inhabitants of a particular area to administer the local affairs of that area (6).

A provincial council could not only create municipal institutions, but also endow them with all the powers necessary for the discharge of the functions of local government, or for any useful municipal purpose (7).

The powers necessary or incidental to municipal government have been held to include the public health and sanitation, as well as the control of streets, buildings, public amenities, service utilities and fire prevention (8).

The current local government ordinances passed by the provincial councils give local authorities wide powers to make bylaws in relation to public health, drainage, nuisances, food, infectious diseases and unhealthy trade (9).

The national Health Act confers powers on a Minister of national health. And the 1990 National Policy for Health Act empowers the Minister to determine national policy for any matter which will promote the public health, and every national, provincial and local health authority must perform its functions in accordance with such national policy (10).

The Health Act states that the functions of the national department are to co-ordinate health services and provide, with due regard to services rendered by provincial and local authorities, additional services necessary to establish a comprehensive national health service. A provincial administration must provide hospital and personal health services, and co-ordinate these with due regard to similar services rendered by national and local authorities. A local authority must abate nuisances, and provide services to prevent communicable diseases, and coordinate these services with due regard to similar services rendered by national and provincial authorities. The Act also empowers the Minister to make regulations relating to communicable diseases, conditions dangerous to health, food, and nuisances (11).

A provincial ordinance may not be repugnant to an Act of Parliament, but the mere fact that an ordinance deals with the same matter as does an Act does not mean that the two are repugnant, unless effect cannot be given to both laws at the same time (12).

There are many cases where local health bylaws made under provincial ordinances have been found not to be repugnant to national health statutes or regulations, and it has been held that although the Health Act provides for health regulations which could apply generally or to specific areas, a provincial council was not precluded from legislating on the health aspect of local government. No cases have been found where a municipal health bylaw was adjudged to have been overridden by a national health regulation (13).

One of the few cases where the court found that a provincial ordinance was invalid as being

repugnant to an Act of Parliament involved public health. The Public Health Act stated that local authorities must carry out the provisions of the Act, and provided that the Governor-General could appoint any body of persons to be a rural local authority for this purpose. A Natal provincial ordinance provided for the creation of health committees to carry out in areas outside existing municipalities the duties imposed on local authorities under the Health Act. The provincial court held that the province could not establish such a committee for a rural area, because the Act reserved the appointment of rural health bodies to the Governor-General. The court of appeal found that the ordinance was invalid on a different ground, that the provincial council may make ordinances on municipal institutions, divisional councils and other local institutions of a similar nature. A health committee of the kind in question was not such a local institution because it did not confer a substantial measure of local self-government but was created merely to be a cog in the national health machinery. Subsequently the South Africa Act was amended to allow local authorities to establish health committees to carry out the provisions of the Health Act (14).

It is proposed that the power to legislate on environmental health, including sanitation and communicable infections, should be reserved exclusively to the national legislature. The power to make laws on environmental health should be entirely excluded from provincial and local authorities, even where the power is merely incidental to another provincial or local power. But the central legislature should have the power to delegate to provincial or local level the administration of national environmental health legislation (see part 15 of the enclosed memorandum).

This proposal does not extend to personal health matters such as the provision of hospital and nursing services (part 16).

Yours faithfully,

Prof Louise Tager
letter\9229

Proposal that environmental health should be exclusively a national matter under the constitution

LAW REVIEW PROJECT

18 October 1993

INDEX

page

-ooOoo-

1. Introduction

1.1 This memorandum proposes that the power to make laws on environmental health matters should be reserved exclusively to the central government.

1.2 Briefly, public health was not mentioned in the 1909 Act of union. Colonial laws empowered local authorities to make bylaws relating to sanitation and the control of infectious diseases. After the 1918 flu epidemic there was a national conference which led to the enactment of the 1919 Health Act. This Act allowed provincial administrations to retain their powers relating to local government and hospitals (see part 2 of this memorandum below).

1.3 The ordinances of a provincial council are classed under the category of statutes, not of mere regulations. A matter on which a provincial council may make ordinances includes all powers reasonably required to deal fully and effectively with that matter (see part 3 of this memorandum).

1.4 Provincial councils had no powers to make ordinances on public health, but the matters on which a provincial council was empowered to make ordinances could incidentally deal with fields which strictly speaking lay beyond its powers (see part 4).

1.5 A provincial council could make ordinances in relation to municipal institutions (part 5).

1.6 Local authorities are organs of government which enable inhabitants of a particular area to administer local affairs of that area (6).

1.7 A provincial council could not only create municipal institutions, but also endow them with all the powers necessary for the discharge of the functions of local government, and for any useful municipal purpose (7).

1.8 The powers necessary or incidental to municipal government have been held to include the public health and sanitation, as well as the control of streets, buildings, public amenities, service utilities and fire prevention (8).

1.9 The current local government ordinances passed by the provincial councils give local authorities wide powers to make bylaws in relation to public health, drainage, nuisances, food, infectious diseases and unhealthy trade (9).

1.10 The national Health Act confers powers on a Minister of national health. And the 1990 National Policy for Health Act empowers the Minister to determine national policy for any matter which will promote the public health, and every national, provincial and local health authority must perform its functions in accordance with such national policy (10).

1.11 The Health Act states that the functions of the national department are to co-ordinate health services and provide, with due regard to services rendered by provincial and local authorities, additional services necessary to establish a comprehensive national health service. A provincial administration must provide hospital and personal health services, and co-ordinate these with due regard to similar services rendered by national and local authorities. A local authority must abate nuisances and provide services to prevent communicable diseases, and

coordinate these services with due regard to similar services rendered by national and provincial authorities. The Act also empowers the Minister to make regulations relating to communicable diseases, conditions dangerous to health, food, and nuisances (11).

1.12 A provincial ordinance may not be repugnant to an Act of Parliament, but the mere fact that an ordinance deals with the same matter as does an Act does not mean that the two are repugnant, unless effect cannot be given to both laws at the same time (12).

1.13 There are many cases where local health bylaws made under provincial ordinances have been found not to be repugnant to national health statutes or regulations, and it has been held that although the Health Act provides for health regulations which could apply generally or to specific areas, a provincial council was not precluded from legislating on the health aspect of local government. No cases have been found where a municipal health bylaw was adjudged to have been overridden by a national health regulation (13).

1.14 One of the few cases where the court found that a provincial ordinance was invalid as being repugnant to an Act of Parliament involved public health. The Public Health Act stated that local authorities must carry out the provisions of the Act, and provided that the Governor-General could appoint any body of persons to be a rural local authority for this purpose. A Natal provincial ordinance provided for the creation of health committees to carry out in areas outside existing municipalities the duties imposed on local authorities under the Health Act. The provincial court held that the province could not establish such a committee for a rural area, because the Act reserved the appointment of rural health bodies to the Governor-General. The court of appeal found that the ordinance was invalid on a different ground, that the provincial council may make ordinances on municipal institutions, divisional councils and other local institutions of a similar nature. A health committee of the kind in question was not such a local institution because it did not confer a substantial measure of local self-government but was created merely to be a cog in the national health machinery. Subsequently the South Africa Act was amended to allow local authorities to establish health committees to carry out the provisions of the Health Act (14).

1.15 It is proposed that the power to legislate on environmental health, including sanitation and communicable infections, should be reserved exclusively to the national legislature. The power to make laws on environmental health should be entirely excluded from provincial and local authorities, even where the power is merely incidental to another provincial or local power. But the central legislature should have the power to delegate to provincial or local level the administration of national environmental health legislation (see part 15 below).

1.16 This proposal does not extend to personal health matters such as the provision of hospital and nursing services (part 16).

2. Background

2.1 Public health was not mentioned in the South Africa Act of 1909 but by virtue of applicable colonial legislation local authorities were empowered to make bylaws relating to sanitation and the control of infectious diseases in their respective areas. A wide variety of public

health aspects was dealt with by colonial legislation. The prevention of outbreaks of infectious diseases was, however, regarded as the responsibility of the central government due to its national importance, although the South Africa Act contained no specific provisions in this respect. Owing to the vagueness of this Act in respect of public health and related matters, there was doubt and confusion regarding the respective scope and functions of the central government, provincial administrations and local authorities in that sphere. This led to overlapping, friction and neglect. The influenza epidemic of 1918, which caused over 150 000 deaths, finally galvanized the central government into action. At the public health conference held in Bloemfontein during 1918 a public health bill was drafted, which eventually led to the promulgation of the Public Health Act during 1919 (EH Cluver *Medical and Health Legislation in the Union of South Africa* 2 ed 1960, cited in *Law of South Africa* vol 21 "Public Health" MA Rabie *para* 278).

2.2 The 1919 Public Health Act allowed provincial administrations to retain their responsibility for the administration of local government, and the establishment and management of general hospitals. It effected important changes in other respects, in that colonial and provincial legislation relating to public health administration and control was repealed and substituted by a uniform code for the control of infectious diseases and environmental sanitation. A national health authority, the department of public health, was established to administer the act. However, the fundamental principle governing the administration of the act was that of decentralization in that it imposed upon local authorities the primary responsibility for the protection of public health in the areas falling within their respective jurisdictions. The act also made provision for refunds by the central government in respect of expenditure incurred by local authorities in carrying out specified health services, while provincial administrations retained responsibility for the establishment and maintenance of general hospitals (*Law of South Africa* vol 21 "Public Health" MA Rabie *para* 278) .

3. Provincial council ordinances are classed under the category of statutes

3.1 A provincial council was empowered to make ordinances in relation to matters coming within various classes of subjects (South Africa Act 9 Edw VII c 9 *s* 85).

3.2 It has been held that a provincial council was a deliberate legislative body, and that its ordinances duly passed and assented to must be classed under the category of statutes, and not of mere bylaws or regulations. The legislative authority committed to a provincial council must be taken to include all powers properly required to effect the purpose for which it was conferred. Powers will be implied which are properly or reasonably ancillary to those expressly conferred. Authority given to a provincial council to make ordinances in regard to any specified subject must, in the absence of clear contrary intent, include such legislative powers as are reasonably required to carry out the objects of the enactments, that is to deal fully and effectively with the subject assigned (*Middelburg v Gertzen* 1914 AD 544 550 552-3).

3.3 A provincial council could within the limits imposed make laws as freely and effectively as parliament itself (*JCI v Marshall's Township Syndicate* 1917 AD 662 668).

4. Provincial councils had no power to make ordinances on public health

4.1 The view which the court took in a particular case of the matter in dispute made it unnecessary for the court to deal with one question raised in that case, whether public health fell within the purview of a provincial council at all. That the question was at least open to argument seemed to follow from the absence of any reference to public health in the list of matters for which provincial councils where empowered to make ordinances by the South Africa Act, coupled with the fact of its having been comprehensively dealt with, without reference to provincial councils, in the Public Health Act 36 of 1919 (*Isipingo v Jadwat* 1925 NPD 299 303).

4.2 But it has been held that no department of human activity is entirely insulated. And therefore no general subject matter can be fully regulated without incidentally dealing with matters which, strictly speaking, lie beyond it. When legislative jurisdiction is conferred on a provincial council in respect of some special subject matter it follows, in the absence of any indication to the contrary, that it intended to empower the provincial council to deal fully with that matter, in accordance with the conditions and requirements prevailing at the time of legislation. And yet it will be found, generally speaking, impossible to do this without treading on other matters not included within the limits of the subject assigned. So where authority was given to make laws relating to municipal institutions, the due exercise of that authority involves something more than the mere creation of a municipal council. The corporation called into being must have extensive power to control the actions of individuals in the interests of the community (*Middelburg v Gertzen* 1914 AD 544 551-2).

5. Provincial ordinances on municipal institutions

5.1 A provincial council could make ordinances in relation to municipal institutions, divisional councils and other local institutions of a similar nature (South Africa Act *s* 85(vi)).

5.2 The general authority to make ordinances in relation to municipalities was far-reaching, and any matter which came within its scope could be legislatively dealt with. The fact that the power so to legislate arose by implication from general language in no way lessened its efficiency, for the whole fabric of municipal institutions was committed to the jurisdiction of the provincial council (*JCI v Marshall's Township Syndicate* 1917 AD 662 668).

6. Local authorities are organs of government

6.1 The courts have observed that a facile distinction is sometimes drawn between municipalities and other entities with legislative and executive powers on the ground that municipalities are mere creatures of statute. That is undoubtedly so, but so are provincial councils and, for that matter, Parliament. With respect to authority of course they differ vastly and are ordered in a definite hierarchy but the function of each is government. A municipality is not merely a corporation like a company. It is a phase of government, local it is true, but still government (*R v Bethlehem* 1941 OPD 227 231).

6.2 The main object of establishing municipal councils and similar bodies for purposes of

municipal government is to enable representatives of the inhabitants of given areas to administer, subject to some degree of control by central authority, the local affairs of those areas in the general interests of their respective communities (*Sinovich v Hercules* 1946 AD 783 820). Local government means administration by the inhabitants as distinguished from administration by the State (*R v Mziza* 1946 TPD 654 660).

7. Powers of municipal institutions

7.1 A provincial council could not only create bodies for the management of municipal affairs, but also endow them with all the powers necessary to the discharge of the functions of local government (*Head & Co v Johannesburg* 1914 TPD 521 525). A provincial council could by implication endow a municipality with all powers necessary for the purpose of administering the municipality (*Williams v Johannesburg* 1915 TPD 362 364). Any power that serves a useful urban or municipal purpose could properly be conferred by a provincial council on a municipal council (*Bloemfontein v Bosrand Quarries* 1930 AD 317 379). The tendency in interpretation is towards liberality. Unless the court can clearly decide that no useful specific purpose is served, it will be loth to declare that the power was improperly conferred (*Sinovitch v Hercules* 1946 AD 783 820).

7.2 A municipal corporation is a creature of statute and can therefore only rely on statutory authority for its powers. The powers of a municipality are those expressly granted by statute, those incidental to the powers granted or naturally flowing from them as being powers that the legislature implied the municipality should have, and those essential and indispensable to carry on the functions of the municipality (*De Villiers v Pretoria* 1912 TPD 626 632).

7.3 The powers of a provincial council in relation to a municipal institution were not limited to matters which were absolutely necessary for those institutions. The provincial council could endow municipal corporations with all such powers as would enable them to deal fully and effectively with reasonable municipal requirements in accordance with the social and economic conditions of the present time. To ascertain whether any particular power comes within this principle it is necessary to examine the subject matter and the course of legislation dealing with it. Owing to the complexity of modern life there is an enormous mass of regulations dealing with all sorts of subjects affecting citizens of towns (*Groenewoud v Innesdale* 1915 TPD 413 417).

7.4 It has been held that, in deciding the limits of the legislative powers of a provincial council as may be reasonably required to deal fully and effectively with the subject of municipal institutions, the court may have regard to legislation on municipalities passed by the former colonial legislature of the province, to afford some assistance in deciding what powers of legislation are reasonably required to deal with that subject now, as an element to be taken into account in dealing with any question of the validity of a particular provision of a provincial ordinance. On the one hand, to confine provincial ordinances within the limits covered by earlier statutes would prevent any legislative progress, and on the other hand it must be borne in mind that pre-union statute law was the work of parliaments whose

jurisdiction was not restricted to certain specially assigned subjects and their enactments on particular matters might not in every instance be a safe guide to the limits of the implied powers of provincial councils possessing a restricted authority to deal with such matters. But making allowances for these considerations, it is clear that the general trend of prior legislation must be an element in deciding on the validity of ordinances on the same subject passed by provincial councils under the powers conferred. Whatever was common to all the municipal acts of the South African colonies when the South Africa Act was passed may be regarded as the necessary and usual rights of South African municipalities, and that, to this extent at least, the provincial council had to power to legislate (*Middelburg v Gertzen* 1914 AD 544 553-4 565).

7.5 A bylaw must expressly or impliedly be restricted to local government purposes. If the court is satisfied that a bylaw goes beyond local government purposes it will declare it to be invalid (*Naicker v Durban* 1953 2 SA 364 N 367G-H).

8. Health powers of municipal institutions

8.1 It is not, of course, easy to specify the powers which are necessary or incidental to municipal government, which varies so much with both place and time, but they may be grouped generally under the heads of public health and sanitation, the control of streets, traffic and public places, the regulation of buildings, the provision of public amenities, and the establishment, management and control of what are known as public service utilities such as water and lighting, the prevention of fires and similar objects in which public combination is necessary for effective results, or individual activities require local supervision (*Maserowitz v Johannesburg* 1914 WLD 139 146).

8.2 It is the duty of the municipal council to safeguard the public health (*Madrassa Anjuman Islamia v Johannesburg* 1917 AD 718 730).

8.3 It is not surprising that local authorities have been clothed with extensive powers and duties regarding public health and sanitation. Local authorities exercise powers and duties which otherwise would rest with the provincial councils or central governments. It can fairly be said that local authorities were intentionally established by the legislation to attain more decentralisation regarding certain public matters, especially public health and sanitation, and to that extent to unburden the provincial councils and central government (*Roodepoort Maraisburg v E Props* 1933 AD 87 102-3 *per* Beyers JA).

8.4 The question in one case was whether the provincial council could endow municipalities with the control of food sold in the municipalities. The court stated that it need not on that occasion consider ordinary food, but could consider products like milk and meat. The court stated that there was no doubt that the control of the introduction and distribution of such food products within a municipality was a matter deeply concerning the health of the inhabitants. It was one of the ordinary incidents of municipal government that they should have control of the production and distribution of such foodstuffs, and this may be taken as so from the history of legislation on the subject. There was for instance the statute of the

Cape Town municipality in 1840, which gave the municipal commissioners as they were then called the power to make rules for the due and proper care of the quality of meat and authorised them to enter and inspect shops where meat was sold and also to take care that it was good and wholesome. Sections of a similar character appeared in a great many cases in the Cape Colony and Natal Acts of an early date and also appear in Transvaal Acts. It was therefore quite clear that the control of the introduction and distribution of such products as meat and milk, which could very soon become nuisances, was within the proper functions of a municipality (*Cooper v Johannesburg* 1916 CPD 601 604).

8.5 In an old case on whether a bylaw which created an offence for neglecting to comply with any directions of a sanitary inspector was unreasonable and therefore *ultra vires*, the court observed that the bylaw was sweeping, but that it had to be borne in mind that the inhabitants of the area had voluntarily placed themselves under the general municipal statute and elected a municipality with very extensive powers to make bylaws, powers as to which it was sufficient to observe that to carry out effectively more than one of the purposes mentioned it would obviously be necessary to appoint a sanitary inspector or some such officer and to arm him with very considerable powers of supervision and control. Carrying out the principle, so popular and fashionable, of local self-government, the local representative authority had passed this bylaw, and the court ought not to invalidate it as unreasonable if it was possible to give it a reasonable construction and intendment (*Wightman v Beaconsfield* 1889 HCG 296 299-300).

9. Health provisions of the local government ordinances

9.1 The municipal ordinance passed by the provincial council of the Cape provides that the council of a municipality may make bylaws for the maintenance of good rule and government and the convenience, safety and comfort of the inhabitants of the municipal area (Municipal Ordinance 20 of 1974 (Cape) *s* 188), and in particular, but without prejudice to the generality of the foregoing, relating to *inter alia* the keeping and accommodation of animals (*s* 188(9)), the erection and demolition of buildings, including the erection of buildings which will be dangerous, unhealthy or insanitary, or the erection of buildings on sites which are contaminated, unhealthy or not reasonably susceptible to drainage (*s* 188(17)(*a*) and (*b*)), the disposal of night soil, domestic refuse and other unhealthy matter, and the use to be made by any municipal service or other system in connection therewith (*s* 188(26)), the drainage and sewerage on the premises (*s* 188(28)(*a*)), the slaughtering of animals (*s* 188(36)), abattoirs (*s* 188(37)), the sale of food and of the carcasses of animals (*s* 188(38)(*a*)), the storage, conveyance, manufacture, preparation and handling of food or carcasses intended for sale in the municipal area (*s* 188(38)(*b*)), the veterinary inspection of milk cows (*s* 188(39)), the spread of infectious diseases (*s* 188(42)(*a*)), the prevention and abatement of nuisances (*s* 188(50)) and unhealthy trades (*s* 188(79)).

9.2 In Natal, the provincial council has provided that the town council of a borough may make bylaws in relation to *inter alia* similar matters, under the headings animals and birds (Local Authorities Ord 25 of 1974 (Natal) *s* 266(1)(*b*)), buildings and premises (*s* 266(1)(*d*)), food

supplies (*s* 266(1)(*h*)), litter (*s* 266(1)(*i*)), nuisances (*s* 266(1)(*l*)), public health and safety (*s* 266(1)(*q*)), sanitation (*s* 266(1)(*t*)), trades, businesses, occupation and callings (*s* 266(1)(*u*)) and water supply and drainage (*s* 266(1)(*w*)).

9.3 The position is the same in the Orange Free State, where the provincial council enacted that a municipal council may make regulations relating to *inter alia* animals and birds (Local Government Ord 8 of 1962 (OFS) *s* 146 (7)), buildings (*s* 146(10)), health (*s* 146(11)), poison (*s* 146(12)), milk (*s* 146(20)), nuisances (*s* 146(22)), accumulation of rubbish (*s* 146(24)), wells and ponds (*s* 146(25)), sewerage and drainage (*s* 146(26)) and food and drink (*s* 146(35)).

9.4 And in the Transvaal the provincial council made an ordinance which provides that a council may make bylaws on various aspects of *inter alia* the cleanliness of public and private places (Local Govt Ord 17 of 1939 (Transvaal) *s* 80(4)), cesspools and drains (*s* 80(5)), nuisances (*s* 80(6)), animals (*s* 80(7)), the public health (*s* 80(10)), infectious diseases (*s* 80(11)), food and drink (*s* 80(14)), offensive trades (*s* 80(15)), disinfection (*s* 80(17)), the manufacture or preparation of food for sale (*s* 80(23)), the purveyance of milk (*s* 80(24)), vermin (*s* 80(30)), poison (*s* 80(31)), mosquitoes (*s* 80(33)), buildings (*s* 80(42)) and the keeping of certain animals (*s* 80(67)).

10. National health policy and Act

10.1 The Act of Union provided that the governor-general may appoint Ministers of State for the Union not exceeding ten in number to administer to such departments of State as the governor-general-in-council may establish (South Africa Act 9 Edw VII c 9 *s* 13). The notice making known the appointment of Ministers and the establishment of State departments (Govt Notice 1 of 1910) did not refer to a department of health.

10.2 The 1919 Public Health Act provided that there shall be for the Union a department of Public Health, which shall be under the control of a Minister and in respect of which there shall be a portfolio of public health (Act 36 of 1919 *s* 2)). There is still a department of health, called the department of National Health and Population Development (Public Service Act 111 of 1984 *s* 6(1) and *Schedule* 1). The controlling minister is currently styled the Minister of National Health (Govt Notice 375 of 7 Feb 1992). The current health statute was enacted in 1977 (Health Act 63 of 1977), and repealed the 1919 Act (Act 63 of 1977 *s* 63(1)).

10.3 The 1977 Health Act used to provide for the establishment of a health matters advisory committee (*s* 2), to make recommendations to the Minister (*s* 3(1)(*a*)(i)) in regard to the formulation of a national policy on the rendering of health services by the Department and provincial administrations and local authorities (*s* 12(*a*)) and the efficient co-ordination of health services rendered by these three levels of government (*s* 12(*c*)), and that these recommendations would be considered by a national health policy council (*s* 12), and decided on by the Minister of National Health (*s* 13). These provisions have been repealed by a 1990 Act (National Policy for Health Act 116 of 1990 *s* 20(1)) which provides that the Minister may after consultation with a health policy council (*s* 2(2)(*a*)) determine the national policy

to be applied in respect of any matter which in her opinion will promote the health of the inhabitants of the Republic (*s* 2) including the efficient co-ordination of health services provided by the State and local authorities (*s* 2(1)(*e*)), and which provides for a health matters committee which may investigate and consider any matter relating to health, and which shall in respect of any matter in which the Minister may determine the national policy make recommendations to the health policy council (*s* 5(1)(*a*)(i)). Every Minister of a Department of State responsible for health, Administrator of a province and local authority to which any duty or function relating to health has been entrusted under any law shall perform such duty or function in accordance with any national policy for health determined by the Minister (*s* 3). It has been made known that the Minister has determined a national policy in respect of *inter alia* the co-ordination of health services (Govt Notice R2359 of 21 Aug 1992), and a strategy for primary health care (Govt Notice R1646 of 3 Sept 1993).

11. Provisions of the Health Act

11.1 The 1977 Health Act provides that the functions of the Department of National Health are, with due regard to health services rendered by provincial administrations and local authorities, to co-ordinate health services rendered by the Department and provide such additional services as may be necessary to establish a comprehensive health service for the population of the Republic (Act 63 of 1977 *s* 14(1)(*a*)), and to take steps for the promotion of a safe and healthy environment (*s* 14(1)(*c*)).

11.2 The functions of a provincial administration in regard to health services shall include the provision of hospital facilities and services (*s* 16(*a*)) and ambulance services (*s* 16(*b*)), the treatment of patients suffering from acute mental illness (*s* 16(*c*)) out-patient treatment (*s* 16(*d*)), maternity homes (*s* 16(*e*)), personal health services (*s* 16(*f*)) and, with a view to establishment of a comprehensive health service within its province, the co-ordination of its hospital and personal health care services, with due regard to similar services rendered by the Department of National Health, other provincial administrations and by local authorities (*s* 16(*g*)).

11.3 A local authority must take all necessary and reasonably practicable measures to maintain its district in a hygienic condition (*s* 20(1)(*a*)), to prevent and abate any nuisance or unhygienic or offensive condition (*s* 20(1)(*b*)) and the pollution of water (*s* 20(1)(*c*)), to provide services approved by the Minister for the prevention of communicable diseases, the promotion of health and the rehabilitation of persons cured of any medical condition (*s* 20(1)(*d*)), and to co-ordinate such services with due regard to similar services rendered by the Department of National Health or the provincial adminstration (*s* 20(1)).

11.4 The Act contains various provisions relating to co-operation, powers of a higher level of government in case of default by a lower level of government, and dealing with the appointment of medical officers of health and health inspectors, and providing for the making of regulations. The Minister of National Health has the power to make regulations relating to various matters in respect of notifiable medical conditions (*s* 32), communicable diseases

(*s* 33), conditions dangerous to health (*s* 34), food and milk (*s* 35), fish farming and intensive animal-feeding systems (*s* 36) edible products originating from polluted waters (*s* 36A), water intended for human use and food processing (*s* 37), rubbish and sewage and other waste products (*s* 38) and nuisances (*s* 39).

12. Repugnancy

12.1 The South African Act provided that an ordinance made by a provincial council shall have effect in and for the province as long as far only as it is not repugnant to any Act of Parliament (9 Edw VII c 9 *s* 36). This was re-enacted in the 1961 Constitution (Republic of South Africa Constitution Act 32 of 1961 *s* 85). This provision has been repealed (Provincial Government Act 69 of 1986 *s* 22(*b*)), but the rule that a provincial council could not enact a provision in conflict with an Act of Parliament still applies (*Administrator v Brydon* 1993 3 SA 1 A 10C).

12.2 Provincial councils have been abolished (Provincial Government Act 69 of 1986 *s* 2), although their ordinances remain in force (*s* 4). Any provision of an ordinance may be amended, repealed or substituted by a provincial administrator acting in consultation with the other members of his provincial executive committee, by proclamation approved by standing committee of parliament (*s* 14(2)(*a*)) after public advertisement to obtain the views of interested persons (*s* 16(ii)).

12.3 Some of the local government ordinances provide that municipal bylaws may not conflict with other laws. So the Cape ordinance provides that a council may make bylaws not inconsistent with the provisions of that ordinance or of any other law (Municipal Ord 20 of 1974 *s* 188). The Natal Ordinance provides that no council bylaw shall be made which is inconsistent with or repugnant to the provisions of that ordinance or any other statutory law or regulation in force in the borough (Local Authorities Ordinance 25 of 1974 *s* 266(1)).

12.4 "Repugnant" means contrary or contradictory, inconsistent or incompatible (*Shorter OED*). "Inconsistent" has the similar meaning of not agreeing or in keeping, at variance, at discordance, incompatible or incongruous (*ibid*).

12.5 The 1919 Public Health Act provided that, save as was specially provided in that Act, its provisions shall be deemed to be in addition to and not in substitution for any provisions of any other law which are not in conflict or inconsistent with that Act. If the provisions of any other law were in conflict or inconsistent with that Act, the provision of that Act were to prevail (Act 36 of 1919 *s* 156). Any regulation under that Act could be expressed to be in addition to or in substitution for any like document issued by an Administrator or local authority (*s* 157(1)). This meant that the Public Health Act envisaged provincial legislation in respect of public health in local government (*R v Dumdum* 1952 3 SA 584 T 588H). The 1977 Health Act does not contain these provisions.

12.6 Commentators on municipal law have observed that it must be noted that there must be an actual repugnancy to something in an Act of Parliament before an ordinance can be said to

be invalid. An ordinance may, and frequently does, deal with the subject-matter as an Act, without being repugnant to the Act. So, for example, both parliament and a provincial council have dealt with public health. The general conclusion to be drawn is that the courts will be slow to hold that provincial powers have been abrogated (Dönges & Van Winsen *Municipal Law* 2 ed *pp* 11-12).

12.7 The question of repugnancy of a provincial ordinance to an act of parliament is no different to the question of whether or not there has been an implied repeal by the Act of the ordinance (*Morar v Chief Constable* 1927 NPD 415 417-8). Statutes must be read together and the later one must not be so construed as to repeal the earlier one, unless the later statute expressly altered the earlier one or such alteration is a necessary inference from the later statute (*Wendywood Development v Reiger* 1971 3 SA 28 A 38B). A statute with no intimation of an intent to repeal prior laws does not repeal them, unless the new and old are irreconcilably in conflict (*New Modderfontein GM Co v TPA* 1990 AD 367 401). A repeal will not be implied unless the two laws are so plainly repugnant to each other that effect cannot be given to both at the same time. The court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can imply the repeal of the prior enactment. That is to say, the repeal must, if not express, be a necessary implication (*Ntuli v Benoni* 1957 3 SA 597 W 602A-B). A repugnant law is one which by its nature and field of operation cannot exist with another. If the two measures cannot overlap, there is that element of repugnancy leading to an implied repeal (*Mokwena v State President* 1988 2 SA 91 T 96B).

13. National regulations and local bylaws

13.1 There are many cases where local health bylaws made under local government ordinances were found not to be repugnant to national legislation.

13.2 Although the Minister of National Health has been given power under the Public Health Act to make regulations in regard to matters of public health and to apply them generally or to specific areas, the provincial council is not precluded from legislating on this aspect of local government (*R v Dumdum* 1952 3 SA 584 T 588F-G).

13.3 A local authority may institute a prosecution under its bylaws for having a nuisance on premises, even though the local authority did not first serve under the Public Health Act a notice to abate the nuisance. There was nothing inconsistent between the civil duty imposed on a local authority by the Act, and the co-existence of the penal bylaw. The casting by the Act of a duty on the local authority did not derogate from the powers conferred on the local authority to adopt its own measures for the safeguarding of the public health in its area. There is no implied repeal, in that neither was the bylaw wholly incompatible with the Act, nor did the two standing together lead to wholly absurd conclusions, nor was the entire subject-matter of the bylaw taken away by the Act. It is true that the Act prescribes a method by which local authorities are to proceed if they proceed under the Act, but both sets of powers may co-exist (*Bernstein v Chief Constable* 1924 NPD 391 393-4 395-6).

13.4 Standard abattoir bylaws made under the Municipal Ordinance have been held not to have been replaced by national regulations made under the Animal Slaughter, Meat and Animal Products Hygiene Act (*S v Barnard* 1971 1 SA 474 C).

13.5 A local authority was not precluded from exercising its power to abate nuisances under the Public Health Act, even though it also had the power to make regulations to abate nuisances in the area in question under the Blacks (Urban Areas) Consolidation Act. Far from conflicting, "these two enactments can stand very well side by side, and similar provisions for abating nuisances to preserve public health are found in local government ordinances or in bylaws made by local authorities under the powers conferred (*Mpaza v Johannesburg* 1949 3 SA 567 T 570).

13.6 A municipal bylaw under a provincial ordinance provided that a person may not keep a cow without holding a permit from the medical officer of health. A person was charged with keeping a cow in the native location of the local authority without such a permit. The accused contended that the bylaw was *ultra vires* to the extent that it applied in the location, and that any regulation or bylaw for the location could only be made under the Natives (Urban Areas) Consolidation Act. It was held that the bylaw was of general application in the municipality, including the location. The Natives (Urban Areas) Consolidation Act provided that an urban local authority could make regulations as to the keeping of animals in locations (Act 25 of 1945 *s* 48(3)(*k*)), and that such a regulation had to be approved by the Minister of Native Affairs (*s* 35(5)). The accused argued that natives had no say in the administration of an urban area and that ministerial approval was a safeguard in their interest. The court stated that this argument was impressive, but if it was intended that any law which would affect a location in a municipality should have ministerial approval it would have been easy to say so. The Act did not prohibit other legislative enactments being passed in regard to native locations in a municipality, and there was no reason why bylaws could not be made under other laws so long as they were not inconsistent or repugnant with the Act or its regulations. It would be anomalous if the general city bylaws were not to apply in the municipal location. Different considerations could arise if a city bylaw was made to apply to the location only and was one which could have been made under the Act, and in such a case it could be argued that the bylaw should instead be a regulation under the Act. But this did not arise here because the bylaw was of general application. The bylaw was not repugnant to the Act or any regulation made under it (*Sibisi v Durban* 1950 2 SA 398 N 400 402).

13.7 There are many other cases where provincial or local legislation has been upheld where provision was also made under national legislation, such as cases involving trade licensing (*Morar v Chief Constable* 1926 NPD 415; *Orkin v Pretoria* 1927 TPD 536 545-6 549; *S v Anton* 1967 4 SA 622 E), Sunday trading by a hawker in a location (*R v Brenner* 1931 OPD 184), vehicle licensing (*R v Ngema* 1951 4 SA 154 T 157D), public gatherings by natives (*R v Xoville* 1955 4 SA 17 T), and water supply charges (*Ntuli v Benoni* 1957 3 SA 597 W).

13.8 The extent to which apparently conflicting laws can be reconciled is shown by a case that involved an Act stating that a person in possession of a dangerous weapon commits an

offence unless he can prove that the weapon was required for a lawful purpose, and a State President's proclamation for black areas stating that no native shall carry beyond the boundary of his residence any dangerous weapon unless authorised by the native commissioner. It was held that there was nothing inconsistent in the two enactments. If an individual possesses a dangerous weapon for the lawful purpose of the defence of his home, then he commits no offence under either enactment while it is retained within his residence (*R v Maseti* 1958 4 SA 52 E 53E-54A).

13.9 Where an Act stated that a provincial council had no power to make an ordinance imposing direct taxation on the lands of natives, and an ordinance provided that a local authority shall levy a rate on all ratable property in the municipality, a lot holder sued by the local authority alleged that he was a native and therefore exempt from the municipal rate as being a direct taxation on the lands of a native. The court held that the Act had amended the financial relations legislation that dealt only with provincial revenue for provincial purposes, and that the Act was not intended to apply to municipal revenues imposed by rates (*Foley v Grahamstown* 1926 EDL 225). It has been stated that this case affords a good example of the restrictive interpretation the courts will give to Union legislation curtailing provincial powers (Dönges & Van Winsen *Municipal Law* 2 ed *p* 23).

13.10 No case has been found where provincial or local health legislation has been invalidated as being repugnant to national health legislation other than the case involving health committees discussed immediately below.

14. One of the few cases of repugnancy involved local administration of the Health Act

14.1 One of the few cases where the courts found that a provincial ordinance was invalid as being repugnant to an Act of Parliament involved public health. A provincial ordinance authorised the Administrator to proclaim an area for which the public health committee was to be elected by voters in the area. Each such committee was to perform the functions imposed on local authorities by the Public Health Act 36 of 1919. The Public Health Act stated that urban and rural local authorities shall carry out the provisions of the Act, and that an urban local authority included any borough or town or village council or board, or other body (not being a rural authority) constituted in accordance with any law and which under any law is endowed with sanitary powers for safeguarding the health of the inhabitants of this district. A rural local authority meant any divisional council and any body of persons which the Governor-General was authorised to constitute and declare to be rural local authority (*s* 7). The Governor-General could also declare the provincial Administrator to be the local authority for any area in his province outside the district of an existing local authority, and the Administrator could, in accordance with regulations made by the Minister of Health or in accordance with any law in force in the province, levy rates on owners of property in the area to defray the expenses incurred by the Administrator in performing functions under the Act (*s* 8).

14.2 A provincial ordinance empowered the Administrator to proclaim any part of the province

outside an urban local authority or an area for which he was appointed the local authority by the Governor-General under the Act, as an area for which a public health committee may be elected to perform the functions imposed on local authorities under the Act. A public health committee constituted under the ordinance for what was apparently a rural area sued a resident of the area for rates which it had imposed on his property, and the defendant raised the exception that the committee was not lawfully established in that the provincial council has no power under any law to create such a committee.

14.3 The court found that although the Public Health Act provided that an urban local authority which had to carry out its provisions included any body constituted in accordance with any law with sanitary powers to safeguard the health of the inhabitants, such a body had to be in the nature of an urban authority. The Act expressly conferred on the Governor-General the power to appoint for rural areas bodies to administer the Act, and that it was inferred that he could define the areas in which they shall function. The court held that these powers were permitted by the Act to the Governor-General alone, and that they were exactly those which the provincial council assumed. That the ordinance was thus *ultra vires* as being repugnant to the Public Health Act (*Isipingo Public Health Committe v Jadwat* 1925 NPD 299).

14.4 The appeal court disagreed with the trial court finding that the ordinance was intended for rural areas only, and that the Act reserved to the Governor-General the power to constitute rural authorities.

14.5 The appeal court considered that the ordinance authorised the Administrator to proclaim urban areas. The appeal court also observed that an urban local authority will generally speaking be found established where urban conditions exist, and rural local authorities where rural conditions are present, but that this was not necessarily so, and that an urban authority might be called into existence in an area popularly described as rural, and the Governor-General might constitute a rural authority for a locality largely urban. The true test was not the nature of the area, but the origin or constitution of the authority, and that a provincial law could establish an urban authority even for a sparsely populated area, and the Governor-General might proclaim a rural authority for an area with a considerable population. The appeal court found that the health committee in question was not a rural local authority. The only urban local units known in Natal were boroughs or townships.

14.6 The health committee argued that it was duly constituted as an "other" body in accordance with a law as contemplated in the Public Health Act. The question was thus whether the ordinance was a law duly passed by a competent lawgiver, and the only relevant provision was the one in the South Africa Act empowering a provincial council to legislate on municipal institutions, divisional councils and other local institutions of a similar nature. The appeal court found that the health committee was neither a municipal institution nor a divisional council, and the question was whether it was an other local institution of a nature similar to municipal institutions or divisional councils. It was held that municipal institutions have the common characteristic that they confer a substantial measure of local self-government within their respective areas. Health committee areas were not proclaimed under the ordinance

with a view to the exercise of local self-government, but simply and solely to carry out the provisions of the Public Health Act. The Public Health Act was a statute dealing with the public health of the whole Union, a subject which has not been entrusted to provincial councils. Ordinance health committees are not local institutions of a similar nature to municipal authorities but merely cogs in the Union health machinery, so the provincial council had no legislative power to create such committees and the ordinance was therefore *ultra vires* (*Isipingo Health Committee v Jadwat* 1926 AD 113 119-121).

14.7 After this judgment an Act was passed which stated that it was desirable that provincial councils should be empowered to legislate in respect of local institutions having the function of preserving the public health, that public health committees were established under the invalid ordinance and that it was desirable to validate acts done by them, and which amended the South Africa Act to provide that a provincial council may make ordinances as to municipal institutions, divisional councils and also other local institutions having authority and functions in any area in respect of the local government of, or the preservation of public health in that area, including any such body as is referred to in *s* 7 of the Public Health Act (Local Government (Provincial Powers) Act 1 of 1926 *s* 1(1)).

14.8 This amendment was deemed to have come into operation in 1920 for a reason which is not clear, but this retrospectivity does not apply to the invalid ordinance (*s* 1(2)). Rates imposed and acts done by a health committee established under the invalid ordinance were deemed to have been lawfully imposed or done (*s* 2). All assets, rights and obligations of a committee under the invalid ordinance were vested in the provincial administrator, but if the provincial council should constitute any municipal or health authority under the South Africa Act as currently amended for such an area, it would be competent for the provincial council or the Administrator to transfer such vested assets and liabilities to such newly constituted authority (*s* 4).

15. Proposal to reserve environmental health legislation to the national legislature

15.1 It is proposed that the power to legislate on environmental health matters should be reserved exclusively to the national legislature. This proposal is restricted to environmental health, which includes the sanitation of the environment, and the control of communicable infections.

15.2 The power to legislate on the environmental health matters should be entirely excluded from the legislative powers of provincial and local authorities, even where the power of a provincial or local authority to legislate on environmental health is merely incidental to another legislative power entrusted to a provincial or local legislature.

15.3 The central legislature should however have the right to delegate to provincial and local authorities the administration of environmental health legislation passed by the central legislature. Central legislation should be able to confer on provincial or local authorities any function, power or duty in relation to environmental health matters other than the power to legislate on those matters.

16. This proposal does not relate to personal health

16.1 This proposal is limited to environmental health, and does not extend to personal health matters such as the provision of hospital and nursing services.

16.2 This memorandum does not propose that the power to legislate on hospital services should be restricted to the central legislature.

16.3 The South Africa Act did provide that a provincial council may make ordinances in relation to the establishment, maintenance and management of hospitals (South Africa Act 9 Edw VII c 9 *s* 85(v)), and this was retained in the 1961 constitution (now the Provincial Government Act 32 of 1961 *s* 84(1)(*e*)).

-ooOoo-