

**LOCAL GOVERNMENT AND THE PROTECTION OF THE
ENVIRONMENT: AN ANALYSIS OF THE FUNCTIONAL AREAS
OF 'MUNICIPAL PLANNING' AND 'ENVIRONMENT'**

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A. DECLARATION

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B. ACKNOWLEDGMENTS

Thank you to everyone who contributed, especially to those who persisted to sacrifice and encourage. And, a particular thank you to my supervisor Professor Michael Kidd for your patience and guidance; it is greatly appreciated.

C. ABSTRACT

The Constitution brought about fundamental changes to the structure of government in South Africa. The national, provincial and local spheres of government are defined as being *distinctive, interdependent and interrelated*. Each sphere is obliged to 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 in addition must not assume any power or function except those conferred on them in terms of the Constitution. The areas for which each sphere has executive and legislative powers are assigned in Schedules 4 and 5 of the Constitution. This is done through the use of functional areas.

In the context of environmental law, the allocation of these functional areas is a minefield of potential conflict between the spheres of government. As such, defining the scope of the functional areas, and establishing principles in terms of which the spheres of government exercise their constitutionally protected powers is an important issue. This is highlighted in the case of conflict arising between the functional areas of municipal planning (a local government functional area) and environment (a national and provincial functional area). This planning-environment conflict has led to a range of recent judgments that appear to have crystallised the principles in terms of which the Constitution should be viewed as allocating the functional areas. A key principle is that the three spheres of government should not be seen as having been placed in *hermetically sealed compartments* and that sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere should be seen as intruding into the functional area of another. Each sphere would be exercising power within its own competence.

Therefore, it is apparent that local government has been saddled with a significant amount of powers to regulate environmental-issues through planning legislation. Whilst this may be appropriate in certain circumstances, the courts must be wary of allowing too broad an interpretation of local functional areas where this would erode into the functional area of environment. In order to further environmental governance,

alternative means of defining the functional areas should be adopted. Such alternate means include legislative interpretation, administrative definitions and negotiated definitions. Within this suite of tools, giving effect to the Constitution through effective environmental governance at each sphere of government is achievable.

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1. INTRODUCTION

1.1. Environmental law in the context of the Constitution of the Republic of South Africa, 1996¹

Environmental governance is a good example of an instance where all three spheres of government are required to establish and enforce legislative measures pertaining to a single and shared subject matter – namely, the environment. The competency to oversee matters that relate to the environment is thus shared between the different spheres on the basis that each sphere is responsible for the particular governance that best suits its structure, resources, reach, dimension and nature.²

The management and protection of the environment is a remarkably complex task, which is complicated by a variety of factors ranging from defining what is meant by the word 'environment',³ to the allocation of sufficient resources to effectively implement legislation and policy (be it personnel, financial or scientific), to the (often) conflicting demands of development versus environmental protection. Against this background it is not difficult to understand why the legal regulation of matters affecting the environment is inherently a difficult subject matter for any government. In South Africa, environmental governance is even further complicated due to the unusual⁴ structure of the government, which has only relatively recently come into being in terms of the Constitution.⁵

Bray, discussing the Interim Constitution,⁶ notes that the 'federal elements of the constitutional structure [...] may cause far-reaching consequences for the development of a cohesive system of environmental law and environmental management'. The 'federal elements' to which Bray refers were retained in the (final) Constitution. A review of our case authority tends to suggest that Bray was correct in the assertion.

¹ Constitution of the Republic of South Africa, 1996, as amended (hereinafter referred to as the Constitution).

² C Bosmam, L Kotze and W Du Plessis 'The failure of the Constitution to ensure integrated environmental management from a co-operative governance perspective' (2004) 19 (2) *SAPR/PL* at 413

³ See J Glazewski 'The Nature and Scope of Environmental Law' in J Glazewski and L du Toit (eds) *Environmental Law in South Africa* (2013) 1-11 – 1-12.

⁴ Although not unique to South Africa, there are relatively few governments that adopt what can be described as a federalist approach to governance.

⁵ The Constitution.

⁶ Act 200 of 1993.

Indeed, the constitutional structure of government, the division of powers between the spheres of government, and the principles in terms of which such spheres are meant to co-operate are unclear and often contradictory. This is especially true in respect of the functional area of 'municipal planning' vis-à-vis the functional area of 'environment'. This area of conflict has given rise to a series of important cases that have crystallised the manner in which functional areas should be interpreted.

Bray in examining the division of legislative competences relating to the environment, goes on to suggest that 'the enactment, normative hierarchy, implementation and enforcement of environmental law will be determined by the constitutional structure of the state.'⁷ This statement clearly indicates the importance of the constitutional structure of the state as it relates to environmental governance. Therefore, it is important to formalise the manner in which the three spheres of government perceive the extent of their environment-related legislative and executive powers as prescribed in the Constitution. The constitutional division of powers and the principles in terms of which the spheres of government must operate are therefore critical to environmental law.

One of the fundamental structural components of government established in terms of the Constitution is the division of the government into three spheres. These spheres consist of a national, provincial and local sphere of government.⁸ The Constitution assigns to each sphere of government specific administrative and legislative competences. A characteristic of this multi-sphere government is that original legislative authority vests in each sphere.⁹ The empowering provisions in terms of which the legislative authority of each sphere of government is set out are found at sections 44, 104, and 156 of the Constitution.¹⁰

Section 156(1) of the Constitution provides that a municipality has the executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. In addition, municipalities have executive authority in respect of, and the right to administer any

⁷ E Bray 'Fragmentation of the environment: another opportunity lost for a nationally coordinated approach?' (1995) 10 *SARP/PL* at 173

⁸ The Constitution; s 40(1).

⁹ DW Freedman 'Constitutional law: Structures of government' in WA Joubert (ed) *LAWSA* 2nd ed Replacement Volume (2012) Vol 5(3) at para 57.

¹⁰ In respect of the national, provincial and local spheres, respectively.

other matter assigned to it by national or provincial legislation. In terms of section 156(2), a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. Therefore, local government is assigned the authority to legislate in respect of any of the matters provided for at section 156(1). One such functional area included at Part B of Schedule 4 is that of 'municipal planning'.

Therefore, local government is entitled to exercise legislative and administrative authority in respect of, *inter alia*, 'municipal planning'. Such authority must be exercised in accordance with the principles set out in the Constitution. Such principles include respecting the constitutional status, institutions, powers and functions of government in the other spheres;¹¹ not assuming any power or function except those conferred on it in terms of the Constitution;¹² and exercising its powers and performing its functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.¹³ These principles are designed to promote co-operation and co-ordination between the spheres of government in order to avoid conflict.¹⁴ Given the supremacy of the Constitution, which essentially means that any law or conduct inconsistent with it is invalid,¹⁵ it is important to ensure that the spheres of government respect these constitutional principles. However, in order to ensure that the different spheres do not encroach onto the powers and functions of another sphere, it is necessary for the functional areas to be clearly defined. This should ensure that the appropriate sphere of government is achieving its constitutional mandate to govern within its functional areas.

The Constitution does not define the functional areas and so alternate means to define the functional areas need to be investigated. Largely, it has fallen to the courts to determine the boundaries of the functional areas. However, such matters only reach the courts where an incident of alleged encroachment gives rise to conflict that is justiciable. From an environmental perspective, 'municipal planning' has been the functional area that has contributed most to establishing firm principles in terms of

¹¹ The Constitution; s 41(1)(e)

¹² The Constitution; s 41(1)(f)

¹³ The Constitution; s 41(1)(g)

¹⁴ DW Freedman *op. cit.* n9 at para 60.

¹⁵ The Constitution; ss 1(c) and 2

which functional areas should be defined and how the spheres of government are meant to co-operate. In particular, the landmark decision of the Constitutional Court in the *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* case¹⁶ provided a great deal of clarity on the manner in which 'municipal planning' should be defined. This case, as well as several other subsequent cases, have crystallised the understanding that local government is entitled to legislate in respect of environment-related matters, to the extent that this is necessary and falls within the scope of 'municipal planning'.

However, it is not clear whether such a definition of 'municipal planning' is appropriate given the prima facie nature of several of the other functional areas; specifically 'disaster management', 'environment', 'nature conservation, excluding national parks, national botanical gardens and marine resources', 'pollution control', 'regional planning and development', 'soil conservation'¹⁷ and 'provincial planning'.¹⁸ This is particularly problematic in that the courts have generally shied away from defining functional areas, and when forced to do so, have adopted a 'bottom-up'¹⁹ approach to interpretation, which it will be shown can lead to untenable implications.

In light of this, three key inter-related questions arise. First, how have the courts defined the functional areas listed in the Constitution? Second, in light of the constitutional principles, the nature of the environment and the current suite of environmental legislation, are these definitions (and the manner in which the Court has arrived at them) appropriate? Third, what are the implications of attributing such definitions to these functional areas?

In order to answer these questions, this paper will discuss the manner in which the Constitution has established the government of South Africa and assigned to each sphere specific competences. Focusing specifically on the local sphere of government, it will be shown how a suite of national legislation has sought to define and regulate the role that local government is meant to play. Following this, the manner in which the courts have provided judicial definitions to the functional areas will be analysed and

¹⁶ 2010 (6) SA 182 (CC).

¹⁷ The Constitution; Schedule 4 Part A.

¹⁸ The Constitution; Schedule 5 Part A.

¹⁹ DW Freedman *op. cit.* n9 at para 224.

discussed, highlighting the limited role judicial interpretation has in achieving optimal environmental governance. Thereafter, the principles in terms of which the spheres of government are meant to co-operate will be discussed, showing that alternate means of defining the functional areas exist and that adopting these alternate means would assist in achieving the distinct, interdependent and inter-related government that was created in terms of the Constitution and would provide a greater deal of clarity to each sphere in providing effective environmental governance.

2. STRUCTURE OF GOVERNMENT

2.1. Pre-Constitutional government

Prior to the dawn of democracy and the formulation of the Constitution, South Africa was governed by a system of government that was centralised around the national level of government. In addition to the national level there also existed a provincial level and a local level of government, which together formed the pre-constitutional structure of government. It is appropriate to refer to this pre-constitutional structure of government as a 3-level hierarchy. In this hierarchical system, each level was directly inferior to the level(s) above it²⁰ and therefore the only level that had any real independence was the national level.

The national level of government, through the national parliament, was vested with the vast majority of law making powers. The administrative powers that related to the implementation of these laws were then divided between the different government departments at both the national and provincial levels of government.²¹ In some instances, the provincial level of government was also vested with legislative power, such as in respect of the regulation of nature conservation, which at the time was primarily concerned with the preservation of fish and game species. This narrow concept of environmental conservation bears little resemblance to the broad concept of environmental conservation that exists in our statute books today. Even though the pre-constitutional structure of government, characterised as a 3-level hierarchy, centralised the majority of law-making powers in the national government, the responsibility to implement and enforce such laws was highly fragmented between national and provincial government.²²

Under this system, local government was strictly a subordinate level of government. The pre-constitutional local government was vested only with 'prescribed, controlled governmental powers.'²³ Van Wyk describes the pre-constitutional local government as being an 'administrative phenomenon, and agent of the provincial government designed

²⁰ DW Freedman *op. cit.* n9 at para 203.

²¹ C Loots 'Distribution of responsibility for environmental protection' (1996) 3 *SAJELP* 81.

²² *Ibid.* at 81-82.

²³ DW Freedman *op. cit.* n9 at para 203.

to implement apartheid policy.²⁴ The significance of this is more than just of historical interest, as the local government established in terms of the Constitution has inherited and has to deal with many of the structures and laws that re-enforced the subordinate nature of local government at the time. As stated by Cameron JA in the majority judgment in *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitaanse Munisipaliteit*:²⁵

[u]nder the preconstitutional dispensation, municipalities owed their existence to and derived their powers from provincial ordinances [...that] were passed by provincial legislatures which themselves had limited law-making authority, conferred on them and circumscribed by Parliamentary legislation.²⁶

Therefore, it is evident that local government, despite being a separate level within the system of government, was not empowered to exercise any legislative or administrative independence. The functioning of this system of government is aptly described in the *CDA Boerdery* case:

[p]arliament's lawmaking power was untrammled, and it could determine how much legislative power provinces exercised. The provinces in turn could largely determine the powers and capacities of local authorities. Municipalities were, therefore, at the bottom of a hierarchy of lawmaking power: constitutionally unrecognised and unprotected.²⁷

In terms of this hierarchical system, planning and environmental conservation were regulated at the national and provincial levels of government, and any competence that the local sphere had in terms of such areas was limited to what had been specifically assigned by the national or provincial government.

2.2. Government in terms of the Interim Constitution

With the dawn of the constitutional dispensation, the system of government in South Africa, and in particular the local government level, underwent a 'formal and

²⁴ Van Wyk J 'Local Government' in WA Joubert (ed) *LAWSA* 2nd ed (2008) Vol 15(1) at para 4.

²⁵ 2007 4 SA 276 (SCA).

²⁶ *Ibid.* at para 33.

²⁷ *Ibid.*

substantive revolution.²⁸ As noted above, prior to the adoption of the Interim Constitution, local authorities were seen as being creatures of statute, and were entirely subject to provincial government's control.²⁹ The Interim Constitution was meant to operate for a limited time by establishing the necessary conditions for democratic elections and to administer the newly-democratic South Africa.³⁰ Similarly to the final Constitution, national, provincial and local government were assigned legislative and executive competences in respect of listed functional areas. It is not necessary to discuss the operation of the Interim Constitution in any great detail; it suffices to note that the system of government that is familiar today was first borne through the operation of the Interim Constitution.

2.3. Government in terms of the (final) Constitution

The Constitution was promulgated on 18 December 1996 and came into effect on 4 February 1997. Chapter 3 of the Constitution is headed 'Co-operative Government' and deals with the structure and functioning of the democratic South African state. The foundation for the structure of the government is provided for at section 40, which states:

- (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.³¹

Section 40 incorporates three important elements that characterise the government system of South Africa. The first element is a structural element in terms of which three spheres of government are established, namely the national, provincial and local spheres. The use of the term 'sphere' as opposed to the previously used term 'level' reflects the intention to move away from the hierarchical relationship that existed

²⁸ N Steytler & J de Visser 'Chapter 22: Local Government' in S Woolman *et al* (eds) *CLOSA* 2ed (RS4 2012) Vol.2, p22-1.

²⁹ *Ibid.*

³⁰ S Woolman & J Swanepoel 'Chapter 2: Constitutional History' in S Woolman *et al* (eds) *CLOSA* 2ed (RS4 2012) Vol.1 at 2-39

³¹ The Constitution; s 40.

between the national, provincial and local government.³² The second element is a descriptive element in terms of which the 3 spheres of government are described as being *distinctive, interdependent* and *interrelated*. It will be shown that this element plays a crucial role in defining the boundaries of the functional areas assigned to each sphere. The Constitutional Court in *Independent Electoral Commission v Langeberg Municipality*,³³ described the meaning of this descriptive element, stating:

[a]ll the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole.³⁴

Freedman notes that 'the Constitutional Court has explained that [this] phrase confirms that while each sphere has its own autonomous powers and responsibilities and must exercise them within the parameters of its own defined space, all three spheres must work together in order to ensure that the government as a whole fulfils its constitutional responsibilities.'³⁵ The third element is a constraining element which has the effect of limiting the manner in which each sphere may exercise their respective powers. Each sphere is bound to exercise its powers in terms of the principles of co-operative governance espoused in the Constitution. Section 41(1) provides that

All spheres of government and all organs of state within each sphere must

[...]

- (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;

³² S Woolman & T Roux 'Chapter 14: Co-operative Government & Intergovernmental Relations' in S Woolman *et al* (eds) *CLOSA* at 14-7.

³³ 2001 (3) SA 925 (CC).

³⁴ *Ibid.* at para 26.

³⁵ *DW Freedman op. cit. n9* at para 58.

- (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.

Therefore, the system of government created in terms of the Constitution is such that although each sphere of government has distinct responsibilities, each sphere must 'work together in order for the South African government as a whole to fulfill its constitutional mandate.'³⁶

2.4. Allocation of legislative and executive competence

Each sphere of government is allocated legislative and executive powers in terms of the Constitution. As the focus of this work is on local government, particular attention will be paid to the allocation of competences to this sphere. In respect of local government, and as a general rule, the exercise of the legislative and executive powers allocated to it may not be interfered with by either the provincial or national spheres of government.³⁷ The specific areas in terms of which local government is vested with legislative and executive powers will be discussed in detail below, however before embarking on this discussion it is important to understand what is meant by the terms 'executive power' and 'legislative power', as intended by the Constitution.

Executive powers include those powers that are performed by the executive of the state, which in terms of local government is the municipal council.³⁸ Executive powers must

³⁶ S Woolman & T Roux *op. cit* n32 at 14-9.

³⁷ The Constitution; s 41(1)(f) and (g)

³⁸ The Constitution; s 151(2)

be exercised in a lawful manner.³⁹ The exercise of executive powers is an administrative action and therefore may be subject to review in terms of the Promotion of Administrative Justice Act ('PAJA').⁴⁰ Therefore, municipal councils (as with other executive bodies of the government) may not exercise executive powers without due regard to the law. Legislative power is the power to make and enact law.⁴¹ In terms of local government, legislative power vests in the municipal council.⁴² Local government legislation is referred to as a 'by-law'. A by-law is original legislation that is enforceable in the area of jurisdiction of the municipality that enacted it.

Interestingly, the principle of separation of powers (in terms of which executive and legislative powers are kept separate and are accountable to each other in the interest of ensuring that the general populace is protected from the untrammelled powers of political organisations) is not applicable to local government, as the municipal council is vested with both executive and legislative powers.⁴³ It has been suggested that the absence of separation of powers in respect of local government 'should be viewed in light of a municipality's specific developmental mandate'⁴⁴ which requires participatory democracy and that the Constitution's intention is 'not to limit the imperative of open debate in a transparent setting only to legislative decisions [... but rather to] extend this imperative to all council decisions.'⁴⁵

³⁹ See generally Y Burns 'Administrative law' in WA Joubert (ed) *LAWSA* 2nd ed (2003) Vol 1.

⁴⁰ Act 3 of 2000.

⁴¹ S Seedorf & S Sibanda 'Chapter 12: Separation of Powers' in Woolman *et al* (eds) *CLOSA* 2ed (RS4 2012) Vol 1 at 12-22.

⁴² The Constitution; s 151(2)

⁴³ Steytler N and de Visser J *op cit.* n28 at 22-35.

⁴⁴ *Ibid.* at 22-36

⁴⁵ *Ibid.* at 22-36 – 22-37.

3. THE ALLOCATION OF POWERS

3.1. The importance of the Constitution

Section 2 of the Constitution, provides that '[the] Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'⁴⁶ The Supreme Court of Appeal has stated that the effect of section 2 is that the Constitution is 'the ultimate source of all lawful authority in the country [and no law or act can be lawfully made or performed (as the case may be)] which is not sanctioned by [it].'⁴⁷ Therefore, the importance of the Constitution in respect of environmental governance in South Africa cannot be overstated. Henderson notes that 'the legal source for environmental law in South Africa is in the first instance to be found in the Constitution [...].'⁴⁸ Henderson's comment must be seen in light of the fact that the Constitution advanced the status of the environment by virtue of the fact that entrenched in the Bill of Rights, is an environmental right.⁴⁹ Considering that section 7(2) mandates the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights,'⁵⁰ it is apparent that local government must comply with this mandate. Therefore, it is critical that the operation of the Constitution in respect of environmental issues is fully understood by the national, provincial, and local spheres of government.

However, the Constitution has given rise to a complexity that makes it difficult to achieve 'full integration of environmental laws.'⁵¹ Henderson goes so far as to suggest that the Constitution has made it impossible to achieve such integration, because:

the Constitution provides for concurrent national and provincial legislative competence; functional areas of exclusive provincial legislative competence and for some of these competencies local authorities have been given executive authority and the rights of administration. A number of areas relating to the environment are therefore spread across these various functional areas. There

⁴⁶ The Constitution; s 2.

⁴⁷ *Speaker of the National Assembly v De Lille MP* 1999 (4) All SA 241 (A) at para 14.

⁴⁸ PGW Henderson *Environmental Laws of South Africa* (RS 24 2013) Vol 1 at 1-3.

⁴⁹ *Ibid.* at 1-4.

⁵⁰ The Constitution; s 7(2).

⁵¹ PGW Henderson *op.cit* n48 at 1-4.

must accordingly be a determination of powers relating to the environment, between national, provincial and local spheres of government.⁵²

Therefore, understanding the manner in which powers are allocated in terms of the Constitution is crucial to ensure that all role players are able to give full effect to their mandates, and that integrated and effective environmental governance is achieved.

3.2. Original, assigned and incidental powers

Section 156 of the Constitution establishes the powers and functions of local government. Local government's powers and functions may only arise from one of the sources contemplated in the Constitution. The exercise of any power arising contrary to the Constitution would be invalid. Section 156 is set out in full below:

- (1) A municipality has the executive authority in respect of, and has the right to administer-
 - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.
- (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
- (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.
- (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-
 - (a) that matter would most effectively be administered locally; and
 - (b) the municipality has the capacity to administer it.

⁵² *Ibid.* at 1-4 to 1-5 (footnotes and emphasis omitted).

- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

It is evident that section 156(1) and (2) of the Constitution envision local government's powers arising from three distinct sources. Freedman describes these powers as being either original powers, assigned powers, or incidental powers.⁵³ Original powers are provided for at section 156(1)(a) of the Constitution and are those powers that are derived directly from the Constitution by virtue of being listed as a functional area at Part B of Schedule 4 or Part B of Schedule 5. Assigned powers are those that are assigned to local government in terms of national or provincial legislation as provided for in terms of section 156(1)(b) of the Constitution. Incidental powers are those that are reasonably necessary for, or incidental to, the effective performance of a municipality's functions as provided for in terms of section 156(2) of the Constitution.

3.2.1. *Original powers*

As stated above, original powers are those that arise as a direct result of the functional areas listed in Part B of Schedules 4 and 5 of the Constitution. 'A municipal council has the authority to pass laws in respect of the local government matters listed in Part B of Schedule 4 and in Part B of Schedule 5.'⁵⁴ For convenience, these Schedules are set out in full at Appendix A. Henderson notes that 'a number of areas relating to the environment are [...] spread across the various functional areas.'⁵⁵ The functional areas that prima facie appear to incorporate environment-related issues include 'air pollution', 'municipal planning', 'municipal health services', 'water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems',⁵⁶ 'beaches', 'control of public nuisances', 'noise pollution', and 'refuse removal, refuse dumps and solid waste disposal.'⁵⁷ It is evident that the listing of these functional

⁵³ W Freedman 'The legislative authority of the local sphere of government to conserve and protect the environment' (2013) at 2. Paper delivered at the Environmental Law Association's Annual Conference of 2013.

⁵⁴ *Ibid.*

⁵⁵ PGW Henderson *op. cit.* n48 at 1-5.

⁵⁶ These are listed at Part B of Schedule 4.

⁵⁷ These are listed at Part B of Schedule 5.

areas is minimalistic in the sense that the scope of the functional area is not defined.⁵⁸ As each sphere of government is mandated not to encroach into other spheres' functional competences, it is crucial for the sake of effective environmental governance that the functional areas are clearly defined. Thus, defining the scope of these functional areas becomes necessary to ensure that the appropriate sphere of government is exercising a power that falls within that sphere's competence, and that no unlawful actions are taken by the respective spheres of government.

Original powers can be described as being the most significant source of local government power because these original powers 'cannot be removed or amended by ordinary statutes or provincial acts'⁵⁹ and can only be 'altered or withdrawn if the Constitution itself is amended.'⁶⁰ Original powers are therefore 'a fundamental feature of local government's institutional integrity.'⁶¹ The original powers conferred upon local government in respect of these functional areas include legislative and administrative powers.⁶² Original legislative authority is limited to those matters listed in Part B of Schedule 4 and Part B of Schedule 5.⁶³

3.2.1.1. Schedule 4, Part B

The legislative authority of local government in respect of those functional areas listed at Part B of Schedule 4 is shared with the national sphere of government.⁶⁴ In terms of section 44(1), the national government may 'pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4.' As such, a prima facie reading of this section implies that '[t]his amounts to a general power with no apparent limitation.'⁶⁵ However, section 155(7) provides that national government has legislative and executive authority to see to the effective performance by municipalities of their functions *by regulating the exercise by municipalities of their executive*

⁵⁸ N Steytler & Y Fessha *Defining provincial and local government powers and functions: The management of concurrency* (2005) at 6. <http://www.mlgi.org.za/publications>. (Accessed on 23 July 2013).

⁵⁹ J de Visser 'Assignment of Powers to Local Governments' (2002) *Local Government Working Paper Series No. 1* at 2. . <http://www.mlgi.org.za/publications>. (Accessed on 23 July 2013).

⁶⁰ W Freedman *op. cit.* n49 at 2

⁶¹ *Ibid.*

⁶² The Constitution; s 156(1) and (2).

⁶³ The Constitution; s 156(1)(a) read with s 156(2).

⁶⁴ The Constitution: s 44(1)(a)(ii).

⁶⁵ J Mettler 'The legislative powers of local government' (2000) *Local Government Working Paper Series No. 1* at 7. <http://www.mlgi.org.za/publications>. (Accessed on 23 July 2013).

authority.⁶⁶ Mettler notes that section 155(7) gives rise to two competing interpretations relating to the extent of national government's legislative powers in respect of Schedule 4 Part B function areas.⁶⁷ The first interpretation is that section 155(7) limits the national government's legislative powers in respect of Schedule 4 Part B functional areas to a regulating competence only.⁶⁸ The second interpretation, which Mettler suggests is to be preferred, is that 'legislative power of [national government] in respect of Schedule 4 Part B matters is unencumbered' and that section 155(7) has no limiting effect thereon.⁶⁹ Mettler argues that this interpretation is to be preferred as it does not 'strain the apparent and unambiguous meaning of s 44(1)(a)(ii) in respect of local government matters contained in Schedule 4.'⁷⁰

Turning now to considering the status of provincial government competence in respect of Schedule 4 Part B functional areas, it is noted that provincial governments have 'a more limited legislative competence to legislate'⁷¹ in respect of local government functional areas listed at Part B of Schedule 4. Provincial governments' legislative competence over Schedule 4 Part B functional areas is limited by section 155(6)(a) and (7) 'to the function of monitoring and support and further to regulate the manner in which municipalities exercise their authority.'⁷² Section 155(6)(a) provides that '[e]ach provincial government [...] by legislative and other measures, must provide for the monitoring and support of local government in the province'⁷³ and section 155(7) provides that provincial governments have the legislative and executive authority to 'see to the effective performance by municipalities of their functions in respect of matters listed in Schedule 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).'⁷⁴ Thus, in a manner of speaking, these functional areas represent an 'area of exclusive legislative competence of local government vis-à-vis provincial government.'⁷⁵

⁶⁶ The Constitution; s 155(7) (own emphasis added)

⁶⁷ J Mettler *op.cit* n65 at 8.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at 9.

⁷² *Ibid.* at 10.

⁷³ The Constitution; s 155(6)(a).

⁷⁴ The Constitution; s 155(7).

⁷⁵ J Mettler *op.cit* n65 at 10.

3.2.1.2. *Schedule 5 Part B*

The legislative authority of local government in respect of those functional areas listed at Part B of Schedule 5 is shared with the national sphere of government to the extent set out at section 44(2). Subsection (2) provides that 'Parliament may intervene, by passing legislation [...] with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.'⁷⁶ Clearly, it would be difficult for national government to show reason to legislate in terms of section 44(2).⁷⁷ Therefore, this legislative competence should be seen as being an extraordinary competence conferred upon national government. Provincial governments' legislative competence in respect of Schedule 5 Part B functional areas is essentially the same as that in respect of Schedule 4 Part B functional areas (as discussed above).

Therefore, 'while the national and provincial spheres of government are entitled to pass laws regulating the local government matters set out in Schedule 4B and Schedule 5B, they are not entitled to legislate on the 'core' of Schedule 4B and Schedule 5B matters. Instead, they are only entitled to pass framework legislation dealing with national standards, minimum requirements, monitoring procedures and so on.'⁷⁸

3.2.2. *Assigned powers*

The Constitution empowers local government to exercise legislative and executive authority in respect of any matter assigned to it by the national or provincial spheres of government.⁷⁹ It must be noted that the national and provincial spheres of government are not able to freely assign any power to the local government. National government's powers to assign legislative powers are limited in terms of section 44(1)(a)(iii) of the Constitution which provides that the national government may assign any of its legislative powers, except the power to amend the Constitution, to any legislative body

⁷⁶ The Constitution; s 44(2).

⁷⁷ J Mettler *op.cit* n65 at 11-12.

⁷⁸ W Freedman *op cit.* n49 at 3.

⁷⁹ The Constitution; s 156(1)(b) read with s 156(2).

in another sphere of government. Provincial government may, in terms of section 104(1)(c) of the Constitution, assign any of its legislative powers to a Municipal Council in that province. In addition, section 156(4) provides that

[t]he national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if -

- (a) that matter would most effectively be administered locally; and
- (b) the municipality has the capacity to administer it.

Commenting on this subsection, Kirby *et al* note that '[t]he bias towards subsidiarity is implied in section 156(4), which compels national and provincial governments to assign their functional areas to municipalities if the matter is better administered locally and the municipality is capable of dealing with the matter.'⁸⁰ Of particular importance is the manner in which the actual assignment of powers must be effected. To highlight this, the wordings of the provisions which provide for the exercise of assigned powers by the provincial and local government are relevant. Whilst provincial government may only exercise legislative authority over those matters which are *expressly* assigned to the province by national legislation,⁸¹ local government has executive authority in respect of, and has the right to administer any matter assigned to it by national or provincial legislation.⁸² Therefore, 'while the power to pass legislation on a matter that falls outside Schedules 4 and 5 cannot be assigned by implication to the provincial legislatures it can be assigned by implication to the municipal councils.'⁸³

3.2.3. *Incidental powers*

Finally, the Constitution provides that a municipality has the right to exercise 'any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.'⁸⁴ As noted by Freedman, 'incidental powers refer to those powers that strictly speaking fall outside the matters over which a municipality has

⁸⁰ C Kirby, N Steytler & J Jordan 'Towards a more cooperative local government' (2007) 22 *SAPR/PL* at 145.

⁸¹ The Constitution; s 104(1)(b)(iii).

⁸² The Constitution; s 156(1)(b).

⁸³ W Freedman *op. cit.* n49 at 8.

⁸⁴ The Constitution; s 156(5)

legislative and executive authority, but are so closely connected to the effective performance of its functions that they are considered to be a part of the matters over which a municipality has authority'.⁸⁵ It has been suggested that the incidental powers should not be 'interpreted in a narrow or literal sense [...] but instead local government's developmental mandate should be broadly construed'.⁸⁶ Therefore, as argued by Steytler *et al*, two principles should guide the interpretations of section 156(5): first, a purposive interpretation linked to the developmental mandate of local government and second, incidental powers should not be used to 'increase the functional ambit of local government's powers but rather to enhance the efficacy of administering an existing function area'.⁸⁷

3.3. Municipalities' mandate in terms of section 24 of the Constitution

Local government's role in terms of the management and protection of the environment is important. Where determining whether or not local government powers have been infringed, it has been suggested that it is important to examine the 'purpose and effect' of the allegedly infringing exercise of power (be it an executive action or legislative action). If, considering the purpose and effect, such power overlaps with the mandate of developmental local government, it should be deemed to be constitutionally impermissible and therefore invalid.⁸⁸ This is implied in that local government is vested with the executive and legislative power in respect of several functional areas that have an impact on environmental concerns.⁸⁹ In addition to the implied environmental mandate, an express mandate is provided in that local government has been tasked to meet a 'developmental mandate'. In terms of the White Paper on Local Government, 1998⁹⁰ the notion of 'developmental local government' is comprised of four characteristics:

1. Maximising economic growth and social development: local government is instructed to exercise its powers and functions in a way that has a maximum impact on economic growth and social development of communities.

⁸⁵ W Freedman *op. cit.* n49 at 8.

⁸⁶ N Steytler & J de Visser *op. cit.* n28 at 22-48.

⁸⁷ *Ibid.*

⁸⁸ J De Visser 'Demarcating provincial and local powers regarding liquor retail' (2004) 19 *SAPR/PL* at 368.

⁸⁹ As listed above.

⁹⁰ White Paper on Local Government (9 March 1998)

2. Integrating and coordinating: local government integrates and coordinates developmental activities of other state and non-state agents in the municipal area.
3. Democratic development: public participation: local government becomes the vehicle through which citizens work to achieve their vision of the kind of place in which they wish to live.
4. Leading and learning: municipalities must build social capital, stimulate the finding of local solutions for increased sustainability and stimulate local political leadership.⁹¹

It has been suggested that these four characteristics 'are not only fundamental to giving content to local government's developmental mandate but that they are *also very useful in interpreting constitutional and statutory provisions that deal with local government*.'⁹² Whilst the developmental mandate does not directly relate to the environment, it can be argued that the inclusion of the environmental right at section 24 of the Constitution creates a duty on the state to progressively realise such right. Local government, as an organ of state, is mandated to ensure the progressive realisation of this right. Du Plessis argues that '[t]he Constitution [...] reiterates the role of local government in the realisation or fulfilment of the environmental right.'⁹³ In support of this argument Du Plessis points to section 152(1)(b)⁹⁴ and (d)⁹⁵ and section 153(a) noting that

[a]n inclusive reading of the Constitution, together with an understanding of the inseparable link between, on the one hand, environmental resources such as water, air and soil, and, on the other, 'basic needs' serves to reinforce the idea that the Constitution creates a legally valid and enforceable environmentally relevant expectation on the part of rights holders. It is the enforceable duty of local government to realise the section 24 environmental right within the limits of the scope of its constitutional powers. 'To realise' in the constitutional context refers to the taking of positive measures and the investment of

⁹¹ Community Law Centre *Developmental Local Government Determining Appropriate Functions and Powers* (2007) 8-9.

⁹² *Ibid.* at 9 (own emphasis added).

⁹³ A du Plessis 'Local environmental governance' and the role of local government in realising section 24 of the South African Constitution (2010) *Stell LR* at 268.

⁹⁴ The Constitution; s 152(1)(b), which provides that the objects of local government are, *inter alia*, to ensure the provision of services to communities in a sustainable manner.

⁹⁵ The Constitution; s152(1)(b), which provides the objects of local government are, *inter alia*, to promote a safe and healthy environment.

resources towards the progressive discharge or fulfilment of the duties implied by a right.⁹⁶

In addition, the Local Government: Municipal Systems Act⁹⁷ ('Municipal Systems Act') further provides evidence of an environment-related mandate. In terms of section 4(2), municipalities must 'strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner,⁹⁸ and 'promote a safe and healthy environment in the municipality.'⁹⁹ In terms of section 23 municipalities must undertake 'developmentally-oriented planning so as to ensure that it strives to achieve the objects of local government set out in section 152 of the Constitution; gives effect to its developmental duties as required by section 153 of the Constitution; and contributes to the progressive realisation of the fundamental rights contained in section 24 of the Constitution.'¹⁰⁰ The Municipal Systems Act further provides that all municipalities must each adopt an integrated development plan ('IDP').¹⁰¹ An IDP must include, *inter alia*, a spatial development framework ('SDF') which 'must include the provision of basic guidelines for a land use management system for the municipality.'¹⁰² Therefore, it is evident that local government is seen as an important component of government in terms of providing for effective environmental governance.

⁹⁶ A Du Plessis *op. cit.* n93 at 268-269.

⁹⁷ Act 32 of 2000.

⁹⁸ Act 32 of 2000; s 4(2)(d).

⁹⁹ Act 32 of 2000: s 4(2)(i).

¹⁰⁰ Act 32 of 2000: s 23(1).

¹⁰¹ Act 32 of 2000: s 25.

¹⁰² Act 32 of 2000: s 26(e).

4. NATIONAL LEGISLATION DEFINING LOCAL GOVERNMENT

4.1. Introduction

Considering the complexity of local government as a sphere of government in the constitutional scheme, Van Wyk pointed out that '[a] comprehensive legislative structure is necessary to address all [the] functions of municipalities.'¹⁰³ National legislation has been promulgated that further defines the manner in which local government operates. Such legislation will be discussed below.

4.2. Local Government: Municipal Systems Act¹⁰⁴

As was briefly shown above, the Municipal Systems Act is one of the principle statutes which regulate the functioning of local government. The long title of the Municipal Systems Act confirms that its purpose is, *inter alia*:

to provide for the manner in which municipal powers and functions are exercised and performed [...] to establish a framework for support, monitoring and standard setting by other spheres of government in order to progressively build local government into an efficient, frontline development agency capable of integrating the activities of all spheres of government for the overall social and economic upliftment of communities in harmony with their local natural environment; [and] to provide for legal matters pertaining to local government.¹⁰⁵

Chapter 2 of the Municipal Systems Act confirms the constitutional principles of local government autonomy and co-operative governance. Specifically, section 3(2) provides that

[t]he national and provincial spheres of government must, within the constitutional system of co-operative government envisaged in section 41 of the Constitution, exercise their executive and legislative authority in a manner

¹⁰³ J Van Wyk 'Parallel planning mechanisms as a 'recipe for disaster'' (2012) 12(1) *PER/PELJ* at 223.

¹⁰⁴ Act 32 of 2000.

¹⁰⁵ Act 32 of 2000; Long title.

that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority.¹⁰⁶

The Municipal Systems Act therefore specifically requires that the national and provincial spheres of government may not compromise or impede local government from exercising its administrative and legislative powers. Thus, the autonomy of local government is affirmed through the operation of the Municipal Systems Act.

The rights and duties of municipalities are provided for at section 4, and include the right to 'exercise the municipality's executive and legislative authority, and to do so without improper interference'¹⁰⁷ and the duty to 'promote a safe and healthy environment in the municipality.'¹⁰⁸ Therefore, the Municipal Systems Act reaffirms the autonomy of local government and further mandates local government to promote a safe and healthy environment within its area of jurisdiction. This mandate is an important element that has been used by the courts in interpreting functional areas where environment-related conflict arises.¹⁰⁹

A further important duty set out in the Municipal Systems Act is to 'contribute [...] to the progressive realisation of the fundamental rights contained in sections 24 [...] of the Constitution.'¹¹⁰ In addition, the Municipal Systems Act requires that '[a] municipality must in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights.'¹¹¹ As already noted, all municipalities are required to adopt an IDP, which includes a SDF which sets out basic guidelines for land use management within the municipality. Therefore, the Municipal Systems Act requires that local governments consider environmental concerns where exercising municipal planning powers.

4.3. Local Government: Municipal Structures Act¹¹²

In terms of the Constitution, three categories of municipalities can be established:

¹⁰⁶ Act 32 of 2000; s 3(2).

¹⁰⁷ Act 32 of 2000; s 4(1)(b).

¹⁰⁸ Act 32 of 2000; s 4(2)(i).

¹⁰⁹ See discussion of cases at chapter 5 below.

¹¹⁰ Act 32 of 2000; s 4(2)(j).

¹¹¹ Act 32 of 2000; s4(3).

¹¹² Act 117 of 1998.

- (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.
- (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
- (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.¹¹³

As is evident from the above, the division of legislative and executive authority between municipalities is provided for. This is because local municipalities (Category B) fall within the jurisdiction of district municipalities (Category C) and share legislative and executive authority over the functional areas assigned in terms of the Constitution.¹¹⁴ The Constitution does not provide which functional areas are assigned to local or district municipalities, but does require that national legislation 'make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C.'¹¹⁵ The national legislation in terms of which such division of functional areas is provided for is the Local Government: Municipal Structures Act ('Municipal Structures Act'). In terms section 84 of the Municipal Structures Act, the functional areas listed in Schedule 4 and 5 as local government competences are divided between district and local municipalities. The manner in which the Municipal Structures Act assigns functional areas between these two categories of municipalities is to list specifically those areas which are to be exercised by a district municipality, and to leave the remainder of the functional areas allocated in terms of Schedules 4 and 5 to local municipalities.¹¹⁶ Should a dispute arise concerning the performance of a function or the exercise of a power, the Municipal Structures Act specifically provides that the MEC for local government in the province must resolve the dispute by defining their respective roles in the performance of that function or in the exercise of that power.¹¹⁷ It has been

¹¹³ The Constitution; s 155(1).

¹¹⁴ N Steytler 'District municipalities - giving effect to shared authority in local government' (2003) 7(2) *Law, Democracy & Development* at 228.

¹¹⁵ The Constitution; s 155(3)(c)

¹¹⁶ Act 117 of 1998; s 84(1)-(2) read with s 83(1). The matters assigned to district municipalities are set out at Annexure B hereto.

¹¹⁷ Act 117 of 1998; s 86.

suggested that whilst such dispute resolution mechanism 'avoids paralysis'¹¹⁸ it is not an efficient solution 'since the MEC could be called upon to resolve innumerable squabbles over minor issues, and then must adhere to the lengthy process of consultation and publish the result by notice in the Provincial Gazette.'¹¹⁹ In addition, the MEC being called upon to resolve disputes may in fact be an instance of provincial interference and arguably be an unlawful intrusion into the functional area of local government.¹²⁰ This apparent infringement of the constitutional system of government is indicative of the complexity of the system, and evidences an apparent lack of critical understating of the operation of the Constitution in this subject matter.

Kirby *et al* note that three areas of uncertainty have arisen in respect of the division of functional areas in terms of the Municipal Structures Act, '[f]irst, how to distinguish when a matter is no longer a local matter but a district one; second, the broad definition of some functions; and third, the over inclusiveness of some district powers.'¹²¹

Although inter-municipal conflict is not the focus of this paper, it is worth noting that the division of functional areas in terms of the Municipal Structures Act bears the same minimalistic nature as the Constitution, and therefore suffers from the same potential problems.

¹¹⁸ C Kirby, N Steytler & J Jordan *op. cit.* n80 at 150.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.* at 149.

5. JUDICIAL INTERPRETATION OF FUNCTIONAL AREAS

5.1. Introduction

As has been shown above, the manner in which powers are allocated to the three spheres of government in terms of the Constitution provides a fertile ground for conflict arising from the situation where different views are held as to what a particular functional area entails. Due to this, the courts have played a significant role in delineating the boundaries of these functional areas and in providing principles in terms of which this should be done. Steytler *et al* note the importance of such judicial interpretation stating that 'as an integral part of the Constitution, the meaning of Schedules 4 and 5 is, in the final analysis, determined by the courts.'¹²²

Where any statute falls to be interpreted by a court the divergent theories of interpretation play an important role in determining the final interpretation settled upon by a court. This is especially true where the text to be interpreted is the Constitution. In this light, it has been suggested that ideological considerations may play an important role in the interpretation of the listed functional areas.¹²³ It is argued that proponents of centralisation of government would favour a different interpretation to proponents of decentralisation of government.¹²⁴ Thus it has been argued that judicial interpretation, specifically with reference to the local government functional areas, may result in the powers of the local sphere of government being drastically circumscribed (or over ascribed). However, based on a review of the cases set out below, it is apparent that this has not been the case. The courts have adopted a purposive approach to interpreting the Constitution. The Constitutional Court has commented that

[i]n the interpretation of those Schedules [to the Constitution] there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner

¹²² N Steytler & YT Fessha 'Defining local government powers and functions' (2007) 124(2) *SALJ* at 324.

¹²³ *Ibid.* at 325

¹²⁴ I Rauthebach & R Malherbe *Constitutional Law* 3ed (1999) 81 as cited in N Steytler & YT Fessha *op. cit.* n122 at 325.

which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively¹²⁵.

This statement by the court reflects that the 'determining factor in interpreting the functional area is enabling the respective legislatures to discharge their responsibilities completely and successfully.'¹²⁶ It may even be suggested that the Constitution favours that local government be granted as much power as possible as provision is made for the mandatory assignment by the national and provincial spheres of their respective powers that 'necessarily relates to local government.'¹²⁷

Judicial interpretation is therefore an important tool for unpacking the meaning, content and scope of the listed functional areas. Recently, the courts have been tasked with pronouncing on several cases that dealt with the interpretation of functional areas. These cases will be discussed below.

5.2. *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*¹²⁸

Although the *Liquor Bill* case did not deal with any of the environment-related functional areas, it is nevertheless an important case in the jurisprudence of the manner in which the courts have approached the task of interpreting the functional areas listed in the Constitution.

In this case, the issue before the Constitutional Court was whether the national government had intruded into the provincial government's exclusive competence in respect of the functional area of 'liquor licences' by adopting a Bill regulating, *inter alia*, liquor licensing. In reaching its decision, the court noted that 'the Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a *functional vision of what was appropriate to each sphere*....'¹²⁹ The court adopted the approach that the functional areas listed at Schedule 4 and Schedule 5

¹²⁵ *Western Cape Provincial Government and others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and another* 2001 (1) SA 500 (CC) at para 17.

¹²⁶ N Steytler & YT Fessha *op. cit.* n122 at 325.

¹²⁷ The Constitution; s 156(4).

¹²⁸ 2000 (1) SA 732 (CC).

¹²⁹ *Supra* n128 at para 51 (own emphasis added).

of the Constitution must be interpreted in light of this 'functional vision'.¹³⁰ As will be discussed below, the court's expression of the importance of this 'functional vision' is of great value when considering the status of local government vis-à-vis environmental governance.

In order to give effect to the functional vision, the court found that it was necessary to analyse the manner in which Schedule 5 functional areas operated within the greater constitutional scheme. Relying on the manner in which the Constitution provided for conflicts between national and provincial legislation, the court reached the conclusion that 'the Constitution contemplates that Schedule 5 competences must be interpreted so as to be distinct from Schedule 4 competences.'¹³¹ Therefore, those functional areas which are assigned to provincial government should be interpreted as having 'distinct identities, which can be differentiated from other functional areas.'¹³² This reasoning then led the court to differentiate functional areas based on, *inter alia*, the territorial limits of the actual exercise of power of each sphere of government. In considering these territorial limits, the court stated that where issues could be dealt with at an inter-provincial level these should be seen as falling within the national government's competence and that where issues could be dealt with at an intra-provincial level these should be seen as falling within the provincial governments' competence.¹³³ The court accordingly stated that 'where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.'¹³⁴ Therefore, the court essentially found that the allocation of exclusive powers to the province would be contrary to the functional vision if such powers included the ability to legislate in respect of matters that have effects beyond the territorial limits of the respective provinces.

In this regard, the *Liquor Bill* case highlights that where conflict arises regarding the scope of functional areas, a purposive approach to interpretation must be adopted to ensure that the intention of the legislature is given effect. In this case, the intention of the Constitution was expressed as the 'functional vision of what was appropriate to each

¹³⁰ N Steytler & YT Fessha *op. cit.* n122 at 325.

¹³¹ *Supra* n128 at para 48

¹³² N Steytler & YT Fessha *op. cit.* n122 at 326.

¹³³ *Supra* n128 at 51.

¹³⁴ *Supra* n128 at 52.

sphere'. Although the court pronounced on the national-provincial dynamic in this case, the territorial principle that was applied to inform the functional vision of the Constitution should apply where interpreting any overlap of functional areas.¹³⁵ As such, it is submitted that where a dispute arises as to the scope of a functional area assigned to local government, such functional area should be interpreted in light of the statement that 'only matters that have no extra-municipal dimensions fall within local government's domain.'¹³⁶ Therefore, only intra-municipal matters should fall within the scope of powers vested in the local government through the allocation of the various functional areas. De Visser, in discussing this judgment, notes that the delineation of functional areas must be informed by three considerations. First, delineation cannot be absolute and overlap is inevitable. Second, despite the first consideration, delineation is necessary to inform discussions within the context of co-operative governance. Thirdly, in deciding whether the exercised power lies outside of authority of a particular sphere, the purpose and effect of such act must be taken into account.¹³⁷ From an environmental perspective, application of the territorial principle appears, *prima facie*, to be nearly impossible to apply. This is because there is no generally accepted concept of what is meant by the term environment. Glazewski notes that environmental concerns may encompass a broad array of fields, from matters connected to the natural environment to matters connected with the built environment.¹³⁸ Giving meaning to the functional area of 'environment' therefore requires an understanding of what is meant by the term 'environment', as contained in Schedule 4.

5.3. *Wary Holdings v Stalwo (Pty) Ltd*¹³⁹

The *Wary Holdings* case is an important case that deals with the division of powers between the three spheres of government with regard to land-use management, specifically in respect of the subdivision of agricultural land. The Constitutional Court was unable to reach a unanimous decision in this case, resulting in two judgments. It is noted by Steytler that '[t]he split Constitutional Court decision reflects both different

¹³⁵ N Steytler & YT Fessha *op. cit.* n122 at 326.

¹³⁶ *Ibid.*

¹³⁷ J de Visser *op. cit.* n88 at 367.

¹³⁸ J Glazewski *op. cit.* n3 at 1-10.

¹³⁹ This matter was heard in the High Court, Supreme Court of Appeal, and Constitutional Court. The judgments of the High Court and of the other courts were reported as *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd & another* [2006] JOL 17455 (SE) *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and another* 2008 (1) SA 654 (SCA), and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* 2009 (1) SA 337 (CC), respectively.

visions of local government and how to resolve division of powers questions through statutory interpretation.¹⁴⁰ As will be discussed, the methodologies adopted by the court in both the majority and the minority judgments are of significance in determining how to delineate the competences of the three spheres of government, where conflict arises in respect of environment-related functional areas.

The relevant facts of this case are as follows. Wary Holdings ('Wary') and Stalwo entered into an agreement for the sale of a portion of land. At the time the agreement was concluded, the land was zoned as agricultural land. The seller, Wary, had applied for the rezoning of the land to allow for light industrial land use. The rezoning application was accepted, subject to certain conditions. The conditions imposed various obligations on Wary, the result of which was that Wary would incur substantial costs in preparing the land. This meant that the sale was effectively unprofitable. Stalwo approached the court *a quo* for a declaratory order that the agreement was binding. Wary raised the defence that, in terms of the Subdivision of Agricultural Land Act ('SALA')¹⁴¹ the subdivision of agricultural land could only be undertaken if prior Ministerial permission allowing for such subdivision was granted. As the sale-agreement did not provide for this, and such permission had not been obtained, it was argued that the agreement was void *ab initio*. Interestingly, in this case it is clear that the functional allocation of powers would have been relevant to deciding the dispute. However, as noted by Steytler whilst '[t]he Court correctly framed the dispute as one dealing with the constitutional distribution of powers between the different spheres of government, [it did] not follow through on its own analysis.'¹⁴² Instead the court's reasoning hinged upon interpreting the evolution of the definition of 'agricultural land' in terms of the SALA, with little or no regard placed on the allocation of functional areas between the different spheres of government. In this regard, SALA provides that 'agricultural land' means:

¹⁴⁰ N Steytler 'The decisions in Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd' (2009) 2 *Constitutional Court Review* at 429.

¹⁴¹ Act 70 of 1970.

¹⁴² N Steytler *op. cit.* n140 at 437.

any land, except-

(a) land situated in the area of jurisdiction of a municipal council [...]

Provided that land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such.¹⁴³

As the proviso in this definition clearly made reference to 'transitional councils', the question that arose in this case was whether the proviso only existed during the lifetime of transitional councils, or whether it continued to apply where transitional councils were replaced by elected municipal councils.¹⁴⁴ The High Court found that the reference to 'transitional councils' was intended to pinpoint a period in time, and therefore the proviso continued to apply even when transitional councils ceased to exist. On appeal to the Supreme Court of Appeal, the court overturned the High Court decision finding that

the proviso was meant to operate only for as long as the land envisaged therein remained situated in the jurisdiction of a transitional council. It was a simple matter for the legislature to say so expressly if it intended such land to retain the classification after transitional councils ceased to exist.¹⁴⁵

This meant that 'once transitional councils were replaced by municipal councils in 2000, the classified land lost its agricultural character, unless [that land was] specifically declared by the minister to be agricultural land.'¹⁴⁶ On further appeal to the Constitutional Court the majority decided that the proviso continued to operate despite transitional councils ceasing to exist. Unfortunately, the court did not 'attempt to show why municipalities have 'the competence and capacity' to administer land falling in their jurisdiction. There is no reference to any competence of local government, such as

¹⁴³ Act 70 of 1970; s 1.

¹⁴⁴ NNJ Olivier & C Williams 'Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd (amicus curiae); Minister of Agriculture & Land Affairs (intervening)) [2008] JOL 22099 (CC) (2010) 35(2) *Journal for Juridical Science* at 102.

¹⁴⁵ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and another* 2008 (1) SA 654 (SCA) at para 24.

¹⁴⁶ J Van Wyk 'Is subdivision of agricultural land part of municipal planning' (2009) 24 *SAPR/PL* at 553.

‘municipal planning’.¹⁴⁷ Whilst it is expected that the court would have inquired into the competences of the national and local sphere to administer within the functional area of agriculture, such inquiry did not take place. However, in the minority decision, Yacoob J did deal with the constitutional allocation of powers appropriately. The minority sought to follow the approach of the court in the *Liquor Bill* case. Accordingly, '[t]he main substance of legislation had to be determined, and the field of competence in which its substance falls had to be ascertained, as well as what it incidentally accomplishes.'¹⁴⁸ Following this approach, the minority found that the main substance of SALA was planning, and as such concluded that 'if the planning function in relation to agricultural land continues to be undertaken by the Minister of Agriculture instead of by municipalities, it would be at odds with the Constitution in two respects: it would negate the municipalities' planning function and it may trespass into the sphere of the exclusive provincial competence of provincial planning.'¹⁴⁹ Therefore, having concluded that SALA was in fact planning legislation meant that it fell within the functional area of municipal planning and not agriculture, and was thus a local government competence that the Minister of Agriculture could not intrude on. This minority decision is important in that it stresses the importance of construing legislation and the exercise of powers in terms of legislation within the functional vision of the Constitution. This places the Constitution at the forefront of determining all disputes relating to the division of powers between the spheres of government. As such, the effect and purpose of legislation must be determined in order to ensure that it is correctly classified within one (or more) of the functional areas listed in the Constitution. Once this is done, it can then be determined whether the legislation aligns with the constitutional division of legislative and executive competences.

5.4. *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others*¹⁵⁰

¹⁴⁷ N Steytler *op. cit.* n140 at 435.

¹⁴⁸ NNJ Olivier & C Williams *op. cit.* n144 at 116.

¹⁴⁹ *Ibid.* at 116, referring to para 131 of the judgment.

¹⁵⁰ This matter was heard in the High Court, Supreme Court of Appeal, and Constitutional Court. The judgment of each of these courts are reported as *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others (Mont Blanc Projects and Properties (Pty) Ltd and another as amici curiae)* 2008 (4) SA 572 (W), *Johannesburg Municipality v Gauteng Development Tribunal and others* 2010 (2) SA 554 (SCA), and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* 2010 (6) SA 182 (CC), respectively.

Following from the *Liquor Bill* case, the trio of judgments in the *Gauteng Development Tribunal* case presented the first opportunity the courts had to deal with conflict arising in respect of environment-related functional areas. The Constitutional Court's judgment in the *Gauteng Development Tribunal* case is regarded as a landmark decision which examined the provincial-municipal competence dynamic with specific reference to environmental concerns.

The matter came to the Constitutional Court due to an earlier judgment by the Supreme Court of Appeal declaring specific chapters of national planning legislation to be unconstitutional. Therefore, the pertinent issue that fell to be decided by the Constitutional Court was whether certain chapters of the Development Facilitation Act¹⁵¹ ('DFA') were indeed 'unconstitutional, by reason of being inconsistent with the constitutional scheme for the allocation of functions between the national, provincial and local spheres of government.'¹⁵² The facts of this case are concisely set out as follows:

As an authorised local authority under the Town-Planning and Townships Ordinance (Ordinance), the City [of Johannesburg was] empowered to consider applications to rezone land and to establish new townships within its area of control. It delegated these functions to its planning committee. Difficulties emerged from 1997 onwards as the Tribunal, empowered by the [Development Facilitation] Act, began to decide applications for 'land developments' (in the form of rezoning applications and applications for the establishment of townships) within the City's jurisdiction. The City says that, in approving a number of these applications, the Tribunal failed to take into account the City's development-planning instruments, and was also more lenient than its own Planning Committee. According to the City, this resulted in decisions that undermined its development-planning, and also allowed for 'forum-shopping' which undermined the authority of the planning committee.¹⁵³

Commenting on the Supreme Court of Appeal's judgment (which judgment was generally accepted by the Constitutional Court) in the *Gauteng Development Tribunal*

¹⁵¹ Act 67 of 1995.

¹⁵² *Supra* n15 at para 19.

¹⁵³ *Supra* n15 at para 9.

case, Van Wyk notes that the court 'formalised planning terminology in South Africa, delineated the boundaries of 'municipal planning' and 'urban planning and development' as listed in Schedules 4 and 5 of the Constitution and, in the process, clarified the structure of planning law.'¹⁵⁴ Van Wyk notes further that 'the [Supreme Court of Appeal's] clarification of planning terminology [...] formed a crucial part of the court's interpretation of the provisions of Schedules 4 and 5 of the Constitution, and the conclusion it reached on the legislative powers of national and provincial legislatures in respect of planning at municipal level.'¹⁵⁵ This comment shows the significance of formalising the terminology relating to the functional areas as this terminology is important in defining the boundaries of the functional areas as listed in the Constitution. Thus, to extrapolate to other functional areas, in order to determine the boundaries of the functional area 'environment' it would be necessary to understand what that word meant to the drafters of the Constitution. As previously noted, the Supreme Court of Appeal's reasoning was largely followed by the Constitutional Court, which confirmed the declaration of invalidity in respect of the DFA.

The Constitutional Court, in reference to the autonomy which is granted to each of the three spheres of government, stated that '[t]his autonomy cannot be achieved if the functional areas itemised in the schedules are construed in a manner that fails to give effect to the constitutional vision of distinct spheres of government.'¹⁵⁶ Having accepted the functional vision approach established in terms of the *Liquor Bill* case, the Constitutional Court stated that '[t]he Constitution confers different planning responsibilities on each of the three spheres of government in accordance with what is appropriate to each sphere.'¹⁵⁷ However, in developing this functional vision methodology, the Constitution Court stated that

the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. This is the position, even in respect of functional areas that share the same wording, like roads, planning, sport and others. The distinctiveness lies in the level at which a particular power is

¹⁵⁴ J Van Wyk *op. cit.* n99 at 215.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Supra* n15 at para 50.

¹⁵⁷ *Supra* n15 at 53.

exercised. [...] The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres.¹⁵⁸

In defining the scope of 'municipal planning', the court stated that the term had 'assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships [and...] is commonly used to define the control and regulation of the use of land.'¹⁵⁹ The court then stated that as there is nothing in the Constitution to suggest that this common usage was not what had been intended. As a result, it was held that the contested powers relating to land use and development fell within the scope of 'municipal planning'.¹⁶⁰

Following from this finding, the court had to consider whether or not the contested powers also fell within the functional areas of 'urban and rural development' (a provincial competence). The court, in applying the *dictum* in the *UDM*¹⁶¹ case, stated that 'is the duty of this court, and indeed the other courts as well, to construe the sections of the Constitution in a manner that strikes harmony between them and gives effect to each and every section.'¹⁶² In light of this, the court held that a purposive interpretation of the Constitution requires that the term 'development' be construed narrowly 'so as to enable each sphere to exercise its powers without interference by the other spheres.'¹⁶³ In doing so, the court applied the 'functional vision' of the Constitution, and found that it was not necessary to determine the scope of the provincial functional area, suffice to say that it did not include the powers forming part of municipal planning.¹⁶⁴

In defining the boundaries of municipal planning, Van Wyk notes that the court identified two components of planning that describe what comprises the functional area of municipal planning. These components are 'land use planning' and 'land use and

¹⁵⁸ *Supra* n15 at 55.

¹⁵⁹ *Supra* n15 at 57.

¹⁶⁰ *Supra* n15 at 57.

¹⁶¹ *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2) 2003 (1) SA 495 (CC) at para 83.*

¹⁶² *Supra* n15 at 61.

¹⁶³ *Supra* n15 at 62.

¹⁶⁴ *Supra* n15 at 63.

management and land development.¹⁶⁵ Within these components, matters relating to environmental concerns could be considered without intruding into the functional area of environment.

The *Gauteng Development Tribunal* case is further significant in that it laid the foundation for what is referred to as the 'bottom-up' method for interpreting the functional areas. This method of interpretation argues that, 'rather than attempting to provide an exhaustive definition of both overlapping matters, the more specific matter (usually one listed in Part B of Schedule 4 and Part B of Schedule 5) should be defined first, leaving the residual areas to the much broader matter (usually one listed in Part A of Schedule 4 and Part A of Schedule 5).¹⁶⁶ Unfortunately, this methodology has allowed the courts to steer away from having to interpret functional areas such as 'environment' and 'urban and rural development', and therefore serves to highlight an inherent deficiency of judicial interpretation as it relates to the functional areas. Furthermore, by broadly interpreting functional areas assigned to the 'smaller' sphere of government, the courts risks being over inclusive and potentially detracting from the functional areas of the 'larger' spheres of government.

5.5. *Maccsand (Pty) Ltd v City of Cape Town and others*¹⁶⁷

Although the *Maccsand* case did not directly deal with the scope of 'municipal planning' or 'environment', one of the issues that fell to the court to decide was whether or not the exercise of municipal planning powers by a municipality could prevent mining activity from occurring when mining was a national competence. The legislation giving rise to the dispute in this matter was the Land Use Planning Ordinance ('LUPO')¹⁶⁸ and the Mineral and Petroleum Resources Development Act ('MPRDA').¹⁶⁹ It is worth noting that LUPO is pre-Constitution legislation, the administration of which was assigned to the provincial government of the Western

¹⁶⁵ J Van Wyk *op. cit.* n99 at 222.

¹⁶⁶ DW Freedman *op. cit.* n9 at para 224.

¹⁶⁷ This matter was heard in the High Court, Supreme Court of Appeal, and Constitutional Court. The judgment of each of these courts are reported as *City of Cape Town v Maccsand (Pty) Ltd and others* 2010 (6) SA 63 (WCC), *Maccsand (Pty) Ltd and another v City of Cape Town and others* 2011 (6) SA 633 (SCA), and *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC), respectively.

¹⁶⁸ Ordinance 15 of 1985 (Cape).

¹⁶⁹ Act 28 of 2002.

Cape.¹⁷⁰ The relevant facts that led to this dispute were that Maccsand was issued with a mining permit in respect of land situated within the jurisdiction of the City of Cape Town Metropolitan Municipality ('City of Cape Town'). The mining permit related to portions of land which were zoned in terms of LUPO as 'public open space and rural land use'. This zoning did not allow for mining. In spite of LUPO, Maccsand commenced mining activities on the land. This resulted in the City of Cape Town launching an urgent interdict to prevent such mining from continuing until the land was appropriately zoned to allow for mining.¹⁷¹

As mining is an exclusive competence of the national sphere of government,¹⁷² it was alleged by Maccsand that local government could not be permitted to regulate mining in terms of local planning laws because 'as mining falls under the exclusive competence of national government.'¹⁷³ The argument raised was essentially that 'allowing the municipality to exercise land use decisions in terms of LUPO would enable the local government to 'veto' decisions of the national sphere on a matter that falls within the exclusive competence of the latter.'¹⁷⁴ Maccsand further argued that if LUPO is applicable to mining, it 'would amount to permitting an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government'.¹⁷⁵

In determining the issue, the court analysed the relevant provisions of LUPO in order to determine what it was that LUPO in fact regulates, thus following the methodology previously adopted by the court in the *Gauteng Development Tribunal* case. It was stated that '[t]he role played by LUPO is limited to the control and regulation of the use of land'¹⁷⁶ and did not in any way attempt to regulate mining. In disposing of Maccsands' arguments, the court noted that '[w]hile the MPRDA governs mining, LUPO regulates the use of land. An overlap between the two functions occurs due to the fact that mining is carried out on land.'¹⁷⁷ The court then went on to state that such

¹⁷⁰ 2012 (4) SA 181 (CC) at 15.

¹⁷¹ *Supra* n170 at 20-22.

¹⁷² The Constitution; s 44(1)(a)(ii).

¹⁷³ NJJ Olivier C Williams & PJ Badenhorst 'Maccsand (Pty) Ltd v City of Cape Town 2012 (4) SA 181 (CC)' (2012) 15(5) *PER/PELJ* at 552.

¹⁷⁴ M Kidd, 'Country Report: South Africa: Developments in Environmental Law during 2012' (2013)4 *IUCNAEL EJournal* at 223.

¹⁷⁵ *Supra* n170 at 41.

¹⁷⁶ *Supra* n170 at 18.

¹⁷⁷ *Supra* n170 at 43.

overlap 'does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments.'¹⁷⁸ Thus, 'sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power *within its own competence*.'¹⁷⁹

The court, relying on the judgment in the *Gauteng Development Tribunal* case, reaffirmed that the potential for overlap between functional areas is not necessarily contrary to the allocation of powers as set out in the Constitution and thus gave effect to the principle of the 'functional vision' first stated in the *Liquor Bill* case. Olivier *et al* note that '[t]he question of conflicts between the MPRDA and [...] other sets of legislation should arise only in instances where the subject matter of the legislation concerned is substantially identical, in which event section 146 of the Constitution [...] and section 156(3) of the Constitution [...] would apply.' Therefore, the court clearly adopted the approach that functional areas should be interpreted in terms of the functional vision, and in the process affirming the approach established in the *Liquor Bill* case. Thus, the purpose and effect of the allegedly intrusive act of a particular sphere of government is fundamental in order to decide whether or not such act is constitutionally impermissible.

The court then stated that where such overlap exists, 'the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.'¹⁸⁰ In effect, the Constitutional Court 'made it clear that national and provincial governments may not use legislation to take away or diminish the administrative responsibilities of planning that have been assigned to municipalities in the Constitution.'¹⁸¹ The court took cognisance of the fact that the MPRDA did not contain any provision that suggested that LUPO (or other planning law) ceased to apply in respect of land encumbered by a mining right awarded in terms of the MPRDA. In fact, the court found that the opposite view was intended in

¹⁷⁸ *Supra* n170 at 43.

¹⁷⁹ *Supra* n170 at 47 (own emphasis added).

¹⁸⁰ *Supra* n170 at 47.

¹⁸¹ J de Visser *et al. Report on Roundtable on Law Reform in Planning* (2012). <http://www.mlgi.org.za/publications>. (Accessed on 23 July 2013).

that the MPRDA specifically required that a mining right is subject to the provisions contained in the MPRDA and to other relevant laws.¹⁸²

Therefore, it is evident that the functional areas were interpreted in a purposive way to give effect to the 'functional vision' and a bottom-up approach was applied. Following this approach, the functional area of 'environment' should be interpreted to ensure that it does not include any powers falling within any of the local government competences. However, there is little likelihood of the court defining the functional area of environment as the bottom-up methodology effectively precludes the necessity for doing so. With this in mind, it appears that the functional area of environment should be construed as a broad matter, which includes what would usually have been understood to fall within such powers, but not including any powers that are exercised by local government. Practically speaking, the lack of a clear definition for the functional area has the potential to adversely affect environmental-governance.

5.6. *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning and another*¹⁸³

The *Shelfplett* case represents an interesting analysis of the scope of provincial planning vis-à-vis municipal planning. The facts of the case are as follows. Shelfplett owned various portions of land falling within the jurisdiction of the Bitou Municipality. In order to develop the land, various planning approvals needed to be obtained, as well as an amendment of the Knysna-Wilderness-Plettenberg Bay Regional Structure Plan ('the RSP'). An application for amendment of the RSP was submitted to the provincial MEC for consideration. This application was supported by the Bitou Municipality but was eventually refused by the MEC. The MEC provided the following reasons for his decision:

- (a) where the local authority failed to establish the required urban edge, the MEC assesses a suitable urban edge to ensure that there is sufficient land for future development while attaining higher densities;
- (b) the existence of a golf estate and polo estate in the area did not justify a northward shift in the urban

¹⁸² *Supra* n170 at 44.

¹⁸³ 2012 (3) SA 441 (WCC).

edge; (c) township development in a northerly direction was undesirable given the exceptionally attractive landscape; (d) the proposed development would put added pressure on the N2; (e) persons employed at the new development would have to travel substantial distances to reach the property, in conflict with the WC SDF's aim of bringing work opportunities closer to where employees reside and (f) the development would entail potential expense for the Bitou Municipality in providing services and infrastructure.¹⁸⁴

Upon refusal of the amendment application, Shelfplett had launched an application in which it sought, *inter alia*, the 'review and setting aside of the MEC's refusal on various grounds, including that he had based his decision on considerations that involved an impermissible intrusion into the Municipality's exclusive executive competence in respect of municipal planning.'¹⁸⁵ Such review was brought in terms of the PAJA.¹⁸⁶ Essentially, the pertinent issue in this case was that should it be found that the MEC's decision to refuse the amendment of the RSP had been materially influenced by considerations of a 'municipal planning' nature, such decision would have to be set aside. As such, the court was required to balance the planning powers conferred in terms of the functional areas of provincial planning and municipal planning.

In making its determination, the court noted that 'it is legitimate in interpreting these [functional areas] to have regard to the existing range of planning legislation at the time the Constitution was enacted'.¹⁸⁷ As such, the court analysed the effect of the Physical Planning Act 125 of 1991 ("the 1991 PPA") and found that

a [regional structure plan] appears to have been conceived as a provincial planning instrument since it was the administrator of a province who was empowered to cause the plan to be prepared and who had the power to approve and amend it. A regional structure plan would generally straddle several municipal areas [...] dealing with land in fairly broad brush strokes and employing a relatively small number of broad categories of land use.

¹⁸⁴ *Supra* n183 at 82.

¹⁸⁵ *Supra* n183 at 4.

¹⁸⁶ Act 3 of 2000.

¹⁸⁷ *Supra* n183 at 110.

Based on this, the court held that since the 1991 PPA, and in particular, regional structure plans in terms of the 1991 PPA, fall within the competence of provincial planning, 'all the considerations which the [1991 PPA] authorises the relevant authority to take into account in approving or amending an RSP are permissible provincial planning considerations.'¹⁸⁸ In reaching this conclusion, the court noted that it is important to draw a distinction between the 'function entrusted to an authority and the considerations he may take into account in performing the function.'¹⁸⁹ In doing so, the court differentiated the present case from that of the *Gauteng Development Tribunal* case, in terms of which the court was required to investigate the function and not the 'considerations that may be taken into account in performing the function.'¹⁹⁰ The court then stated that such considerations 'take their character from the function to which they relate.'¹⁹¹ The court therefore dismissed the ground of review relating to the intrusion into the local government functional area, despite accepting that such an interpretation meant that the same or similar considerations may be taken into account by both provincial government and local government.

Thus, in analysing the manner in which the legislation giving rise to the exercise of a function operated, the court was able to determine that due to the fact that the exercise of the function related to provincial concerns and did not take away from the municipality's powers to administer municipal planning, and therefore such function was a power in terms of provincial planning. The *Shelfplett* case explains an interesting nuance in interpreting the functional areas, being that the functional areas relate to the power to be exercised and not to the considerations that can be taken into account in exercising these powers. Thus, in terms of environmental governance, it would be appropriate for all spheres of government to take into account environment-related considerations when exercising other powers. This would appear to complement the manner in which NEMA provides that the national environmental management principles contained therein apply 'throughout the Republic to the actions of all organs

¹⁸⁸ *Supra* n183 at 113.

¹⁸⁹ *Supra* n183 at 113.

¹⁹⁰ J Van Wyk 'Planning in all its (dis)guises: Spheres of government, functional areas and authority' (2012) 15(5) *PER/PELJ* at 311.

¹⁹¹ *Supra* n183 at 113.

of state that may significantly affect the environment.¹⁹² Unfortunately, the case is only a High Court judgment and has only persuasive value in other jurisdictions.

5.7. *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning and another*¹⁹³

In the *Clairison's* case, 'municipal planning' again formed the context of an inquiry into the constitutional allocation of powers between spheres of government. The applicant raised a ground of review in terms of the PAJA that the Minister had unlawfully made a decision to refuse an application for environmental authorisation under the now repealed Environmental Conservation Act ('ECA')¹⁹⁴ insofar as he had unlawfully intruded into the local sphere of government by taking into account municipal planning concerns.¹⁹⁵ Therefore, the application related to conflict between the functional areas of environment and municipal planning. The ground of review being that the Minister was materially influenced by an error of law. The court dismissed this ground of review.¹⁹⁶ The facts of this case therefore bears a strong similarity to those of the *Shelfplett* case, in that it was alleged that *considerations* taken into account intruded in the functional area, and not the actual exercise of the power itself. The court formulated that the issue as being 'whether the Minister could permissibly take into account municipal planning considerations (or, put differently, the spatial context of the applicant's land) in reaching a decision.'¹⁹⁷

In reaching its decision, the court relied on the judgment in the *Shelfplett* case¹⁹⁸ and stated that the Minister must be able to give consideration to the spatial context of the applicant's land in relation to environmental factors, and that if this was not allowed, the Minister would be unduly prevented from exercising powers lawfully granted to him in terms of the ECA.¹⁹⁹ Therefore, it is evident that the court agreed with the *Shelfplett* reasoning in terms of which the distinction between the function entrusted to

¹⁹² NEMA; s 2(1).

¹⁹³ Unreported judgment of the Western Cape High Court in case no. 26165/2010 [2012] ZAWCHC 44 (16 May 2012).

¹⁹⁴ Act 73 of 1989.

¹⁹⁵ *Supra* n193 at 15.2.

¹⁹⁶ *Supra* n193 at 62.

¹⁹⁷ *Supra* n193 at 57.

¹⁹⁸ See above.

¹⁹⁹ *Supra* n193 at 61.

a sphere of government and the considerations that may be taken into account in performing that function. The court then stated that 'having regard to considerations which the Municipality could or should take into account when deciding on municipal planning issues, does not preclude another sphere of government from taking into account the very same considerations in the exercise of its functions.'²⁰⁰ Therefore, the allocation of functional areas in terms of the Constitution does not necessarily preclude overlap between the functional areas and in addition, more than one sphere of government may 'tak[e] into account *the very same considerations* in the exercise of its functions.'²⁰¹

It is submitted that the reasoning of the court in both the *Shelfplett* and *Clairison's* cases is correct. In addition, these judgments show the significance of determining the actual function being performed; it is this, and not the considerations taken into account, that is allocated in terms of the Constitution. Therefore, as stated previously, from an environmental perspective, it would be appropriate for environmental considerations to be taken into account in respect of the performance of all other functional areas.

5.8. *Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and another*²⁰²

The *Mtunzini* case is significant in that it was the first 'post-Maccsand decision in which the Constitutional Court's wisdom regarding the overlapping powers of the national and local spheres invited application.'²⁰³ The pertinent issue that fell to be determined by the court was whether or not Tronox was obliged to obtain land use planning permission before undertaking mining activities. As such, national and local competences were squarely pitted against each other. Prima facie, it would appear that the issues are the same as the *Maccsand* case, however the court distinguished these two cases on the basis that the present case dealt with an old-order mining right²⁰⁴ and that, at the commencement of mining activities, the land fell outside any town-planning scheme. The facts of the case were that Tronox was the holder of a converted old order

²⁰⁰ *Supra* n193 at 61.

²⁰¹ *Supra* n193 at 61(own emphasis added).

²⁰² [2013] 2 All SA 69 (KZD).

²⁰³ T Humby *Revisiting mining and municipal planning: Mtunzini Conservancy v Tronox KZN Sands Ltd* (2013). (Accessed at <http://cer.org.za/wp-content/uploads/2013/05/Mtunzini-Casenote.docx> on 28 May 2013).

²⁰⁴ I.e. a right granted in terms of the pre-Constitutional Mineral Act 50 of 1991.

mining right in respect of various portions of land falling within the Mtunzini Municipality. In terms of the Town Planning Ordinance ('TPO')²⁰⁵ authorisation for certain development of land was required prior to undertaking such development. Mining as a land use was not expressly included in the definition of development requiring authorisation until an amendment to the TPO in 2008. In reaching its decision in this case, the court found that the now repealed Minerals Act²⁰⁶ was not subject to any other law (which distinguished it from the MPRDA) and fell within the exclusive competence of the national government, which in the pre-constitutional system was supreme. As a result of this, it was held that the TPO was not in conflict with the Minerals Act because it did not regulate mining in any respect.²⁰⁷ The court specifically held that the Mineral Act and the TPO should not be considered in light of the constitutional allocation of functional areas, as the Constitution specifically provides that pre-constitutional laws continue to be effective without any extension of territorial or other limits, unless amended to provide for such.

Humby is highly critical of the court's dealing with this matter, arguing that the reliance placed by the court on the exclusivity of the Minerals Act, and the failure to 'situate the sphere of local government – and by extension the function of municipal planning – within its proper constitutional context'²⁰⁸ lead to a fundamentally incorrect decision that conflicts with the principles espoused in the *Maccsand* case. Humby suggests that if the court had correctly applied the principles of the *Maccsand* case it could have reasoned that a local government was entitled to regulate land-use planning in its jurisdiction, regardless of perceived conflict that might arise due to the purported 'exclusivity' of the Minerals Act as a pre-Constitutional law.²⁰⁹ Humby's criticism appears to be valid. Whilst the Mtunzini case therefore does not contribute further to the definitions of functional areas, it highlights that judicial interpretation is, by itself, not a sufficient mechanism for achieving suitable definitions of the functional areas.

²⁰⁵ Ordinance 27 of 1949.

²⁰⁶ Act 50 of 1991.

²⁰⁷ *Supra* n202 at 61.

²⁰⁸ T Humby *op. cit.* n203 at 12.

²⁰⁹ *Ibid.* at 1 – 2.

5.9. *Le Sueur v eThekweni Municipality and others*²¹⁰

The *Le Sueur* case represented a further opportunity for the court to consider the functional area of municipal planning vis-à-vis that of environment. The judgment of Gayanda J raises interesting issues that arise from a narrow application of the methodologies adopted in the *Gauteng Development Tribunal* case. The facts of this case are briefly set out. The TPO,²¹¹ which regulated planning in the old province of Natal, was repealed and replaced by the KwaZulu-Natal Planning and Development Act ('PDA').²¹² In terms of the TPO, a local authority was empowered to prepare a town-planning scheme. Such scheme set out the spatial planning objectives of the local council, and all development within such scheme fell for prior approval. During 2012, the municipal council of the first respondent, the eThekweni Metropolitan Municipality, adopted a resolution amending its town-planning scheme. The amendment introduced the Durban Open Space System ('D-MOSS') as an element of the town-planning scheme. Essentially, D-MOSS is intended to create a system of open spaces where no development is permitted, or is strictly regulated. The purpose of creating these open spaces is to link areas that have been identified by the municipal council as being areas within the Municipality having high biodiversity value.²¹³ In order to ensure that D-MOSS is effective, no land falling within the D-MOSS areas may be developed 'without first obtaining an environmental authorisation and even then it may only be developed subject to strict controls aimed at protecting the ecological goods and services the land provides.'²¹⁴ In other words, a fundamental aspect of D-MOSS is the conservation and protection of biodiversity within the demarcated boundaries of the eThekweni Metropolitan Municipality; the main tool to achieve this being the use of environmental authorisations.

The applicant in this case was the owner of land located within the jurisdiction of the eThekweni Metropolitan Municipality and had applied for an order declaring that the resolution introducing D-MOSS to the town-planning scheme was unconstitutional and

²¹⁰ Unreported judgment of the High Court of South Africa, KwaZulu-Natal (Pietermaritzburg) under case no. 9714/11. [2013] ZAKZPHC 6 (30 January 2013).

²¹¹ Ordinance 27 of 1949.

²¹² Act 6 of 2008.

²¹³ W Freedman *op. cit.* n49 at 7.

²¹⁴ *Ibid.*

invalid.²¹⁵ The grounds advanced by the applicant justifying such an order were that, *inter alia*, as the subject matter of the resolution was the ‘environment’, which is listed in Schedule 4A of the Constitution and is therefore a functional area of concurrent national and provincial legislative competence, the resolution fell outside the legislative authority of the municipal council.²¹⁶ Essentially, the argument was that the eThekweni Metropolitan Municipality did not have any original or assigned power to legislate within the functional area of the environment, and therefore the D-MOSS resolution was *ultra vires*.

The court rejected this argument and dismissed the application. In reaching its decision, the court relied heavily on the principles developed in the *Gauteng Development Tribunal* case. However, it is argued that the application of the *Gauteng Development Tribunal* principle by the court in the *Le Sueur* case was inappropriately narrow, failing to take into account critical factors relating to the nature of the D-MOSS.²¹⁷ The reasoning adopted by the court is set out below.

The court highlighted that legislation imposes a duty on each sphere of government to protect the environment. Particular reliance was placed on section 7(2) of the Constitution, which provides that 'the state must protect, promote and fulfil the rights in the Bill of Rights.'²¹⁸ The court indicated that the meaning of 'state' in section 7(2) includes local government. The court then held that in reading section 7(2) with section 24 of the Constitution it was clear that the obligations contained in those sections apply to local government and therefore it may not legislate in conflict with section 24.²¹⁹ Further reliance for imposition of this duty was found in section 152(1)(d) of the Constitution, which requires that local government 'promote a safe and healthy environment.'²²⁰ It was against this background that the scope of the functional areas should be interpreted. It is relevant to note that the distinction between the function and the considerations in terms of which such power is exercised appear to have been blurred, and therefore the reasoning of the court in the *Shelfplett* and *Clairison's* cases is not followed.

²¹⁵ *Supra* n210 at 1.

²¹⁶ *Supra* n210 at 4.

²¹⁷ W Freedman *op. cit.* n49.

²¹⁸ The Constitution; s 7(2).

²¹⁹ *Supra* n210 at 19.

²²⁰ The Constitution; s 152(1)(d).

In considering whether 'environment' fell within the functional area of municipal planning the court considered sections 156(1)(b), (4) and (5) of the Constitution, and stated that

[i]t is apparent that although matters relating to the environment may be said, in terms of the Constitution, to be the primary concern of the National and Provincial spheres of government, Local Government in the form of Municipalities are in the best position to know, understand, and deal with issues involving the environment at the local level.²²¹

The court held that all spheres of government were obliged, in terms of section 40(2) of the Constitution, to observe and adhere to the principles of cooperative government as set out in Chapter 3 of the Constitution.²²² In addition, the court reviewed how municipalities have historically exercised legislative responsibility over environmental affairs within municipal areas. Such considerations included, *inter alia*, an overview of the powers given to Transitional Metropolitan Councils (in terms of the Local Government Transition Act²²³), which included powers relating to 'metropolitan environment conservation,²²⁴ 'the co-ordination of environmental affairs,²²⁵ and 'the management and control of environmental affairs;²²⁶ the requirement that the councils formulate and implement an 'integrated development plan', which was defined as a plan aimed at integrated development in management of the Municipal Area and required the promotion of efficient and integrated land development with respect to a number of features, one of which is the encouragement of 'environmentally sustainable land development practices and processes.'²²⁷

The court then considered the position following the enactment of the Constitution. It stated that it is clear that 'when the functional areas were allocated in Schedules 4 and 5, the framers of the Constitution knew what 'municipal planning' encompassed.'²²⁸ The

²²¹ *Supra* n210 at 46.

²²² *Supra* n210 at 46.

²²³ Act 209 of 1993.

²²⁴ Item 19 of Schedule 2. *Supra* n203 at 22.

²²⁵ Item 21 of Schedule 2 (in respect of Metropolitan Councils). *Supra* n203 at 22.

²²⁶ Item 14 of Schedule 2A (in respect of Metropolitan Local Councils). *Supra* n203 at 22.

²²⁷ *Supra* n210 at 22.

²²⁸ *Supra* n210 at 23.

court considered Chapter 5 of the Local Government: Municipal Systems Act, which deals with integrated development planning at municipal level and recognises in section 23(1)(c) that there is an obligation on a municipality, together with other organs of State, to contribute to the progressive realisation of the fundamental rights contained in section 24 of the Constitution²²⁹ and stated that there was 'clearly a legislative mandate from the national legislature in regard to environmental matters.'²³⁰ In addition, the court considered that section 2(4)(f) of the Local Government: Municipal Planning and Performance Management Regulations (published on 24 August 2001) required spatial development frameworks reflected in an integrated development plan to 'contain a strategic assessment of the environmental impact of the spatial development framework.'²³¹ The court stated that the Municipality is under a statutory duty to plan in accordance with its integrated development plan. The court therefore found that it is impossible as a matter of accepted town planning practice to divorce environmental and conservation concerns from town planning principles.²³²

It is apparent that the court allowed the distinction between environmental considerations to be taken into account and the exercise of environment-related powers to become blurred. Thus the court held that municipalities are in fact authorised to legislate in respect of environmental matters to protect the environment at the local level and that the D-MOSS system falls within such competence. Freedman is critical of the court's finding that the functional area of municipal planning encompasses environmental matters.²³³ He has noted that 'it is not clear whether the functional area of municipal planning can be interpreted to encompass environmental matters'. In support of this argument, Freedman highlighted four issues that arise in the court's judgment. Firstly, Freedman noted that 'the court does not clearly define which aspects of the functional area of 'environment' are encompassed by the functional area of 'municipal planning''.²³⁴ This appears to be because the court did not examine the D-MOSS system in any great detail. Freedman has suggested that '[a] cursory examination of the D-MOSS system [...] indicates that it is primarily concerned with

²²⁹ *Supra* n210 at 24.

²³⁰ *Supra* n210 at 24.

²³¹ *Supra* n210 at 26.

²³² *Supra* n210 at 29.

²³³ W Freedman *op. cit.* n49 at 11.

²³⁴ *Ibid.*

'environmental authorisations' and the 'protection of biodiversity'.²³⁵ Secondly, that 'including environmental authorisations and the protection of biodiversity in the functional area of municipal planning potentially upsets the division of subject-matters envisaged by the drafters of the Constitution.'²³⁶ This is because, 'Schedules 4 and 5 indicates that the drafters [of the Constitution] allocated certain environmental matters to the local sphere of government, for example air pollution, noise pollution and refuse removal, refuse dumps and solid waste disposal, and reserved the rest for the national and provincial spheres.'²³⁷ Therefore, allowing local government to exercise additional environmental powers is against the express provisions of the Constitution. Thirdly, 'that including environmental authorisations and the protection of biodiversity in the functional area of municipal planning also means that there is [...] an overlap between the functional area of municipal planning in Part B of Schedule 4 and the functional area of 'environment' in Part A of Schedule B.'²³⁸ Freedman has suggested that such an interpretation is contrary to the Constitutional Court's finding in *Gauteng Development Tribunal* case, where it was stated that 'the functional areas are distinct from one another and one functional area should not include another.'²³⁹ Thus it appears that the court failed to understand the nuance of the principles previously adopted by the Constitutional Court. Finally, Freedman has argued that 'including environmental authorisations and the protection of biodiversity in the functional area of municipal planning could have unintended practical consequences.'²⁴⁰ This is because, as Freedman has noted, 'in the *Gauteng Development Tribunal* case, the Constitutional Court [...] held that while the national and provincial governments have the power to pass legislation with respect to the matters listed in Part B of Schedules 4 and 5, they do not have the power to implement that legislation.'²⁴¹ Such power vests exclusively in local government. In line with the criticism advanced by Freedman, it is evident that adopting a broad interpretation of municipal planning in each and every case is not necessarily correct. Any apparent overlap needs to be considered in great detail to ensure that the intention of the Constitution is not thwarted.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.* at 12.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

Thus, it is evident that the purpose and effect of the D-MOSS was misconstrued as planning legislation when in fact it appears to bear greater resemblance to environmental legislation.

5.10. *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and others*²⁴²

The *Lagoonbay* matter is a further trilogy of judgments from the High Court, Supreme Court of Appeal and Constitutional Court which deal with allocation of powers in terms of the Constitution, and in particular with the functional area of 'municipal planning'. The relevant facts of this case are as follows. Lagoonbay intended to develop a large luxury development in the Southern Cape. In order to undertake the proposed development, Lagoonbay was obliged to obtain various approvals, which included the amendment of the applicable regional structure plan²⁴³ and authorisations for certain necessary changes in land use.²⁴⁴

The regional structure plan ('Structure Plan') in issue was adopted in terms of sections 5 and 6(1) of the Physical Planning Act (i.e. the 1991 PPA).²⁴⁵ In terms of the Structure Plan the land on which the proposed development was intended to take place had been designated as land to be developed for agriculture or forestry uses.²⁴⁶ Therefore, Lagoonbay was required to apply for the amendment of the Structure Plan in order to allow for township development on such land. In addition, Lagoonbay was required to submit rezoning and subdivision of land applications in order to amend the town planning scheme adopted in terms of the LUPO.²⁴⁷

²⁴² Unreported judgment of the Constitutional Court under case no. CCT 41/13. [2013] ZACC 39 (20 November 2013). This matter was an appeal against the decision of the Supreme Court of Appeal, an unreported judgment under case no. 320/2012. [2013] ZASCA 13 (15 March 2013) which was itself an appeal against the decision of the *court a quo* reported as *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and others* [2011] 4 All SA 270 (WCC).

²⁴³ The George and Environs Urban Structure Plan.

²⁴⁴ Unreported judgment of the Constitutional Court under case no. CCT 41/13. [2013] ZACC 39 (20 November 2013) at 3 – 4.

²⁴⁵ Act 125 of 1991.

²⁴⁶ *Supra* n244 at 4.

²⁴⁷ *Supra* n244 at 4.

Lagoonbay's application to amend the Structure Plan was accepted by the provincial Minister, subject to the condition (condition 1.3) that 'the associated future zoning application in respect of the land concerned shall be subject to approval by the Provincial Government as the location and impact of the proposed development constitutes 'Regional and Provincial Planning.'²⁴⁸ Lagoonbay duly submitted its application for rezoning and subdivision of the relevant properties,²⁴⁹ which was initially approved by the municipal council, however, because of the aforementioned condition imposed by the Provincial Minister, the municipality referred the application to the Provincial Minister for the 'necessary further attention.'²⁵⁰ The Minister refused the application.²⁵¹ Lagoonbay then approached the High Court for an order setting aside the decision of the Minister to refuse the application for rezoning and subdivision in terms of LUPO.

The argument advanced by Lagoonbay in seeking such relief was that 'in the light of the constitutional division of power between provinces and municipalities, the Provincial Minister did not have the functional competence to decide rezoning and subdivision applications'²⁵² as these fell within the functional area of municipal planning, which is allocated to local government.²⁵³ The High Court rejected this argument. In doing so, it stated that 'applications for rezoning and township approval involve aspects of 'municipal planning', which fall within the functional competence of municipalities.'²⁵⁴ However, in certain circumstance, such as the present case, 'land-use planning decisions exceed the bounds of municipal planning, and therefore require provincial oversight, because of the scope of the interests they affect.'²⁵⁵ Thus the High Court found that the Provincial Minister was entitled to decide rezoning and subdivision of land applications where these constituted regional planning, or provincial planning.

²⁴⁸ [2011] 4 All SA 270 (WCC) at 4.

²⁴⁹ This application was made in terms of sections 16(1) and 25(1) of LUPO.

²⁵⁰ *Supra* n244 at 6.

²⁵¹ *Supra* n244 at 6.

²⁵² *Supra* n244 at 8.

²⁵³ *Supra* n244 at 8.

²⁵⁴ *Supra* n244 at 12.

²⁵⁵ *Supra* n244 at 12.

The Supreme Court of Appeal overturned this decision and held that 'under the Constitution rezoning and subdivision applications fall to be dealt with by municipalities and therefore that the Provincial Minister lacked the power to refuse Lagoonbay's applications [and] accordingly declared the Provincial Minister's rezoning and subdivision decisions unlawful and set them aside.'²⁵⁶

In the Constitutional Court, the Provincial Minister advanced three arguments:

First, Lagoonbay has not challenged condition 1.3 and sought to have it set aside. The imposition of condition 1.3 was an administrative act that continues to have legal consequences, including the consequence of empowering the Province to decide rezoning and subdivision applications. Accordingly, the Provincial Minister was lawfully empowered to refuse Lagoonbay's applications in April 2011. Second, sections 16 and 25 of LUPO empower provincial functionaries to make rezoning and subdivision decisions. Because there has been no attack on the validity of LUPO, Lagoonbay is not entitled to attack the Provincial Minister's exercise of his powers under that Ordinance. Third, even if the first two arguments do not succeed, the rezoning and subdivision applications sought by Lagoonbay fall within the Province's constitutional competence to determine provincial planning issues.²⁵⁷

In response to the Provincial Minister's arguments, Lagoonbay argued that the Minister could not have performed any act that would allow the usurpation of functions that the Constitution reserves for municipalities, that the Constitution has impliedly amended or repealed sections 16 and 25 of LUPO, and that in light of the *Gauteng Development Tribunal* case 'provincial planning' does not include responsibility for rezoning and subdivision decisions.²⁵⁸

In dealing with the implied repeal or amendment of offending provisions of LUPO, the court dismissed Lagoonbay's argument and stated that '[a]s a matter of general principle, old-order legislation remains in force until the necessary steps are taken to

²⁵⁶ *Supra* n244 at 15.

²⁵⁷ *Supra* n244 at 18.

²⁵⁸ *Supra* n244 at 19.

have it set aside²⁵⁹ and that no such steps have been taken in respect of LUPO, whether by legislative action or juridical relief.²⁶⁰ Therefore, the court held that no provisions of LUPO have been impliedly amended or repealed. The court relied on the following criteria to determine this: first, was there unequivocal and inescapable incompatibility between the allegedly offending provisions of legislation and the Constitution;²⁶¹ second, could the offending provisions be isolated and readily and easily removed to address the alleged unconstitutionality; and third, does the Constitution (or other legislation) offer an equivalent framework for the exercise of the allegedly unconstitutional powers.²⁶² In this case, the court found that none of the criteria were satisfied to suggest the LUPO provisions were amended or repealed.

Following this finding, the court proceeded to answer the question of if it may 'nevertheless resolve this dispute with direct reference to the precepts of the Constitution regarding municipal and provincial functional competences.'²⁶³ In order to answer this, the court considered the pleadings of Lagoonbay and initially noted that '[a]bsent an appropriate justification for a more expansive approach, [it is] limited to considering the grounds of review contained in the original application [...]'.²⁶⁴ Interestingly, the pleadings revealed that Lagoonbay did not seek to impugn the validity of the provisions of LUPO²⁶⁵ and had never directly challenged the constitutional validity of the provisions. Due to this the court was reluctant to decide upon the constitutional status of LUPO as it would be acting effectively as a court of first instance. Applying the principle in the *Phillips*²⁶⁶ case, the court noted that in the absence of exceptional circumstance, the Constitutional Court should not pronounce on issues not 'properly pleaded and ventilated in lower court'.²⁶⁷ Therefore, despite noting *obiter dictum* that in light of the *Gauteng Development Tribunal* case there is at the very least 'a strong case for concluding that, under the Constitution, the Provincial

²⁵⁹ *Supra* n244 at 26.

²⁶⁰ *Supra* n244 at 26.

²⁶¹ *Supra* n244 at 28.

²⁶² *Supra* n244 at 28.

²⁶³ *Supra* n244 at 29.

²⁶⁴ *Supra* n244 at 30.

²⁶⁵ *Supra* n244 at 31.

²⁶⁶ *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC).

²⁶⁷ *Supra* n244 at 36.

Minister was not competent to refuse the rezoning and subdivision applications,²⁶⁸ the court refused to pronounce on the Constitutionality of LUPO.

From this case, it is evident that whilst the court has an important role to play in defining the scope of functional areas, it has limited jurisdiction to ensure that the functional areas are given effect to in practice. It is in this light that alternative means of addressing such conflicts should be adopted, whether through intergovernmental co-operation or through the use of administrative guidelines or negotiated definitions.

5.11. *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others; City of Cape Town v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others*²⁶⁹

Recently, the Western Cape High Court delivered judgment in the *Habitat Council* case. The judgment related to two cases that were jointly heard by the court and are referred to in the judgment as the Habitat application and the Gordonia application. The pertinent issue that fell to the court to determine was the constitutionality of section 44 of LUPO.²⁷⁰ In both the Habitat application and the Gordonia application, all the parties had conceded that section 44 of LUPO was unconstitutional and had requested that the court make such declaration of invalidity.²⁷¹ The court noted that despite such concessions, it was necessary to apply its mind to the issue. It should be noted due to the absence of any dispute in respect of this issue, it is unlikely that any reasoned argument to the contrary would have been placed before the court. Thus, the court would have been hard pressed to come to a different conclusion than that which was proposed by the parties to the applications. This only highlights the inadequacy of judicial interpretation in respect of providing clarity to the nature of the functional areas.

²⁶⁸ *Supra* n244 at 46.

²⁶⁹ 2013 (6) SA 113 (WCC).

²⁷⁰ *Supra* n168.

²⁷¹ *Supra* n269 at 118E.

Section 44 of LUPA provides for the right of appeal against decisions of the City of Cape Town Metropolitan Municipality ('City of Cape Town') under LUPA (i.e. land-use planning decisions) to a provincial appeal body. The provincial appeal body was empowered to consider such appeals and at its sole discretion, dismiss an appeal, uphold an appeal wholly or in part, or make a decision in relation thereto which the municipal council concerned could have made. Furthermore, section 44 provides that a decision of the appeal body must be considered as a decision of the City of Cape Town. Therefore, the applicants had contended that section 44 infringed upon the constitutional division of powers in that it allowed the provincial government to infringe upon the local governments municipal planning competence. As previously stated, this contention was conceded to by all the respondents.

In deciding the issue, the court noted that judicial precedent had established "two cardinal principals"²⁷² that must be applied where examining the provincial-local government power dynamic. First, that different functional competences should be interpreted distinctly from one another, and second, that the functional areas assigned exclusively to the local sphere should be interpreted as applying primarily to matters that may be regulated intra-municipally.²⁷³ Thus, the court identified the functional vision approach as being important. However, although the court identified the correct manner in which to decide the issue, it is submitted that it incorrectly determined the nature of the supervisory powers provided to provincial government vis-à-vis local government. This aspect of the judgement will be discussed below.

In order to determine this issue the court focused on the nature of the supervisory powers granted to provincial government vis-à-vis local government. This was because the court accepted that provincial government was legitimately entitled to operate within the local sphere's exclusive competence, but only to the extent allowed where exercising supervisory or regulatory powers. The court determined that it was necessary to distinguish the section 44 powers provided to the provincial government (in terms of LUPA) from the supervisory powers provided in terms of the Constitution. Upon this construction, the court declared that

²⁷² *Supra* n269 at 119 D.

²⁷³ *Supra* n269 at 119E – 120B.

section 44 of LUPO is [...] manifestly inconsistent with the Constitution to the extent that it not only permits appeals to the province against every decision made by a municipality in terms of LUPO, but also because it allows first respondent to replace every decision with his own decision, even where the development in question patently affects only 'municipal planning'. It must, therefore, follow that by a conflation of the provincial and the municipal powers, LUPO, insofar as s 44 is concerned, is overbroad. It effectively guts the powers of a municipality which are relevant to municipal planning, and gives first respondent powers which would, therefore, be subversive of the constitutional scheme and the principles which have been outlined in this judgment.²⁷⁴

As discussed above,²⁷⁵ provincial governments' legislative competence over local government functional areas is limited by section 155(6)(a) and (7). In terms of this section, provincial government is empowered to, through legislative and other measures, monitor and support local government and to regulate the manner in which municipalities exercise their authority. The court, however, appears to have misunderstood the extent of the supervisory powers, noting instead that provincial government may "broadly manage or control the exercise by municipalities over their executive authority in relation to municipal planning."²⁷⁶ This nuanced misunderstanding then led the court to hold that

provincial government may also assess the outcome of the municipal planning processes. Provincial government may require that the decision be reconsidered by a municipality if the manner in which it was taken, the justification for the decision, or the nature and effect or likely effect of the decision undermine the effective performance by the municipality of its forward planning and land use control functions. This constitutes an approach which harmonises the relationship between the two levels of government, rather than being destructive of local government powers and their conflation with provincial powers.²⁷⁷

²⁷⁴ *Supra* n269 at 125 D-F (own emphasis added).

²⁷⁵ See 3.2.1 above.

²⁷⁶ *Supra* n269 at 122 C.

²⁷⁷ *Supra* n269 at 122 F-G.

As is apparent from the above statement, the court took the view that provincial government was able to take an active regulatory role in assessing each decision of the local government which related to municipal planning. The court was thus able to hold that section 44 was unconstitutional because it allowed provincial government to review *all decisions* (and therefore would inevitably allow it to review decisions falling within the exclusive domain of the local government sphere) and as a result the provincial government was able to usurp the executive powers of local government by making decisions in respect of *any appeal*. The court therefore highlighted that the provincial government was legitimately entitled to hear appeals where these fell within the ambit of exercising its supervisory powers.

In this regard, it is submitted that the court failed to consider the practical utility of the appeal body established in the LUPO. The utility of this appeal body should be to allow aggrieved parties (whether applicants or interested and affected parties) to appeal against decisions of local government relating to LUPO applications. The court appears to envision a supervisory-review body in terms of which provincial government may adjudicate on whether or not the local government has made a decision that will undermine the effective performance of its functions. Considering that the majority of applicants lodging LUPO applications with the City of Cape Town would be private persons, it is difficult to understand how appeals to this supervisory-review body could be launched. The provincial government would not itself be an applicant (in respect of the original LUPO application), and would not usually be an interested or affected party (except where the development included inter-municipal issues). It would not be within the knowledge of private persons to allege that the municipality's decision would undermine the effective performance of its functions. This is essentially a political issue. Thus, it would appear the provincial government would have to lodge such an appeal, and therefore act as both the appellant and appeal forum. Obviously, this situation would not be acceptable. Furthermore, issues relating on whether or not the provincial government had locus standi to launch such an appeal would have to be traversed.

It is submitted that this supervisory-review body would also be contrary to the principle of co-operative governance. Instead, these essentially political issues should be dealt with during the initial decision making process through a consultative processes. For these reasons, it is argued that an appeal body against administrative decisions of the

local government cannot be the correct forum in which provincial government exercises its supervisory powers. Thus, although the court correctly determined that section 44 was unconstitutional, it is submitted that the reasoning adopted by it is fundamentally flawed. If nothing else, this decision serves to highlight the potential for judicial interpretation to negatively impact of the clarity of the functional areas and highlights the importance of adopting alternative means of interpretation.

6. ANALYSIS OF FUNCTIONAL AREAS

6.1. Contribution by judicial interpretation

As is evident from the cases discussed above, '[c]onsiderable overlap between the functional areas assigned to [provincial and local] spheres of government leads, in practice, to an overlap of powers and functions.'²⁷⁸ It is important at this stage to make a distinction between concurrency of powers and overlap of powers.

Concurrency refers to the 'existence of the same powers over the same functional areas.'²⁷⁹ An example of concurrency of powers is where national and provincial government are allocated legislative competence of the areas listed at Part A of Schedule 4. Concurrency of powers is expressly provided for in terms of the Constitution and is 'intended'²⁸⁰ and prima facie permissible.

Overlap, on the other hand, occurs where more than one sphere of government has administrative or legislative authority over the same functional area.²⁸¹ Steytler *et al* note that the allocation of original powers to local government in terms of the Constitution results in at least two areas of overlap: supervisory overlap and overlap between functional areas.²⁸² Whilst supervisory overlap is intended, overlap between functional areas as a consequence of the lack of clarity with which functional areas are listed is 'unintended although not unforeseen.'²⁸³ A consequence of 'minimalist' manner in which Schedule 4 and 5 have been drafted is that 'definitional problems and overlaps'

²⁷⁸ N Steytler & YT Fessha *op. cit.* n122 at 320.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.* at 321.

²⁸¹ *Ibid.* at 320.

²⁸² *Ibid.* at 320-321.

²⁸³ *Ibid.* at 321.

arise.²⁸⁴ These definitional problems fall into two categories. First, where the same functional areas are allocated to the national, provincial or local sphere of government, with the only distinction being the addition of either the 'provincial' or 'municipal' qualification (i.e. provincial planning/municipal planning).²⁸⁵ Second, where 'a provincial functional area includes or covers a local functional area.'²⁸⁶ Steytler *et al* notes that most aspects of local functional areas fall within one of the provincial functional areas.²⁸⁷

In considering the implications of the national-provincial division of legislative powers, Bray notes that the term 'environment' has 'no fixed content' and suggests that its parameters will fall to be determined by the legislature and/or the Constitutional Court. Bray goes on to note that one of the sources of fragmentation that arise due to this is that provincial legislatures may take 'different views on what 'environment' means in the context of their province'. Bray goes on further to suggest that because functional areas such as, *inter alia*, soil conservation and nature conservation are recognized as separated areas from 'environment', that there is an implication that 'environment will be seen only in the context of the individual's basic right to the environment ... a homocentric approach which centers around human health and well-being.'²⁸⁸

The functional approach to interpretation adopted in the *Liquor Bill* case²⁸⁹ gives rise to the territorial principle and the need to determine what is appropriate for each sphere of government. How then does one go about determining what is appropriate to a sphere of government? De Visser argues that local government functions should be interpreted to reflect the constitutional principle of developmental local government.²⁹⁰ Therefore, so the argument goes, 'the competencies must enable local government to discharge its development-driven functions fully and effectively.'²⁹¹ A general problem that arises where courts are required to determine issues relating to the scope of functional areas is that the dispute is often a political issue. Discussing the courts' role in determining

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.* at 322.

²⁸⁷ *Ibid.*

²⁸⁸ E Bray *op cit* n7 at 178.

²⁸⁹ See above.

²⁹⁰ J de Visser *Developmental Local Government* (2005) 117 as cited in N Steytler & YT Fessha *op. cit.* n122 at 321.

²⁹¹ N Steytler & YT Fessha *op. cit.* n122 at 326.

disputes relating to legislative competence, Bronstein notes that '[t]he categorisation of legislation may raise challenging questions of statutory interpretation that force the Court to engage delicate political issues.'²⁹² The court has been reluctant to use the constitutional mechanisms contained in the principle of co-operative governance to 'impose judicial solutions on quintessentially political problems.'²⁹³ Therefore, courts should be seen as having a limited role in defining the boundaries of the functional areas and the manner in which the spheres of government are to co-operate.

A further problem that exists, which is evident from the above cases discussed, is that the guidance provided by judicial interpretation is inadequate as it is couched in broad and general terms and has only been applied to relatively few functional areas.²⁹⁴ Therefore, whilst providing crucial insight into the manner in which functional areas are to be interpreted, such guidance is limited.

Therefore, alternative mechanism for clarifying the scope of functional areas should be considered. Steytler identifies three alternative means of interpreting the functional areas: legislative interpretation, administrative definitions, and negotiated definitions.²⁹⁵ Interestingly, due to the fact that courts have approached defining functional areas in a bottom up manner, the legislative definition of 'environment' as contained in NEMA, has never been considered as being relevant. Prior to the judgments outlined above, Bosman noted that 'the competencies listed in Schedules 4 and 5, read with the definition of 'environment' in the National Environmental Management Act 107 of 1998 [...], could potentially lead to inconsistency in decision-making and even conflict among and between spheres of government that cannot be resolved with reference to the provisions on co-operative governance alone.'²⁹⁶ Whilst conflict has indeed arisen in the area of environment, it has never fallen to the court to consider what is meant by this term. Bosman *et al* argue that it is apparent from a consideration of Schedules 4 and 5 that the definition of environment as contained in NEMA is not what the drafters of the Constitution had intended to allocate by including 'environment' as a functional

²⁹² V Bronstein 'Chapter 15: Legislative Competence' in S Woolman *et al* (eds) *CLOSA* 2ed (RS4 2012) Vol 1 at 15-2.

²⁹³ S Woolman & T Roux *op. cit.* n32 at 14-8.

²⁹⁴ N Steytler & YT Fessha *op. cit.* n122 at 327.

²⁹⁵ *Ibid.* at 327-330.

²⁹⁶ C Bosmam, L Kotze and W Du Plessis *op. cit.* n2 at 411.

area listed in Schedule 4.²⁹⁷ This, it is argued, is because such a situation 'negates co-operation, harmonization, and integration and actually leads to confusion and even conflict.'²⁹⁸ Bosman *et al* conclude by arguing that the 'Constitution will have to be amended to provide clarity not only on the role and responsibilities of the different spheres of government, but also within specific spheres.'²⁹⁹ However, as has been seen from the manner in which the courts have interpreted the functional areas that have given rise to conflict that creative interpretation can lead to results that are flexible and give effect to the principles of the Constitution.

A further consideration when analysing the functional areas is to note that as a general rule, a municipal council 'is not compelled to legislate in any of its functional areas.'³⁰⁰ It is therefore a discretionary power that vests in the municipal council, and thus the absence of local government laws should not be construed as meaning that local government is not entitled to legislate within such area.

6.2. Legislative interpretation

Legislatures in all three spheres of government are able to define the scope of functional areas through the enactment of laws. For example, a municipality passing a by-law has the effect of self-defining the scope of its powers within the functional area to which the by-law relates.³⁰¹ Of course, the potential for individual municipalities to either be over- or under-inclusive to varying degrees is great. At a national level, we have already seen how the definition of 'environment' as set out in the National Environmental Management Act has not been considered when deciding on the functional area of municipal planning vis-à-vis environment. However, this is because the bottom-up method of defining functional areas has been adopted, which has resulted in courts not attempting to define what is meant by environment.

An interesting example of a further national legislative definition is that of 'municipal health services' as contained in the Health Act:³⁰²

²⁹⁷ *Ibid.* at 420.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ Community Law Centre. *Making Law - A guide to municipal councils* at 2. <http://www.mlgi.org.za/publications>. (Accessed on 23 July 2013).

³⁰¹ N Steytler & YT Fessha *op. cit.* n122 at 327

³⁰² Act 61 of 2003.

'municipal health services', for the purposes of this Act, includes-

- (a) water quality monitoring;
- (b) food control;
- (c) waste management;
- (d) health surveillance of premises;
- (e) surveillance and prevention of communicable diseases, excluding immunisations;
- (f) vector control;
- (g) environmental pollution control;
- (h) disposal of the dead; and
- (i) chemical safety, but excludes port health, malaria control and control of hazardous substances.³⁰³

It is evident that the scope of this definition is over inclusive in that there is seemingly great potential for overlap with the provincial competences of 'animal control and diseases', 'environment', and 'pollution control'.³⁰⁴ In addition, this definition also creates overlap between the assignment of local government powers between district and local municipalities in terms of the Municipal Structures Act.³⁰⁵ As noted by Steytler *et al*:

this definition illustrates a further problem, namely the lack of uniformity in the approaches followed by the various national departments. Every national (and indeed provincial) department that deals with local government may have its own conception of how local government powers should be defined and consequently implemented in practice.³⁰⁶

The potential for conflict arising from un-coordinated legislative definitions was noted by Bray in analysing the Interim Constitution. Such analysis is equally applicable to the final Constitution. Discussing the scope of the functional area of 'environment' Bray noted that 'it is possible that provincial legislatures may have different views on what 'environment' means in the context of their provinces.'³⁰⁷ Bray went on to suggest that

³⁰³ Act 61 of 2003; s 1.

³⁰⁴ N Steytler & YT Fessha *op. cit.* n122 at 328-329.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.* at 329.

³⁰⁷ E Bray *op. cit.* n7 at 178.

such lack of co-ordination will have a great effect on the 'implementation and enforcement of environmental legislation.'³⁰⁸

An interesting example of legislative interpretation, which has arisen as a result of the judgment in the *Gauteng Development Tribunal* case, is contained in the Spatial Planning and Land Use Management Act ("SPLUMA").³⁰⁹ SPLUMA essentially seeks to address and regulate planning at a national, provincial and local level. Although enacted, SPLUMA has yet to commence. The purpose of SPLUMA is to replace the pre-constitutional ordinances that are still in force and to ensure that constitutionally acceptable governance exists in the field of planning, particularly in respect of each spheres powers to exercise legislative and executive authority within this field. However, being national legislation, SPLUMA cannot intrude on the provincial or locals spheres' powers in respect of their competences relating to planning. To the extent that such intrusions may exist, SPLUMA would be unconstitutional and therefore unlawful. In order to overcome this, SPLUMA specifically provides that it is legislation enacted in terms of section 155(7) of the Constitution insofar as it regulates municipal planning and section 44(2) of the Constitution insofar as it regulates provincial planning.³¹⁰ The position in respect of municipal planning will be set out. As stated above, section 155(7) of the Constitution provides the circumstances in which national government may legislate in respect of local government functional areas. Subsection (7) provides that

[t]he national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).³¹¹

Prima facie, it appears that national government may only enact legislation that regulates the exercise by municipalities of their executive authority. However,

³⁰⁸ *Ibid.*

³⁰⁹ Act 16 of 2013.

³¹⁰ Act 16 of 2013; s 2(1).

³¹¹ The Constitution; s 155(7) (own emphasis added).

as discussed above,³¹² the effect of section 44 read with section 155(7) of the Constitution appears to provide the national government with an unlimited power to legislate within the functional area of municipal planning (as well as any other matter listed in Schedule 4). In a legal opinion prepared for the Department of Rural Development and Land Reform by Advocates Gauntlett SC and Keightley in respect of the Spatial Planning and Land Use Management Bill,^{313,314} it was argued that national government has unlimited legislative powers in respect of Schedule 4 functional areas.³¹⁵ Therefore, it would appear that SPLUMA cannot be challenged as being unconstitutional by virtue of being contrary to section 155(7) of the Constitution. However, SPLUMA must be scrutinised with regard to other relevant provisions of the Constitution, in order to ensure that the planning system that it creates is aligned with the division of powers in terms of the Constitution. This is where the legislative definitions of relevant functional areas play an important role. SPLUMA offers definitions for municipal planning, provincial planning and national planning³¹⁶:

(1) Municipal planning, for the purposes of this Act, consists of the following elements:

- (a) The compilation, approval and review of integrated development plans;
- (b) the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and a land use scheme; and
- (c) the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.

(2) Provincial planning, for the purposes of this Act, consists of the following elements:

- (a) The compilation, approval and review of a provincial spatial development framework;

³¹² See discussion at 3.2.1.1

³¹³ The negotiation of this Bill lead to the enactment of SPLUMA.

³¹⁴ JJ Gauntlett SC & RM Keightley *Opinion for the Department of Rural Development and Land Reform in respect of the Spatial Planning and Land Use Management Bill* (10 December 2012) accessed from <https://groups.google.com/forum/#!topic/KZNPDA/keNAvTniIL0> on 15 October 2013.

³¹⁵ *Ibid* at paragraph 13.

³¹⁶ Note that for the purpose of this work only municipal planning and provincial planning will be discussed.

- (b) monitoring compliance by municipalities with this Act and provincial legislation in relation to the preparation, approval, review and implementation of land use management systems;
- (c) the planning by a province for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and
- (d) the making and review of policies and laws necessary to implement provincial planning.³¹⁷

As can be seen, the definitions offered by SPLUMA do little to elucidate on the content of municipal planning, and essentially repeat what is already provided for in the Municipal Systems Act. Therefore, it does not appear that SPUMA has advanced the debate regarding the competence in respect of planning. However, the structures put into place by the operation of SPLUMA provide some legislative definition of the functional area of municipal planning. An example of this is that the appeal authority in respect of municipal planning decisions will fall within the local government sphere.³¹⁸ This is in contrast to the various ordinances which have allowed for appeals to the provincial government. This emphasises the autonomy of local government in respect of municipal planning. In addition, a potentially useful mechanism provided for in SPLUMA is the power for the Minister (i.e. national sphere) to publish norms and standards for land use management and land development after consultation with organs of state in the provincial and local spheres of government.³¹⁹ This mechanism provides an opportunity for all spheres of government to negotiate and further define the content of the functional areas relating to planning. However, this efficacy of such mechanism will depend on the consultation process that it follows.

Therefore, it is evident that legislative definitions, if uncoordinated, have the potential to muddy the waters even further, and create even greater conflict between the spheres of government (and even between the classes of local government). How then should the various legislative bodies ensure that legislative definitions do not create further opportunity for conflict? Steytler *et al* suggest that certain mechanisms should be used to mitigate for over or under inclusiveness: follow a process of consultation with

³¹⁷ Act 16 of 2013; s 5(1) and (2).

³¹⁸ Act 16 of 2013; s 51(2).

³¹⁹ Act 16 of 2013; s 8(1).

affected spheres of government (such process must be inclusive and must be used to formulate appropriate legislative definitions); use of standard by-laws to be adopted by local government.³²⁰ Thus, it is apparent that the principles of co-operative governance are important to ensuring that any legislative definitions are appropriate and ensure functional integrity and coherence.³²¹

6.3. Administrative definitions

Administrative definitions, although helpful as guidelines have a key deficiency that cannot be overlooked: administrative definitions have no formal status and therefore cannot be binding on any sphere of government.³²² The Municipal Demarcation Board produced a set of definitions for local government functional areas in 2005.³²³ Steytler notes that these definitions are deficient in a number of respects: key deficiencies include failing to define functional areas in light of local governments objectives as set out in section 152 of the Constitution, failing to define what is meant by the qualifiers 'local' and 'municipal' as they appear in the Schedules; being inconsistent in the manner in which functional areas are defined (in some case definitions relate to a range of permissible activities whilst other definitions relate to facilities and not activities).³²⁴

It is suggested, however, that administrative definitions prepared by the Minister responsible for local government could provide a 'coherent overarching view of the nature and ambit of local government powers and functions.'³²⁵ Such definition could be useful as a tool to:

- (a) [...] give municipalities guidance in determining the ambit of their powers and functions. This will be of great relevance to the drafting of by-laws and the structuring of the executive authority, including the drafting of Integrated Development Plans.
- (b) [...] guide national and provincial departments in drafting statutory definitions of powers and functions concerned with a particular sector of government.

³²⁰ N Steytler & YT Fessha *op. cit.* n122 at 336-337.

³²¹ *Ibid.* at 337.

³²² *Ibid.* at 329-30.

³²³ *Ibid.* at 330.

³²⁴ *Ibid.*

³²⁵ *Ibid.* at 336.

(c) [...] guide provincial governments in defining the scope of their monitoring and support functions with regard to municipalities.

In addition, a set of administrative definitions of this type would be a useful tool in assisting courts to decide upon matters arising from conflict due to alleged unlawful overlap of functional areas. These definitions, if appropriately formulated, would therefore facilitate co-ordinated conflict resolution and governance. In the absence of such administrative definitions, it is suggested that inconsistencies relating to the scope of functional areas are likely to occur which will result in an uncoordinated approach to local government.³²⁶ Thus, from a purely practical level, environmental governance would be best served through coordinated administrative definitions of key functional areas.

6.4. Negotiated definitions

Negotiated definitions should be seen as a tool to implement the Constitutional requirement that all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by co-ordinating their actions and legislation with one another.³²⁷ The Constitution requires that all political means of resolving disputes between organs of state or spheres of government must be exhausted before turning to the courts to resolve such dispute.³²⁸ Seen in this light, the implementation of powers and functions could be agreed upon between different spheres of government.³²⁹ The forum for negotiating definitions of functional areas may take various forms. The KwaZulu-Natal Tourism Act³³⁰ provides an example of a forum in terms of which negotiated definitions of the scope of functional areas between the province and the municipalities within that province can be agreed.³³¹ In terms of this Act, the aim of the intergovernmental forum is to, inter alia, facilitate co-operation between the province and municipalities,³³² and to promote efficiency by eliminating duplication of tourism functions and activities in the Province.³³³ Thus, through

³²⁶ Community Law Centre 'Paper IV: The strangulation of local government' (2008) *Community Law Centre Local Government Project* at 20.

³²⁷ The Constitution; s 41(1)(h)(iv).

³²⁸ S Woolman & T Roux *op. cit.* n32 at 14-7.

³²⁹ N Steytler & YT Fessha *op. cit.* n122 at 330.

³³⁰ Act 11 of 1996.

³³¹ N Steytler & YT Fessha *op. cit.* n122 at 330.

³³² Act 11 of 1996; s 25(1).

³³³ Act 11 of 1996; s 25(2).

intergovernmental fora/forums such as the above, it is possible to negotiate the scope of powers to be administered by each sphere of government. However, the obvious drawback of such forums is that the negotiated definitions may be contrary to the constitutional allocation, and may result in a lack of co-ordination between different forums. Therefore, negotiated definitions should be utilised in conjunction with administrative and legislative definitions.

7. THE ROLE OF CO-OPERATIVE GOVERNANCE

7.1. Introduction

Clearly, the Constitution enhanced the status of local government from that of its pre-constitutional status.³³⁴ De Visser *et al* note that because of the constitutional reality that three spheres of government share one space in which to execute their assigned planning functions, all spheres of government need to embrace a cooperative approach.³³⁵ However, the principle of co-operative governance is a relatively new idea that was only introduced by the Constitution. Woolman and Roux note that prior to the Constitution, although there were different levels of government, co-operative government was a foreign idea as 'all meaningful decision –making processes were concentrated in the national government.'³³⁶

Any consideration of the allocation of powers amongst the three spheres of government must take cognisance of the constitutional principle of co-operative governance. Specially, the concept of co-operative environmental governance will be examined. In the context of environmental law, all three spheres of government have an environmental responsibility which means that the principle of co-operative governance is important to ensuring effective environmental governance.³³⁷ As has been indicated from the case discussions above, local government is mandated to promote a safe and healthy environment.

Co-operative governance is enshrined as one of the fundamental principles set out in the Constitution. Section 41(1) provides that

All spheres of government and all organs of state within each sphere must -

[...]

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

³³⁴ J Mettler *op. cit.* n65 at 5.

³³⁵ J de Visser *et al op. cit.* n181at 4.

³³⁶ S Woolman & T Roux *op. cit.* n32 at 14-1.

³³⁷ A Du Plessis 'Legal mechanisms for cooperative governance in South Africa - Successes and failures' (2008) 23 *SAPR/PL* at 90.

- (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.³³⁸

It has been suggested that the fact that the Constitution specifically provides for the principle of co-operation 'pre-empts sharing of the same responsibilities by different spheres of government.'³³⁹ As noted by Freedman, '[g]iven that there is large overlap between the legislative and executive authority of the national, provincial and local spheres of government, it is not surprising that the Constitution, makes provision for a system of co-operative government'.³⁴⁰ The importance of co-operative governance is a crucial element of the South African governmental structure, which is particularly important in respect of the functional areas which relate to environmental issues (both directly and indirectly). '[E]ach sphere of government exists as a distinctive body with its own unique character, but functions on the basis of interdependence and interrelation with other spheres.'³⁴¹

However, the constitutional principles of co-operative governance 'are not meant to diminish the power of one organ of state at the expense of another. Rather, it presupposes and emphasises the willingness by all spheres of government to work together.'³⁴² Woolman & Roux summarise the Constitutional Court's Chapter 3

³³⁸ The Constitution; s 41(1).

³³⁹ C Bosmam L Kotze and W Du Plessis *op. cit.* n2 at 413.

³⁴⁰ DW Freedman *op. cit.* n9 at para 58.

³⁴¹ C Bosmam L Kotze and W Du Plessis *op. cit.* n2 at 411.

³⁴² *Ibid.* at 413.

jurisprudence as confirming that co-operative governance is governed by two basic principles:

First, one sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere of organ of state. Second, the actual integrity of each sphere of government and organ of state must be understood in light of the powers and the purpose of that entity.³⁴³

In addition, it should be noted that the Intergovernmental Relations Framework Act ('IRFA')³⁴⁴ was promulgated to create a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations, as well as to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes.³⁴⁵ The aim of the Act is to provide an institutional framework for the different spheres of government to facilitate coherent government, co-ordination in the implementation and monitoring of policy and legislation, effective provision of services and the realisation of national priorities. In terms of section 9 of the IRFA, a Cabinet member may establish a national intergovernmental forum to promote and facilitate intergovernmental relations in the functional area for which that Cabinet member is responsible. Similar forums may be established to coordinate provincial-local relations.³⁴⁶ Van Wyk, referring specifically to planning, but which has equal relevance to the field of the environment, notes that '[i]n the face of the varied functional areas that play a role in planning [...] the challenge remains to ensure that principles of co-operative government feature significantly at all times.'³⁴⁷

7.2. Beyond planning

From an environmental perspective planning has been a fertile area of functional conflict. This is because 'decisions concerning land-use lie at the heart of many

³⁴³ S Woolman & T Roux *op. cit.* n32 at 14-8.

³⁴⁴ Act 13 of 2005 .

³⁴⁵ Act 13 of 2005; Long title.

³⁴⁶ Act 13 of 2005; s 16.

³⁴⁷ J Van Wky *Planning Law* (2012) 2nd ed at 590.

environmental issues.³⁴⁸ It is evident that municipal planning has been the catalyst for disputes arising out of the functional areas. One could suggest that this is because planning is in itself a field that is so broad that it includes by implication various of the other functional areas. Yacoob J articulated this notion in the minority judgment in the *Wary Holdings* case, stating that '[p]lanning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land.'³⁴⁹ Due to the fact that planning has given rise to a plethora of functional area conflicts, it is important to consider whether the manner in which such conflicts have been dealt with can be applied to conflicts arising between other functional areas.

It is submitted that the methodologies used by the courts to interpret the functional areas is applicable to all functional areas. Of course, each instance of overlap will have to be considered, and a decision reached on a case by case basis. However the basic principles, such as the functional approach and a bottom-up interpretation will be equally applicable to determining the scope of conflicting functional areas.

³⁴⁸ J Glazewski & L du Toit 'Planning Law and the Environment' in J Glazewski and L du Toit *op. cit.* n3 at 9-3.

³⁴⁹ 2009 (1) SA 337 (CC) at 128.

8. CONCLUDING REMARKS

Whilst the Constitution represented a significant leap in providing mechanisms for effective environmental governance, such as through the incorporation of an environmental right, opening up standing to enforce such a right in the courts of South Africa, and guaranteeing just administrative action,³⁵⁰ the complexity with which it has established a multi-sphere government has led to a lack of clarity regarding the powers of each sphere to govern environment-related matters. From the above analysis it is clear that the constitutional allocation of competences to the three spheres of government is unclear and contradictory. Whilst it does not appear that the drafters of the Constitution intended to list the functional areas in a manner that completely avoided overlap, the Constitution protects local government's autonomy in a number of ways, and therefore, any intrusion into its competence is unconstitutional and unlawful. Thus, overlap, although catered for, cannot be permitted. Mettler notes that

the ability of local government to govern in a particular functional area is a product of its own legislative authority as circumscribed by the legislative authority of the other spheres of government legislating on that particular functional area.³⁵¹

However, barring any highly unlikely and radical amendment of the Constitution, the functional vision of the drafters is here to stay. Thus, it is necessary to define the scope of the functional areas to avoid conflict arising between the different spheres of government.

Although there are various mechanisms available in terms of which functional areas can be defined, there has been a lack of real progress in this regard. It has therefore largely fallen to the courts to interpret the functional areas in response to specific instances of conflict that have arisen. In terms of environmental issues, the bulk of judicial interpretation has been within the context of municipal planning. Whilst intrinsically limited, judicial interpretation has produced clear principles to be applied in defining the scope of functional areas allocated in terms of the Constitution. Key are the theories of giving effect to the functional vision of the Constitution, and the

³⁵⁰ C Loots 'The impact of the Constitution on environmental law' (1997) 4 *SAJELP* at 68.

³⁵¹ J Mettler *op. cit.* n65 at 7.

principle of subsidiarity which informs the bottom-up approach to interpretation. However, as seen in the *Le Sueur* and *Habitat Council* cases, judicial principles may be misconstrued and result in unacceptable precedents being set. In addition, it has been shown that despite the Constitution being in force since 1997, instances of judicial interpretation are relatively rare, and of more concern, the principles that have arisen are legally complex, and often difficult to apply in practice. This is evident in that even lower courts are at pains to consistently apply the precedent of higher courts. It is therefore impractical to suggest that each municipality, each province, and the national government (as well as all organs of state) will apply such principles in a uniform matter. Therefore, whilst judicial interpretation is important, it is a reactive response to conflict, and therefore does not assist in dealing with the cause of the problem. It would be of more benefit to engage in alternative means of providing content to the meaning of the functional areas, thus reducing the amount of conflict and therefore reducing the involvement of the judiciary.

Thus, administrative, negotiated and legislative definitions should be adopted at local government level to inform the content of local governments' competences. However, as has been shown from the above discussion, each of these alternatives cannot be applied in isolation, as each has its own inherent flaws. This then raises the question of whether or not greater clarity and consistency in respect of the interpretation of functional areas is an achievable goal? It is submitted that this goal is in theory an achievable one. This is because the Constitution has provided mechanisms for the functional areas to be defined, whether through co-operative governance, enactment of national legislation, or exercising supervisory powers over local government. These mechanisms allow for legislation to assist in defining the limits of functional areas, for spheres of government and organs of state to negotiate definitions, and for the adopting of administrative definitions. However, from a practical perspective, it is unlikely that conflict can be avoided all together. This it is submitted is due to a number of reasons that are uncontrollable. Such reasons include the fact that governance is ultimately a political monster where conflict cannot (and rightly should not) be avoided. Also, the divergent concerns and capacities of municipalities through South Africa would give rise to divergent ideas of what powers local government can exercise. Whilst these problems can be addressed to some extent through negotiation and co-operation, the outcome of such processes is ultimately compromised by all or some stakeholders.

Thus, whilst greater consistency and clarity may be achieved, it is unlikely that conflict can be avoided. In addition, as the Constitution is supreme, it is likely that any legislative, administrative and negotiated tools would inevitably be challenged in court as being unconstitutional. However, by engaging in alternative means of defining the functional areas, the instances of conflict can be greatly reduced and courts will be in a better position interpret the content of these functional areas.

APPENDIX A

SCHEDULE 4

Functional areas of concurrent national and provincial legislative competence

PART A

Administration of indigenous forests
Agriculture
Airports other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pools
Consumer protection
Cultural matters
Disaster management
Education at all levels, excluding tertiary education
Environment
Health services
Housing
Indigenous law and customary law, subject to Chapter 12 of the Constitution
Industrial promotion
Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
Media services directly controlled or provided by the provincial government, subject to section 192
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
Pollution control
Population development
Property transfer fees
Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5

PART B

The following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution
Building regulations
Child care facilities
Electricity and gas reticulation
Firefighting services
Local tourism
Municipal airports
Municipal planning
Municipal health services
Municipal public transport
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
Stormwater management systems in built-up areas
Trading regulations
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Public transport
 Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
 Regional planning and development
 Road traffic regulation
 Soil conservation
 Tourism
 Trade
 Traditional leadership, subject to Chapter 12 of the Constitution
 Urban and rural development
 Vehicle licensing
 Welfare services

SCHEDULE 5

Functional areas of exclusive provincial legislative competence

PART A

Abattoirs
 Ambulance services
 Archives other than national archives
 Libraries other than national libraries
 Liquor licences
 Museums other than national museums
 Provincial planning
 Provincial cultural matters
 Provincial recreation and amenities
 Provincial sport
 Provincial roads and traffic
 Veterinary services, excluding regulation of the profession

PART B

The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):

Beaches and amusement facilities
 Billboards and the display of advertisements in public places
 Cemeteries, funeral parlours and crematoria
 Cleansing
 Control of public nuisances
 Control of undertakings that sell liquor to the public
 Facilities for the accommodation, care and burial of animals
 Fencing and fences
 Licensing of dogs
 Licensing and control of undertakings that sell food to the public
 Local amenities

Local sport facilities

Markets

Municipal abattoirs

Municipal parks and recreation

Municipal roads

Noise pollution

Pounds

Public places

Refuse removal, refuse dumps and solid waste
disposal

Street trading

Street lighting

Traffic and parking

ANNEXURE B

District municipality functions and powers in terms of section 84(1) of the Local Government: Municipal Structures Act 117 of 1998, as amended.

- Integrated development planning for the district municipality as a whole, including a framework for integrated development plans of all municipalities in the area of the district municipality.
- Potable water supply systems.
- Bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and, where applicable, the generation of electricity.
- Domestic waste-water and sewage disposal systems.
- Solid waste disposal sites, in so far as it relates to -
 - the determination of a waste disposal strategy;
 - the regulation of waste disposal;
 - the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district.
- Municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole.
- Regulation of passenger transport services.
- Municipal airports serving the area of the district municipality as a whole.
- Municipal health services.
- Fire fighting services serving the area of the district municipality as a whole, which includes -
 - planning, co-ordination and regulation of fire services;
 - specialised fire fighting services such as mountain, veld and chemical fire services;
 - co-ordination of the standardisation of infrastructure, vehicles, equipment and procedures;
 - training of fire officers.
- The establishment conduct and control of fresh produce markets and abattoirs serving the area of a major proportion of the municipalities in the district.

- The establishment conduct and control of cemeteries and crematoria serving the area of a major proportion of municipalities in the district.
- Promotion of local tourism for the area of the district municipality.
- Municipal public works relating to any of the above functions or any other functions assigned to the district municipality.
- The receipt, allocation and, if applicable, the distribution of grants made to the district municipality.
- The imposition and collection of taxes, levies and duties as related to the above functions or as may be assigned to the district municipality in terms of national legislation

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