

UNIVERSITY OF KWAZULU-NATAL

**LOCAL GOVERNMENT IN THE
CONSTITUTIONAL DISPENSATION: DEFINING
THE LIMITS OF LOCAL GOVERNMENT'S
LEGISLATIVE AND EXECUTIVE AUTHORITY**

BY

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DECLARATION

I, Gabriella Bernadette La Foy, declare that:

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The law of the Lord is perfect, refreshing the soul. The statutes of the Lord are trustworthy, making wise the simple.

Psalm 19:7

GLOSSARY OF ACRONYMS

AG	Auditor General
ANC	African National Congress
AT	Amended Text (of the Constitution. An acronym used by the Constitutional Court in the <i>Second Certification Judgment</i> to distinguish the amended text under consideration in that case from the previous text considered in the <i>First Certification Judgment</i> [see also NT])
CA	Constitutional Assembly
CEMS	Central Electronic Monitoring System
CEO	Chief Executive Officer
CFO	Chief Financial Officer
Codesa	Convention for a Democratic South Africa
CP	Constitutional Principle
DAFF	Department of Agriculture, Forestry and Fisheries
DG	Director-General
DDG	Deputy Director-General
DME	Department of Minerals and Energy
D-MOSS	Durban Municipality Open Space Systems
DP	Democratic Party
DPME	Department of Planning, Monitoring, and Evaluation
DPSA	Department of Public Service and Administration
DWS	Department of Water and Sanitation
ESE&ID	Economic Sectors, Employment and Infrastructure Development
ESKOM	Electricity Supply Commission of South Africa (a combination of the English acronym, ESCOM and the Afrikaans acronym EVKOM).
EU	European Union
FFC	Fiscal and Financial Commission
FOSAD	Forum of South African Directors-General
G&A	Governance and Administration
HOD	Head of Department
IC	Interim Constitution
IDP	Integrated Development Plan

ICTS	International Cooperation, Trade, and Security
IGF	Intergovernmental Forum
IGR	Intergovernmental Relations
IFP	Inkatha Freedom Party
JCPS	Justice, Crime Prevention, and Security
LG	Local Government
LGTA	Local Government Transition Act 209 of 1993
LUPO	Land Use Planning Ordinance 15 of 1985
MC	Mediation Committee
MEC	Member of the Executive Council
MP	Member of Parliament
MinMec	Ministers and Members of Executive Councils
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NA	National Assembly
NCOP	National Council of Provinces
NEMA	National Environmental Management Act 107 of 1998
NGB	National Gambling Board
NT	New text (of the Constitution. An acronym used by the Constitutional Court to describe the draft of the Constitution under consideration in the <i>First Certification Judgment</i>)
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PCC	President's Coordinating Council
PDA	KwaZulu-Natal Planning and Development Act 6 of 2008
PSC	Public Service Commission
PMDS	Performance Management and Development System for the Public Service
REDISA	Recycling and Economic Development Initiative of South Africa
R293	Proclamation R293 of 1962 (Regulation for the Administration and Control of Townships in Black Areas)
SAA	South African Airways
SALA	Subdivision of Agricultural Land Act 70 of 1970
SALGA	South African Local Government Association
SASSA	South African Social Security Agency
SATRP	South African Tyre Recycling Process

SCA	Supreme Court of Appeal
SDF	Spatial Development Framework
SCOPA	Standing Committee on Public Accounts
SPCHD	Social Protection, Community, and Human Development
SPLUMA	Spatial Land Use Management Act 16 of 2013
UPR	Universal Periodic Review

ABSTRACT

Close on twenty-five years have passed since the adoption of the Constitution of the Republic of South Africa, 1996 (the Constitution). The division-of-powers provisions of the Constitution marked a move away from the previous vertical, centralised system of government towards a more horizontal, decentralised form of government. The foundation of the legal system shifted from a system of parliamentary sovereignty to a model based on constitutionalism, the rule of law, and the observance of human dignity, equality and freedom. This study examines the extent to which the division-of-powers provisions in the Constitution have been realised since the adoption of the Constitution from a local government perspective. This work contributes to earlier research by presenting a comprehensive review of state practice to date. The research was conducted via a review of published work including books, journal articles, dissertations, studies, and working papers. Sources for the investigation include legislation, policy documents, government commissioned reports, white papers, budgets and minutes of parliamentary committees. Using these sources, the judicial interpretation of the constitutional scheme for the allocation of powers is examined and compared with the legislative, fiscal, intergovernmental, and administrative practice of governance in democratic South Africa. The thesis draws together trends across a number of areas and presents a composite picture of the current status of government, comparing the constitutional vision for the division of powers between the spheres of government with current practice. In so doing, it aims to identify the manner in which the legislature, executive and judiciary envisage the constitutional division of powers; the extent to which the different approaches adopted by each branch cohere or conflict with one another and the manner in which they have been implemented over the past twenty years. In addition, the thesis also examines possible reasons for the challenges identified in the implementation process before concluding by suggesting interventions which could improve the efficiency and efficacy of current state administration.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

The advent of the Constitution has brought a definitive shift in the system of governance in South Africa.¹ This change is twofold. First, the principles of constitutionalism now underpin all aspects of governance. Human dignity, equality and freedom have been constitutionally enshrined as the foundational values of the Republic.² The Constitution and the rule of law are supreme. All decisions and actions by government must now conform to the principles and provisions of the Constitution. Legislation or conduct which is inconsistent with the Constitution may be struck down as invalid.³ This represents a fundamental break with the system of parliamentary sovereignty that applied during the apartheid era and which ensured that Parliament was the ultimate authority regarding governance. Under this system, a positivist approach was adopted in terms of which all organs of state, including the courts, were expected to give effect to the letter of the laws enacted by Parliament; there was no obligation to promote human rights and Parliament wielded virtually unchecked powers.⁴

Secondly, there has been a shift from a hierarchical form of government to a system where all spheres of government have a defined area of authority within which to exercise their administrative powers. This is a distinct change from the situation which prevailed under the previous system where national and provincial government exercised direct control over the various forms of local government. The division-of-powers provisions in the Constitution have created a system where legislative and executive authority is divided between the spheres in a way that affords local government an increased measure of autonomy compared to the system which previously existed.⁵

¹ Constitution of the Republic of South Africa, 1996 (the Constitution).

² Ibid s 1.

³ Ibid s 2.

⁴ De Vos & Freedman *South African Constitutional Law in Context* at 12.

⁵ Constitution: s 40 read with s 43.

The Constitution establishes three spheres of government: national, provincial, and local. The three spheres are described as ‘distinct, interdependent, and interrelated’.⁶ The composition, functioning, internal arrangements, and powers and functions of these three spheres are set out in detail.⁷ In contradistinction to the previous system, local government is established as a fully-fledged sphere of government with powers and functions of its own – most notably – the power to draft original legislation in the form of by-laws.⁸ This power allows municipalities to exercise their executive authority over the areas which they administer in terms of the Constitution. The power to draft by-laws is limited to matters which municipalities have the right to administer under the Constitution or national and provincial legislation. Should a conflict arise between national or provincial legislation and a by-law, the by-law will, as a rule, be declared invalid.⁹ However, where national or provincial legislation is drafted in a way which hinders a municipality’s right to exercise its powers or perform its functions, the by-law will prevail.¹⁰

Similarly, national and provincial government have defined areas of functional authority, with residual powers vesting in national government. Their role with respect to local government is to strengthen the capacity of municipalities to manage their own affairs and perform their functions.¹¹ The emphasis falls on assisting municipalities to manage their own affairs. This role of provincial government under the Constitution is in marked contrast to that which previously prevailed where provinces were directly responsible for administering the various local government bodies. From a legislative point of view, the executive authority enjoyed by the provinces was implemented via a system of Ordinances and Regulations applicable to the various forms of local government.¹²

1.2 Research Question

This thesis examines the extent to which the constitutional scheme for the division of powers has been realised since the adoption of the Constitution from a local government perspective. The investigation proceeds from the premise that decentralised local government is good for

⁶ Ibid s 40.

⁷ Ibid ss 40–41, 43–44, 103–104, 126, 139, 146–148, 150–151, 154, 156.

⁸ Ibid s 156(2).

⁹ Ibid ss 156(1), 156(2) and 156(3).

¹⁰ Ibid s 151(4).

¹¹ Ibid s 154(1).

¹² Steytler & De Visser *Local Government Law* (2008) at 2.1 and 2.4.

development. The entrenchment of local government autonomy in the Constitution is an acknowledgement of the importance of local government in achieving democratic and accountable government. To an extent, it can be argued that the status and strength of local government reflects the relative strength of South African governance. If it is accepted that the constitutional entrenchment of developmental local government is central to service delivery, it follows that the state of local government is a measure of the health of democratic governance in the country. This is borne out by the fact that service-delivery protests are most often directed at local government. This shows that citizens, too, expect local governments to deliver on the constitutional mandate. Provincial and national governments appear to share the expectation that local government must deliver and implement all government programmes as they are closest to the people. This is the case even though the Constitution emphasises the interrelatedness and responsibility of all three spheres and distributes functions accordingly. The question of whether this constitutional division of powers is effective is vitally important. It is hoped that this thesis will provide further insight into this question.

The study examines the areas of competence of the three spheres of government, their inter-relationship, and how they function in practice. Examples from the legislative and executive spheres are considered in order to evaluate the implementation of the Constitution's division-of-powers provisions. The emphasis is on how these constitutional provisions have been implemented in the local government sphere. The focus of the investigation is on the efficacy of the system. Leonardy and Brand frame the enquiry in the following terms:

[T]he question in the well-tested British approach to the evaluation of constitutional concepts and institutions should be whether this...system works. Only if that cannot be answered in the affirmative, the need arises to rethink the foundations of the arrangement....and this would seem to apply even if one would have to come to the conclusion that those functions are inconsistent with or do not otherwise meet the demands of legal and/or theoretical logics. If and as long as the arrangement fulfils its function, such inconsistencies or other defects would thus have to be left aside as irrelevant.¹³

This thesis considers the implementation of the division of powers provisions by examining the following elements:

¹³ Leonardy & Brand (2010) 4 *TSAR* 657.

- The institutional design in the Constitution and the division-of-powers provisions.
- The administrative practice of government.
- The practice of intergovernmental relations in the state.
- Judicial interpretation of the constitutional division of powers.
- The legislative practice of the state.
- The fiscal practice of the state.
- Political considerations.

This study contributes to existing research by reviewing the elements enumerated above over a twenty-year period. It draws together trends across a number of areas, and draws a composite picture of the current status of government, comparing the constitutional vision for the division of powers between the spheres with current practice. In so doing, it attempts to answer the following related questions:

- Is the constitutional vision for the division of powers being realised in practice? If not, what are the reasons for this?
- Is there a need to intervene in order to improve the functionality and efficacy of the constitutional system?
- What interventions could improve the efficiency and efficacy of the administration?

1.3. Methodology

The ideas which culminated in the writing of this thesis were precipitated by questions the writer encountered during the early phases of implementing South Africa's local government system whilst working as a research consultant at the Department of Local Government and Traditional Affairs in KwaZulu-Natal. Subsequent work experience in national, provincial, and local government has awakened a keen interest in the potential of local government to transform society. This experience has opened up invaluable opportunities for observation and interaction with the constitutional system – the topic of this study. Case studies are drawn from the local, provincial, and national spheres of government.

The thesis draws on the work of De Visser (2003) and Mathenjwa (2017), together with a number of theses on the topic. It evaluates a variety of national studies conducted by academics, the South African Local Government Association (SALGA), the Department of Planning,

Monitoring and Evaluation (DPME), MunicipalIQ, and the former Department of Constitutional Development.¹⁴

The research for this work was conducted via a review of published work on the subject area of the study. This includes books, journal articles, dissertations, studies, and working papers prepared by academics, legislation, and the policy documents of government departments. Given that the research focuses on public law issues, reliance is also placed on government commissioned studies and reports, white papers, budgets, and the like.¹⁵ The minutes of parliamentary committees have also been consulted in certain instances.¹⁶

¹⁴ De Visser *Developmental Local Government; Mathenjwa Supervision of Local Government; Mathebula Intergovernmental Relations Reform; Mafilika Impact of the National Council of Provinces* available at etd.uwc.ac.za/bitstream/handle/11394/3613/Mafilika_LLM_2013_pdf?sequence=1; Mettler 'The legislative powers of local government' (2000) Local Government Working Paper Series No 1 Community Law Centre University of the Western Cape available at www.mlgi.org.za; De Visser 'Assignment of powers to local government' (2002) Local Government Working Paper Series No 1 Community Law Centre University of the Western Cape available at www.mlgi.org.za; Mettler J 'The legislative powers of local government' (2000) LG Working Paper Series No 1 at 10 Community Law Centre University of the Western Cape available at www.mlgi.org.za; De Visser 'Powers of local government' (2002) Local Government Working Paper Series No 2 Community Law Centre University of the Western Cape available at www.mlgi.org.za; Steyler 'The powers of local government in decentralized systems of government : Dispelling "the curse of common competencies"' (2003) Local Government Working Paper Series No 2 Community Law Centre University of the Western Cape available at www.mlgi.org.za; Steyler N & Fessha Y 'Defining local government powers and functions: The management of concurrency' (2007) Research Paper Local Government Project Community Law Centre University of the Western Cape available at www.mlgi.org.za; Local Government Project Community Law Centre University of the Western Cape Paper I 'Developmental local government: Determining appropriate functions and powers' (2007) available at www.mlgi.org.za; 'Community Protest: Local Government Perceptions' available at <https://www.salga.org.za/.../Community%20Protest%202016%20without%20BLEED.pdf> accessed on 23 September 2017.; 'The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data' available at www.statsa.gov.za/publications/Report%2003-01-22/Report%2003-01-222016.pdf, accessed on 23 September 2017; 'Public Protest in Democratic South Africa' available at <http://sahistory.org.za/article/public-protest-democratic-south-africa>, accessed on 23 September 2017; Allan K & Heese K 'Understanding why service delivery protests take place and who is to blame' available at www.municipaliqu.co.za accessed on 23 September 2017.

¹⁵ Department of Provincial and Local Government 'The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government' (1999); Layman T 'Intergovernmental Relations and Service Delivery in South Africa: A ten-year review commissioned by the Presidency' (2003) available at <http://sarprn.org/documents/d000078751docs/Layman%20Tim.pdf> at 207, accessed on 23 September 2017; Parliament of RSA 'Report of the Independent Panel Assessment of Parliament' (2008) available at <https://pmg.org.za/policy-document/63/> accessed 23 September 2017; DPISA 'White Paper on Local Government' (1997); Department of Constitutional Development 'Discussion Document on Strategic Issues and Options for Policy on Cooperative Government and Intergovernmental Relations' (1999); Department of Monitoring and Evaluation 'Twenty-year Review South Africa 1994-2014 Background Paper: Local Government; National Planning Commission 'National Development Plan' (2012).

¹⁶ PSA Performance Monitoring and Evaluation Committee Meeting of 25 October 2017 available at <https://pmg.org.za/committee-meeting/25324/>, accessed on 17 July 2019 Public Accounts (SCOPA) Committee Meeting of 28 November 2018 available at <https://pmg.org.za/committee-meeting/27688> accessed on 17 July 2019

During the data-evaluation phase, a broad framework for the thesis was developed and the thematic areas were refined and slotted into potential chapters and sections in the body of the work. Literature relating directly to the central research question was summarised and captured into a coding book, setting out the relevant findings chronologically to facilitate legal analysis. During the process of reading and analysis, data was evaluated in terms of author, type – e.g., government sponsored study v peer reviewed journal – findings, audience, research funding, and any other relevant factor. In this section, the primary works relevant to the research area are surveyed. Less relevant literature identified through this process has been included under the thematic subject areas in each chapter.

1.4 Literature Review

During the period following the adoption of the Constitution, aspects of the constitutional design were considered by Simeon.¹⁷ Simeon examined the federal and unitary elements of the South African Constitution in the context of the values and purposes which may have influenced the choice of one constitutional design element over another. He examined whether or not the institutional design of the South African Constitution meets Wheare's strict definition of federalism.¹⁸ The reality is that South Africa has chosen a multi-sphere system of government. This system incorporates many elements found in other constitutions, for example that of Germany, but also responds, as do all federal systems, to the unique cultural, political, and economic dynamics of its peculiar setting.¹⁹

As the constitutional system matured, so too academic commentary on local government developed. Steytler and De Visser have done a considerable amount of work in the area of constitutional and local government law, as has the Community Law Centre²⁰ at the University of the Western Cape.²¹ Steytler's work on concurrency has been particularly insightful and is discussed in Chapter 4. In 2005, De Visser's PhD thesis, supervised by Steytler, was

¹⁷ Simeon (1998) *SA Public Law* 42.

¹⁸ Wheare's test for federalism asks whether a system of government embodies predominantly a division of powers between general and regional authorities each of which with its own sphere, is *co-ordinate with the others and independent in their respective spheres*? If it does, then it is federal in nature. Subject to the qualification that a system which leaves residual powers to central government is quasi-federal and not strictly federal in nature (see Wheare *Federalism* at 11).

¹⁹ Simeon (1998) *SA Public Law* 42 at 71.

²⁰ The Community Law Centre has been renamed as the Dullah Omar Institute.

²¹ Steytler & De Visser *Local Government Law* (2008).

published.²² De Visser's *Developmental Local Government*, is premised on previous negative experiences with centralisation in other African countries. The argument put forward is that the institutional design for local government in the Constitution is premised on the assumption that decentralisation is good for governance. Accordingly, the Constitution adopted the concept of decentralisation and local government was empowered as the key agent for development. De Visser examines the South African local government system in order to answer what institutional choices a transitional state must make to facilitate developmental local government.

De Visser proposes three principles for the developmental role of government and analyses the merits (and demerits) of decentralised local government, using South Africa as a case study, in order to devise an institutional model for developmental local government. He concludes that although decentralisation can contribute significantly to development, it also harbours dangers.²³ In response to these dangers De Visser proposes three institutional principles:

- (1) *Autonomy* – for decentralisation to be effective in the context of local government, local government must be equipped with real and sufficient powers. Interference by what the author calls 'senior governments' (referred to as 'national' or 'central' government in this thesis) is discussed. It is argued that a sufficient degree of financial autonomy is necessary for powers to have any meaning.
- (2) *Supervision* – is discussed as a principle to limit the danger of fragmentation inherent in decentralisation. De Visser argues that supervisory elements in the institutional framework are an essential requirement for developmental local government.
- (3) *Cooperation* – is proposed as a third principle, based on the inclusion of cooperative governance in the institutional design of the South African Constitution. The complexities of governance require a normative framework and instruments to guide intergovernmental dialogue. It also requires a normative framework for the vertical and horizontal integration of policies.²⁴

De Visser concludes that the South African local government system performs reasonably well on all three principles, but most notably on the principle of autonomy. He notes that in 2003, when the study was conducted, there were signs that local government could be under threat.

²² De Visser *Developmental Local Government*.

²³ Ibid.

²⁴ Ibid.

As a result, he underlines the importance of a political will committed to implementing the constitutional vision for developmental local government. Although the study concludes that the system performs relatively well, this should not undermine its underlying message – it could perform still better on all three principles.

In 2007, De Visser developed a working paper on local government functions assisted by the National Treasury Conflict and Governance Facility with funding from the European Union.²⁵ In this paper he argued that there are significant shortcomings in how the Constitution distributes powers and functions between the spheres of government, and how the allocation of powers to local government is interpreted and implemented. In keeping with the principle of subsidiarity, he proposed that those functions that have the most immediate developmental impact on citizens should be performed at the local level.²⁶ This study applies principles discussed in De Visser's PhD thesis to four 'high-impact' powers – housing, local economic development, public transport, and planning but does not cover the entire ambit of the Schedules.²⁷

Mathenjwa's recently-published work, *Supervision of Local Government*, examines the constitutional obligation to monitor local government by reviewing the law and practice of supervision.²⁸ The work covers the role of provincial government as well as that of the institutions supporting democracy, including the Public Protector, the South African Human Rights Commission and the Auditor-General. He argues that the general trend in the supervision of local government indicates that provincial governments are acting outside of the constitutionally-defined limits of supervision and in a manner which usurps municipal authority. Mathenjwa contends that this trend is particularly prevalent in the province of KwaZulu-Natal.²⁹

The literature review yielded rich material which covers important areas related to the division of powers under the Constitution.³⁰ The earlier work of Simeon dealt with the period following the adoption of the Constitution when there were no established practices or judicial decisions

²⁵ De Visser J 'Powers of Local Government' (2002) LG Working Paper Series No 2 at 6 Community Law Centre University of the Western Cape' available at www.mlgi.org.za accessed on 14 March 2016.

²⁶ Ibid.

²⁷ Constitution: Schedules 4 and 5.

²⁸ Mthenjwa *Supervision of Local Government*.

²⁹ Ibid at 178.

³⁰ Constitution.

and academic analysis was accordingly limited to a consideration of the institutional aspects of the Constitution. The later works by Steytler, De Visser, and Mathenjwa dealing with advances in local government, are particularly insightful. It is fortuitous that both De Visser and Mathenjwa's studies rely on case studies drawn from KwaZulu-Natal, as many of the examples in this thesis are also drawn from that province.

This thesis differs from earlier literature in a number of important respects: in the first instance, as much as twenty years has passed since the time of writing of certain of the works, and fifteen since De Visser completed his study. In that time there have been important developments. For example, intergovernmental legislation has been adopted³¹ and the courts have had an opportunity to consider and interpret the constitutional provisions allocating powers to local government.³² These and other developments have had important consequences for the development of the constitutional vision of the division of powers. The study addresses the question of whether these developments have had a positive or a negative impact on the autonomy of local government. This thesis seeks to contribute to the existing discourse by examining the manner in which the legislature, the executive and the judiciary have sought to realise the constitutional division of powers between the three spheres of government over the past twenty years, from a local government perspective. In addition, it attempts to address some of the challenges the system has given rise to by making recommendations aimed at improving legislative and administrative practices affecting the division of powers provisions.

³¹ Intergovernmental Relations Framework Act 13 of 2005.

³² *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)* 2009 (1) SA 337 (CC) (*Wary Holdings*); *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) (*Gauteng Development Tribunal*); *Swartland Municipality v Louw NO & others* 2010 (5) SA 314 (WCC) (*Swartland WCC*); *Minister for Mineral Resources v Swartland Municipality & others* 2012 (7) BCLR 712 (CC) (*Swartland CC*); *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC) (*Maccsand*); *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) (*Lagoonbay*); *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others* 2016 (3) SA 160 (CC) (*Tronox*); *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 (*Le Sueur*); *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC) (*Joseph*); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) (*Blue Moonlight*).

1.5 Chapter Breakdown

Chapter 2 establishes the background for the evaluation of the system of governance established under the Constitution. It begins with a treatment of theoretical models of government. First, the classic tests used to classify governmental systems are discussed in relation to the South African Constitution. Next, various factors are proposed as a framework within which to evaluate the South African system of government.³³ These factors are used to evaluate both the design and the practice of the state.

The chapter sets out the history of constitutional governance in South Africa and its influence on the evolution of our government. This historical overview examines the background to South Africa's history of a unitary government and administration premised on parliamentary sovereignty. The debates which shaped the division-of-powers discussions at the Convention for a Democratic South Africa (Codesa) are compared with similar discussions following the Anglo-Boer War in 1909. The main features of the Constitution's division of powers are set against this historical background.

From a comparative perspective this thesis compares how other countries have dealt with the constitutional division of powers. The constitutions of Germany and Canada, which were used as 'models' by the drafters at Codesa, are examined in greater detail.

In order to situate the constitutional provisions in their interpretative context, the thesis examines how the Constitutional Court interpreted these provisions in the *Certification Judgments*.³⁴ The reasoning followed by the Constitutional Court is analysed in some detail on the basis of its importance under the precedent doctrine.

³³ See Chap 2:

- (a) The constitutional design for government;
- (b) The division of powers between national and sub-national governments;
- (c) The Fiscal practice of the state;
- (d) Intergovernmental relations;
- (e) The administrative practice of the government;
- (f) Political considerations; and
- (g) Judicial decisions.

³⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) (*First Certification Judgment*); *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC) (*Second Certification Judgment*).

Chapter 3 opens by explaining the terminology of ‘cooperative governance’ and ‘intergovernmental relations’. It traverses the evolution of the practice in intergovernmental relations from 1994 to the present. This discussion considers both the period prior to and the period following the adoption of legislation governing intergovernmental relations.³⁵ Important institutions for intergovernmental relations are evaluated, including the National Council of Provinces, the Intergovernmental Forum, and the President’s Coordinating Council. The Cabinet Cluster System and its operation are examined as an example of state practice in the area of intergovernmental relations (IGR).

How IGR have evolved in the financial and fiscal spheres is addressed in some detail in order to evaluate whether state fiscal practice aligns with the constitutional division of powers. Judicial interpretation of the cooperative governance provisions in the Constitution is considered before a number of case studies are presented. Finally, the phenomenon of service-delivery protests and their causes are considered. The investigation in this chapter concludes by identifying a number of areas in the practice of cooperative governance which could benefit from reform.

Earlier, the unique status of local government as an autonomous sphere under the Constitution was introduced.³⁶ The legislative power of local government to pass original legislation is an important feature of the division of powers in the new dispensation. In Chapter 4 the legislative practice of the state with regard to legislation impacting on local government is surveyed.

This chapter first details the scheme for the division of powers provided for in the Constitution. The ambit of national, provincial, and local governments’ legislative authority is set out together with the conflict-of-laws provisions which apply in legislative disputes. The operation of concurrent legislative mandates is outlined. A number of case studies which illustrate state practice in local government functional areas are presented and various problematic areas are identified. The final part of this chapter reviews the case studies and makes recommendations based on the findings.

³⁵ Intergovernmental Relations Framework Act 13 of 2005.

³⁶ See s 1.1.

In Chapter 5, the thesis investigates the issue of concurrent powers discussed in a number of the case studies in Chapter 4 in greater detail. The issue of concurrency is emphasised by examining the manner in which the Constitution allocates the powers over development planning between the three spheres of government. In terms of the Constitution, ‘municipal planning’ and ‘building regulations’ are areas of local-government competence.³⁷ The functional areas of ‘regional planning and development’ and ‘urban and rural development’ fall within the national and provincial governments’ areas of competence,³⁸ while the Constitution assigns the functional area of ‘provincial planning’ to the provinces.³⁹ Various challenges have arisen in implementing the division of responsibilities and have resulted in the body of case law analysed in this section. This section of the thesis examines the case law in order to establish the jurisprudential interpretation of the status of local government.

Chapter 6 highlights the practical challenges associated with the implementation of the constitutional allocation of powers. The High Court’s interpretation of the division-of-powers provisions in the Constitution in *Le Sueur & another v eThekweni Municipality & others* is analysed.⁴⁰ This case revolved around the role of local government in the related functional areas of ‘planning’ and ‘environment’. It is argued that this case illustrates the complexities of the constitutional allocation of powers and responsibilities between the three spheres of government.

In the current chapter – Chapter 1 – the supremacy of the Constitution and the shift from parliamentary sovereignty to constitutionalism as the constitutional basis for the Republic have been introduced. In terms of this shift, the state is constituted as a democratic republic founded on the rule of law and a commitment to human dignity, equality and freedom. The Bill of Rights in Chapter 2 of the Constitution is the bedrock of this new order. It has been pointed out that this shift carries with it the requirement that all law and state practice must meet the standards set by the Constitution. However, no examination of the division-of-powers provisions of the Constitution would be complete without a consideration of their relation to the Bill of Rights.

³⁷ Constitution Schedule 4B.

³⁸ Ibid Schedule 4A

³⁹ Ibid Schedule 5A.

⁴⁰ *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6.

Chapter 6, therefore, considers the impact of the Bill of Rights on the constitutional allocation of powers between the three spheres of government. Recent cases in which the Constitutional Court has considered the impact of the constitutional right to housing on the constitutional allocation of powers and responsibilities within the three spheres, are discussed.⁴¹ It is argued that litigation founded in the Bill of Rights will continue to impact the constitutional allocation of powers. This adds further complexity to this area of law and impacts on the assessment of the efficacy of the constitutional system.

In Chapter 7, the efficacy of the division-of-powers provisions in the Constitution is examined through the lens of state administrative practice. The thesis examines the constitutional provisions governing the public administration. The importance of the Public Service Commission (PSC) and the Department of Public Service and Administration (DPSA) in the constitutional scheme is set out. The powers of the PSC are examined in the light of the Constitutional Court's evaluation of the constitutional text's compliance with Constitutional Principle XXIX.⁴² This principle provides for the safeguarding of the independence and impartiality of the PSC, the Reserve Bank, and the Auditor General. These institutions play a vital role in maintaining professional ethics in the public sector. Accordingly, the thesis considers whether the protection afforded to the PSC by the Constitution is adequate.

Whether the Constitution and public service legislation and policies have instilled constitutional values in the practice of the administration is examined. It is argued that the culture and ethos in the public service fall short of the values enshrined in the Constitution for a number of reasons. It is further argued that there is a link between dysfunctional human-resource practices in government departments and the erosion of good governance in the public sector overall. Finally, the thesis suggests that certain challenges related to concurrency are linked to service delivery and human-resource challenges in the public sector. The concurrent power of health is used to illustrate this point. It is submitted, therefore, that reforms aimed at clarifying the division of powers provisions in the Constitution must be accompanied by attendant changes in the management of the public administration. A number of areas of state administrative practice that could benefit from reform are identified.

⁴¹ *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46; *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC).

⁴² *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC) para 204.

In the final chapter the investigation in the preceding chapters is drawn together. Observations and findings based on this investigation are presented. The thesis concludes by offering a number of recommendations to address the findings.

CHAPTER 2

THE CONSTITUTIONAL DIVISION OF POWERS IN HISTORICAL, THEORETICAL, AND COMPARATIVE CONTEXT

2.1 Introduction

The 1996 signing into law of the Constitution of the newly-democratic South Africa at Sharpeville marked a shift in the country's legal history.⁴³ It signaled a break with the legal tradition of positivism and the system of parliamentary sovereignty which had provided the impetus for the functioning of the apartheid state. In its place, the Constitution established a democratic system built on the foundations of constitutional supremacy and a justiciable Bill of Rights. This democratic constitutional system provided an opportunity for all citizens to participate in the governance of the country.⁴⁴ The governance model in the Constitution ushered in a shift from the hierarchical, vertical system which prevailed under the previous regime, to a democratic, participatory scheme of shared competencies among the three spheres of government. This required the division of constitutional powers and responsibilities between the national, provincial, and local governments.

The division-of-powers provisions of the constitutional model were the subject of much debate and contestation during the negotiating and drafting of the new Constitution. Initially, this discussion revolved around the preliminary question of whether South Africa would choose to reconstitute itself as either a unitary or a federal state. The process of drafting the Constitution required agreement to be reached between parties with vastly differing political ideas. The discussions leading up to the adoption of certain sections in the Constitution shed light on the provisions which emerged, often as a result of contestation and compromise.

This chapter traverses some of the debates surrounding the drafting of the division-of-powers sections in the Constitution. Whether the South African constitutional system of governance is unitary or federal in nature is discussed. Common characteristics of unitary and federal design

⁴³ President Nelson Mandela signed the final draft of the Constitution into law at Sharpeville, Vereeniging on 10 December 1996. See sahistory.org.za/dated-event/mandela-signs-sa-constitution-law accessed on 11 September 2019.

⁴⁴ Constitution: s 1 provides that: 'The Republic of South Africa is one sovereign, democratic state founded on the following values... (d) [u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democracy, to ensure accountability, responsiveness and openness.'

are considered and provide the background for the analysis of the system which has emerged in South Africa after two decades of constitutional governance.

2.2 Local Government in Theoretical Context

2.2.1 The unitary v federal debate

In the section which follows, some of the debates which informed the drafting of the division-of-powers provisions in the Constitution are discussed. However, it is first necessary to consider the preliminary matter of whether the drafters opted for a unitary or a federal model of government. It must be noted that the terms ‘unitary’ or ‘federal’ appear nowhere in the Constitution.⁴⁵

In theory, governments may be classified as either unitary or federal. This general classification must give way to the nuances of practice which result in governmental systems which are varied and unique in character.⁴⁶ This has resulted in the categories being further sub-divided in an attempt to categorise governments falling into the main categories. The discussion set out below provides a broad theoretical structure within which the discussion of the constitutional division of powers in subsequent chapters may be located.

There appears to be a fair amount of disagreement among academics as to whether the South African Constitution is unitary, federal, or quasi-federal in nature. There is the view that the South African Constitution establishes a unitary state with three spheres of government.⁴⁷ It is also argued that the Constitution establishes a unitary system coupled with a fiscally decentralised system of intergovernmental fiscal relations.⁴⁸ Another view holds that the Constitution establishes a ‘federal-type dispensation’, while in Malherbe’s opinion, South Africa is a composite state with federal features.⁴⁹ Simeon argues that the Constitution establishes an integrated federal dispensation similar to that of the German *Lander*.⁵⁰ Devenish

⁴⁵ Simeon (1998) 13 *SA Public Law* 42 at 45.

⁴⁶ *Ibid* at 50.

⁴⁷ *Ibid* at 45.

⁴⁸ Calitz & Essop (2013) 17(3) *South African Business Review* 131 at 132.

⁴⁹ *Ibid*.

⁵⁰ Simeon (1998) 13 *SA Public Law* 43.

agrees that the system is similar to that of Germany, but argues that the end result is a quasi-federal system ‘which involves co-operative government.’⁵¹

Much of what has been said was written in the period directly following the adoption of the Constitution. This means that analysis was limited to the content of the division-of-powers provisions in the Constitution itself. Although the constitutional division of powers is the primary indicator of whether a system is federal or unitary, it is submitted that the question is not resolved on that basis alone. Although it is important to consider the constitutional design, the institutional practices which have arisen over time must also be examined.⁵² This is supported by the fact that in established democracies such as Australia, Canada, Germany and the United States of America, the original provisions of the Constitution have been substantially altered over time by administrative practice and judicial decisions. The result of this gradual evolution is that the resulting system often bears little resemblance to that which was originally conceived when a particular constitution was drafted.⁵³

2.2.2 Unitary government

A unitary government is one in which legislative authority is vested in the national government which is the centre of authority.⁵⁴ Under this system, Parliament is supreme. Powers and responsibilities are devolved to sub-national government via an Act of Parliament. This devolution of powers can just as easily be revoked by Parliament. The 1983 Republic of South Africa Constitution Act is an example of such an Act.⁵⁵ The classic example of a unitary state is the United Kingdom.⁵⁶ This form of government is characterised by a high degree of fiscal and administrative centralisation.⁵⁷ Sub-national governments are merely an adjunct or branch of central government and implement policy and programmes determined at the centre. Legislative authority is concentrated in central government and sub-national governments,

⁵¹ Devenish (1993) 4 *South African Human Rights Yearbook* 42.

⁵² *Ibid* at 46. Simeon refers to Riker who lists party systems and social structures as some of the factors which influence the evolution of federal systems.

⁵³ *Ibid* at 44.

⁵⁴ Devenish (2006) 17 *Stell LR* 129 at 132.

⁵⁵ Republic of South Africa Constitution Act 110 of 1983 (Tricameral Constitution).

⁵⁶ Devenish (2006) 17 *Stell LR* 132.

⁵⁷ *Ibid* at 140.

generally have limited power to legislate, mainly through the adoption of subordinate legislation.⁵⁸

2.2.3 Federal government

A basic definition of a federal system of government is one in which political authority is split between two levels of government – central or national government, and regional (or sub-national) government.⁵⁹

Wheare postulates the following test:

[T]he test I apply for federal government is simply this. Does a system of government embody predominantly a division of powers between general and regional authorities each of which with its own sphere, is *co-ordinate with the others and independent in their respective spheres*.⁶⁰

Wheare qualifies this test by stating that a system which leaves residual powers to central government is quasi-federal and not strictly federal in nature.⁶¹ An alternative test is advanced by Venter who identifies the following characteristics of a federation:

- (a) a permanent federal bond;
- (b) an inflexible written Constitution, deemed the highest law, which is protected against unilateral dissolution;
- (c) justiciability of the Constitution through a Constitutional Court or Supreme Court;
- (d) the constituent states have constitutionally-entrenched functional powers and are therefore deemed to be autonomous in their relationship with the federal state;
- (e) the boundaries of the constituent states are constitutionally protected and permanent;
- (f) a two-chamber legislature in which the second chamber is generally dedicated to the constituent states;

⁵⁸ Ibid.

⁵⁹ Ibid 133–5. Devenish explains that the terms ‘federation’ was first used by the founding fathers of the United States of America in 1787. ‘The definitive aspects of a federation are:

- (a) two orders of government, each acting directly on their citizens,
- (b) a formal distribution of legislative and executive authority and allocation of revenue resources between the two orders of government, including some areas of autonomy for each order;
- (c) provision for representation of regional views within the federal policy making institution;
- (d) a written supreme Constitution not unilaterally amendable and requiring the consent of all or a majority of the constituent units;
- (e) an umpire (courts or referendums) to rule on disputes between governments; and processes to facilitate inter-governmental relations for those areas where responsibilities are shared or overlap’.

⁶⁰ Ibid at 133, para 3.

⁶¹ Ibid.

- (g) a constitutional and democratic state that was formed through a sacred contract or agreement with the people; and
- (h) a constitutional federation is symbolised by the concept of one nation with dual loyalties: loyalty to the federation, and loyalty to the constituent states.⁶²

It has been said that there are as many types of federal government as there are federations.⁶³ This is partly due to design differences in the constitutions of various countries, but also to national differences, the evolution of administrative practices, intergovernmental relations, judicial decisions, and the like. Two models of federalism are discussed below: the Canadian and the German. These two models were selected as the drafters of the South African Constitution looked to these two countries for guidance during the drafting process.

2.2.4 The principle of subsidiarity

According to Aristotle, local autonomy is important for human welfare. He believed that the smaller communities which make up the *polis* – such as families, villages, and the like – should enjoy the autonomy they require to perform their functions.⁶⁴ In this way, they would participate in governance to the benefit of the community. Some of the benefits of the participatory function are that it:

- (a) acts as a check on the central executive;
- (b) results in the harnessing of local knowledge;
- (c) prevents any single group from dominating the community; and
- (d) ultimately contributes to the efficient delivery of local services.⁶⁵

The concept of participatory justice has found expression in the Constitution, and in particular in the sphere of local government with its emphasis on public participation. The constitutional entrenchment of local government is an interesting feature of the model of government in the Constitution. This scheme creates three, as opposed to only two levels of government. The Constitution establishes national, provincial, and local spheres, and describes these spheres as distinctive, interdependent, and interrelated.⁶⁶ The description of local government as a

⁶² Venter (2005) 40 *Journal of Public Administration* 484 at 485.

⁶³ Simeon (1998) 13 *SA Public Law* 50.

⁶⁴ Budhu & Wiechers (2003) 18(2) *SA Public Law* 468.

⁶⁵ *Ibid.*

⁶⁶ Constitution: s 40.

‘sphere’ as opposed to a ‘tier’ signals a move away from an hierarchical towards a cooperative arrangement based on equality. The inclusion of local government as an independent sphere of government is a unique development in Devenish’s view. He proposes that the Constitution effects a form of government which is not merely ‘double government’ but ‘triple government’.⁶⁷ This creates a system in which the three spheres can act independently of one another in certain areas.⁶⁸

In post-modern discourse, a view similar to that espoused by Aristotle has found expression in the ‘principle of subsidiarity’. The subsidiarity principle provides that governance should take place as close as possible to the citizens.⁶⁹ It requires that functions and responsibilities should be located at lower levels of government whenever possible. It further aims to protect lower levels of government against undue influence by higher levels.⁷⁰

The Constitution does not explicitly refer to the principle of subsidiarity but it has clearly been influenced by this principle in that it provides for the protection of the status of local government.⁷¹ In addition, a number of provisions are aimed at preventing undue influence on local government by higher levels of government.⁷² Not least of these are the provisions relating to the assignment of powers and the conditions attached to these in the Constitution and the Municipal Systems Act.⁷³

Section 156(4) of the Constitution provides that:⁷⁴

The national 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.

⁶⁷ Devenish (2006) 17 *Stell LR* 129.

⁶⁸ Budhu & Wiechers (2003) 18(2) *SA Public Law* 468.

⁶⁹ De Visser (2008) 10(1) *Local Government Bulletin* 16.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Local Government: Municipal Systems Act 32 of 2000.

⁷⁴ Constitution.

De Visser argues that this provision is not an express manifestation of the principle of subsidiarity, akin to that found in the European Union (EU) Charter.⁷⁵ The standard subsidiarity principle provides that powers *must* go to local government unless the higher level can better perform the function. The section 156(4) formulation provides that additional powers can be added to local government if appropriate.⁷⁶ He agrees, however, with the view that the scheme of the Constitution, particularly in relation to local government, gives expression to the principle of subsidiarity.⁷⁷

According to De Visser, the principle of subsidiarity applies in intergovernmental relations, the protection of competencies, and the allocation of competencies. He distinguishes between:

- (a) protective subsidiarity, which holds that central government should not interfere unduly in the affairs of sub-national government;
- (b) participatory subsidiarity, which provides a rationale for participation by sub-national government in central government's decision-making (echoing Aristotle's view); and
- (c) allocative subsidiarity, which creates a bias towards sub-national government in the allocation of powers and functions.⁷⁸

Subsidiarity may play a role in the interpretation of the Constitution or in its amendment in that it demands preference for the decentralisation of powers and functions. It may also play a role in any discussions around the transfer of functions from central government to sub-national levels of government.⁷⁹

2.2.5 History of the Federal versus Unitary Debate in South Africa

The talks at Codesa, the multi-party negotiations held at Kempton Park between 1991 and 1992, were not the first time the federal/unitary debate had arisen in South African history. In the wake of the Anglo-Boer War, the National Convention of 1908/1909 was convened in order to settle matters of governance. The role of federalism in a unified South Africa was discussed in detail at the Convention.⁸⁰ It is interesting to note that the debates on federalism at the

⁷⁵ De Visser (2008) 10(1) *Local Government Bulletin* 16.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ De Visser (2010) 1 *Stell LR* 90 at 93.

⁷⁹ *Ibid* at 93–4.

⁸⁰ De Villiers (1993) 8 *SA Public Law* 87.

National Convention closely mirrored the discussions at Codesa. For example, arguments on national unity and the need to foster patriotism were raised by those favouring a unitary state on both occasions. The need to balance the distribution of resources between prosperous and poorly-resourced regions featured prominently at both the said National Convention and at Codesa.⁸¹ Similarly, it was argued at both Conventions that the shortage of skilled administrators to manage sub-national government militated against the devolution of powers to this sphere. At the National Convention, delegates expressed the fear that unelected judges would have excessive power if they were given the authority to assess the laws of the regions and national government for compliance with a constitutional division of powers.⁸²

Ultimately, the delegates at the National Convention decided to adopt a unitary form of government founded on the principle of a sovereign Parliament.⁸³ In 1910, the South Africa Act was passed to give effect to the decisions of the Convention.⁸⁴ It is important to note that because Parliament was sovereign, the Act and the system it established could be amended or revoked by Parliament at any time. It is widely accepted that the Union of South Africa founded in 1910 was essentially a unitary state. However, the apartheid government used what it argued was a ‘confederal design’ to establish its policy of separate development which created the Bantustans as ‘self-governing states’.⁸⁵

The foundation for apartheid was laid in 1913 with the adoption of the Native Land Act which identified separate geographical areas for occupation by black people only.⁸⁶ This was followed by the Black Administration Act in 1927 in terms of which Parliament ceded control over the lives of black South Africans to the Governor General (State President), who assumed the title of ‘supreme chief’ of black people.⁸⁷ When the National Party came to power in 1948, it set out to implement the policy of apartheid. The idea of granting ‘self-government’ to black

⁸¹ Ibid at 88.

⁸² Ibid at 87; Simeon (1998) 13 *SA Public Law* 45. Simeon points out that: ‘The general historical position of the African National Congress has been to argue for a unitary state largely on the grounds that only it could secure majority rule, that only it could ensure the concentration of resources necessary to undertake the massive tasks of providing schools, housing, hospitals, and eroding economic disparities, and that only it could contain the potentially centrifugal tendencies of race and tribe.’

⁸³ De Villiers (1993) 8 *SA Public Law* 88.

⁸⁴ South Africa Act 9 Edw VII c 9.

⁸⁵ The separate-development policy established the Bantustan states of Transkei, Bophuthatswana, Venda, and Ciskei. These ‘states’ were independent in theory. However, this independence was nominal as in practice they were largely controlled by the South African state on whom they relied for financial support.

⁸⁶ Native Land Act 27 of 1913.

⁸⁷ Black Administration Act 38 of 1927.

people was given effect by the enactment of the Black Authorities Act and the Promotion of Black Self-Government Act which created the separate 'homelands' covering thirteen per cent of the country's land mass.⁸⁸

The homelands were rejected by black South Africans. Located principally in rural areas, they had limited infrastructure and few economic resources.⁸⁹ As a result, the homelands depended largely on South Africa for financial resources and were by-and-large under the control of the South African state.

In an attempt to resolve the problem of black political rights, the National Party adopted a policy which required all 'homelands' to become independent states. In furtherance of this objective, Parliament adopted the National States Citizenship Act which provided that every black person would henceforth be a citizen of one of the homelands.⁹⁰ The unfortunate history of the establishment of the independent homelands as 'federal' states by grand apartheid weighed heavily against the adoption of federalism as a model of government for a democratic South Africa.⁹¹ In reality, the system was not strictly speaking federal in character due to the fact that the homelands had limited independence and amounted to nothing more than vassal states of South Africa. At Codesa, fears of ethnic factionalism, together with the need to centralise resources in order to deal with the structural inequalities created by apartheid, were raised by the African National Congress (ANC) which initially strongly favoured a unitary state.⁹²

Due to the racially divisive and emotive history of federalism in South Africa, debate around the issue is often clouded by political considerations and approaching the issue dispassionately is problematic. As has been mentioned above, the ANC was opposed to the adoption of a federal system whereas the smaller parties favoured it.⁹³ Indeed, the National Party's sudden and new-found affection for true federalism was viewed with deep suspicion by the ANC.⁹⁴

⁸⁸ Black Authorities Act 68 of 1959 and the Promotion of Black Self-Government Act 48 of 1959.

⁸⁹ De Villiers (1993) 8 *SA Public Law* 90.

⁹⁰ National States Citizenship Act 26 of 1970.

⁹¹ Simeon (1998) 13 *SA Public Law* 45.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ De Villiers (1993) 8 *SA Public Law* 93.

During Codesa, however, the unitary/federal discussions gradually began to move towards a more nuanced position. There were a number of reasons why political parties began to change their initial positions on this question. The nature of politics is such that some of these reasons related to voter support. So, for instance, the ANC may have altered its approach in light of the strong grassroots support for independent local government and the existence of a negotiating forum devoted exclusively to local government issues.⁹⁵ The need to incorporate tribal structures and to gain the support of traditional leaders may also have been factors.⁹⁶

According to Devenish, who was part of the technical drafting team for the interim Constitution, a change in the ANC's approach to regional government occurred after an ANC constitutional delegation embarked on a study tour to examine the German federal system. This was confirmed by news reports following the study tour in which Dr Zola Skweyiya, chair of the ANC constitutional committee, was quoted as saying that federalism 'is not practised as we thought it was'.⁹⁷ According to Devenish, Dr Joe Slovo, Secretary General of the South African Communist Party, proposed that the question whether to adopt a federal or a unitary system of government should be disregarded; instead he proposed the incorporation of 'decentralised local government' as a pillar of the new constitutional order. Dr Skweyiya emphasised the democratic advantage of 'being closer to the people' inherent in federalism when he stated that the ANC sought a unitary government with some federal characteristics.⁹⁸ This paved the way for agreement between the main political parties on the principle of some form of regional government and formed the basis for the inclusion of the division-of-powers provisions in the Constitution.⁹⁹

2.3 History of Local Government in South Africa

Prior to the adoption of the Constitution, the South African government was highly centralised. The provinces acted as provincial branches of national government departments with no real authority. The Bantustans were the 'home' of black South Africans whose movements were

⁹⁵ DPSA 'White Paper on Local Government' (1997) Section A.

⁹⁶ Simeon (1998) 13 *SA Public Law* 69–70.

⁸⁷ *Ibid.*

⁹⁸ *Sunday Times* 27 September 1991.

⁹⁹ De Villiers (1993) 8 *SA Public Law* 97.

controlled by influx control laws.¹⁰⁰ From 1910, provincial governments controlled local authorities. There was no consistent system of local government in place; local authorities varied according to location and the race group they served. The apartheid government reinforced the policy of apartheid through spatial separation.¹⁰¹

The apartheid government attempted to establish parallel local government structures through a policy of ‘own management for own areas’ in an attempt to bolster its policy of racial exclusion and separate development.¹⁰² These ‘own management structures’ consisted of the following forms of local government:¹⁰³

- (a) In Bantustans traditional leaders were given authority over land allocation and development. Some rural areas, called R293 towns, were given their own administrations.¹⁰⁴
- (b) ‘Coloured’ and ‘Indian’ management committees were set up as advisory bodies to white municipalities.¹⁰⁵
- (c) The Bantu Affairs Administration Act established Administration Boards, which removed responsibility for townships from white communities.
- (d) In 1977 Community Councils were introduced.
- (e) In 1982 Black Local Authorities replaced Community Councils. As with the Community Councils, the Black Local Authorities had no exclusive sources of revenue. They were rejected as illegitimate by popular uprisings in the mid-1980s.¹⁰⁶

Local government structures in white areas were able to draw on the property rates and service charges of the wealthier white communities. As a result they were better resourced than the structures in black areas. The lack of resources in black areas was compounded by the legal

¹⁰⁰ Ibid at 90. The presence of black people in urban areas was strictly controlled by influx control laws. These laws aimed to prohibit the presence of black people in urban areas save for limited categories of people. The exceptions related in the main to persons whose presence in the cities was desirable for economic reasons.

¹⁰¹ DPSA ‘White Paper on Local Government’ (1997) Section A.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ However, in reality the R293-towns lacked any real powers.

¹⁰⁵ These bodies had few decision-making powers. For instance, they were excluded from decisions on the allocation of revenue. In reality, the provincial and central government administrators controlled most responsibilities through the Regional Services Councils which were set up at the same time as the Management Committees. Most coloured and Indian people rejected these structures and refused to register as voters. See www.thejournalist.org.za/thecraft/the-historical-factors-that-shaped-local-governance accessed on 17 July 2019.

¹⁰⁶ DPSA ‘White Paper on Local Government’ (1997) Section A.

prohibition of retail and industrial developments in these areas.¹⁰⁷ Dissatisfaction with this state of affairs led to popular resistance to the system which culminated in a coordinated consumer boycott of rents and service charges led by the United Democratic Front.¹⁰⁸ The boycotts precipitated the collapse of the apartheid local government system and crisis talks were initiated between white municipalities (experiencing the impact of the organised consumer boycotts) and township representatives. These talks were the precursor to local negotiations which paved the way for the establishment of a national Local Government Negotiating Forum.¹⁰⁹ The 1997 White Paper on Local Government credits the crisis in local government as a major driving force behind the national reform process which began in 1990.¹¹⁰

Codesa laid the basis for the future of government in South Africa. Parallel to the discussions of national reform, the Local Government Negotiating Forum met to develop a roadmap for the transformation of local government.¹¹¹ The Forum worked out a framework for the transition process which was encapsulated in the Local Government Transition Act and the interim Constitution.¹¹² The agreement included the principle that arrears owed by black local authorities would be written off.¹¹³ The participation of local government in the process of reform may be one of the reasons why strong local government emerged as an important feature of the Constitution.

The interim Constitution was silent on the detail of how the transformation of the local government system was to be achieved; it merely provided that local government would be restructured in accordance with the Local Government Transition Act (the LGTA).¹¹⁴ The LGTA set out three distinct stages for the restructuring and transformation process. The pre-interim phase began with the commencement of the LGTA and ended with the first democratic local government elections.¹¹⁵ In the pre-interim stage, negotiating forums set up by the Act

¹⁰⁷ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution); Local Government Transition Act 209 of 1993; DPSA 'White Paper on Local Government' (1997) Section A.

¹¹³ White Paper *ibid.*

¹¹⁴ *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 3.

¹¹⁵ The LGTA commenced on 2 February 1994.

were mandated to establish temporary councils to fulfil local government responsibilities. After the elections, the ‘interim phase’ began. During this phase, a number of transitional local structures were established by provincial proclamation. These structures were given powers to administer specific functional areas set out in the Premier’s proclamation for each respective province.¹¹⁶

The third phase in the transformation of local government required the enactment of legislation to give effect to the constitutional vision of developmental local government.¹¹⁷ To do so, the Ministry for Provincial Affairs and Constitutional Development began an extensive process of consultation and research which culminated in the White Paper on Local Government. The White Paper sets out the framework for the current local government system.¹¹⁸

A plethora of new legislation has been enacted in order to give effect to the White Paper’s policy proposals – beginning with the Local Government: Municipal Structures Act.¹¹⁹ This legislation regulates all aspects of the functioning of local government. It covers institutional aspects such as the categories of municipality, governance matters, political oversight, and financial and administrative systems. The adoption of this legislation marked the end of the transition process and the beginning of a new chapter for democratic local governance. Certain aspects related to the content, scope, and impact of this legislation on local government are revisited in subsequent chapters.

2.4 Local Government Powers and Functions in Comparative Context

2.4.1 Introduction

In the discussion above, the impact of the study tour which the ANC constitutional drafting group undertook to Germany during Codesa was discussed.¹²⁰ It is important to consider the German Constitution in this light as the drafters drew on aspects of German constitutional and administrative practice as the South African constitutional and administrative order,

¹¹⁶ Premiers Proclamation 24 of 1994 enacted under s 10 of the Local Government Transition Act 209 of 1994.

¹¹⁷ Ibid para 4.

¹¹⁸ DPISA ‘White Paper on Local Government’ (1997) Foreword by Valli Moosa, Minister of Provincial Affairs and Constitutional Development.

¹¹⁹ Local Government: Municipal Structures Act 117 of 1998.

¹²⁰ Section 2.3 above.

established under the interim Constitution began to take shape. In addition, but perhaps to a slightly lesser degree, the Canadian Constitution and practice were used as a model in the drafting of the South African Constitution. This section considers the division-of-powers provisions in other constitutions, most notably those of Germany and Canada.

Most early federal constitutions do not include local government as a sphere of government; local government is simply controlled by the regional or central government. This was the case in the United States of America (1787); Switzerland (1848); Canada (1867); and Australia (1901).¹²¹ During the last fifty years, however, local government has been increasingly recognised, and has emerged as a fully-fledged and constitutionally recognised form of government in countries with federal features.¹²²

Local government was recognised in the constitutions of Germany (1949); Spain (1978); Brazil (1988); India (1992 constitutional amendments); and Nigeria and Switzerland (1999).¹²³ In these countries, the constitutional allocation of powers to local government takes various forms. The 73rd and 74th Amendments to the Indian Constitution provide long lists of functions and powers. The states may decide which of these powers and functions to devolve to local government.¹²⁴ Similarly, the Nigerian Constitution assigns powers to local government in terms of two lists. The first details broad areas in which local government must participate in state activities. Steyler refers to this form of concurrency as participatory common competencies. The second list contains more specific local government functions.¹²⁵

A contrasting approach to defining local government powers is found in the Constitutions of Germany, Brazil, and Spain.¹²⁶ In terms of this approach local government is guaranteed the powers to manage its own affairs but the precise ambit of those powers is not spelt out.¹²⁷ For instance, the German Basic Law states: ‘The municipality shall be guaranteed the right to manage all the affairs of the local community on their own responsibility.’¹²⁸ In all of the

¹²¹ Steyler (2005) 2 *CILSA* 272.

¹²² *Ibid.*

¹²³ *Ibid* at 273.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* at 274.

¹²⁶ *Ibid* at 276.

¹²⁷ *Ibid* at 274.

¹²⁸ *Ibid.*

examples discussed, how local government powers are allocated results in differing degrees of overlap and concurrency.¹²⁹

2.4.2 Canadian Federalism

The Canadian Constitution of 1867 established Canada as one of the oldest federal governments. Wheare describes the Canadian model as quasi-federal.¹³⁰ However, it has evolved over time and certain commentators opine that it now reflects the divided model of federalism.¹³¹ In the divided model, two or more separate entities or states interact with each other in a manner which resembles two virtually independent countries. This form of federalism is often referred to as ‘competitive executive federalism’ or ‘federal-provincial diplomacy’.¹³²

In this model, there is a clear division of responsibilities with minimum overlap or concurrency. As regards the division of powers, the Canadian model resembles the classical federal division of powers – with each level of government having defined and distinct areas of responsibility. Only two areas of concurrent power were contained in Canada’s original Constitution – agriculture and immigration.¹³³ Although the design is one of distinct areas of responsibility, areas of concurrency have evolved in practice.¹³⁴

In the divided model, the sub-national units have considerable fiscal autonomy with each level of government having independent taxing powers.¹³⁵ Intergovernmental transfers – termed equalisation payments – respect provincial autonomy and are subject to few conditions. As a result, the provinces are able to determine policy with minimal intervention by the central government. To a great extent, the provinces have relatively independent revenue systems.¹³⁶

¹²⁹ Ibid at 273.

¹³⁰ Simeon (1998) 13 *SA Public Law* 52.

¹³¹ Ibid at 51.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid at 53.

¹³⁶ Ibid.

Intergovernmental relations in Canada have evolved through practice; they are not set out in any legislation but are conducted between high-level Ministers and officials.¹³⁷ There is no formal mechanism for the interests of the sub-national units or provinces to be presented at national or central government level. In addition, there is separation between national and provincial politics.¹³⁸

The courts in Canada have played a significant role in transforming the Canadian system initially envisioned in the 1867 Constitution into a classic federal system by limiting federal powers and asserting provincial authority in provincial areas of competence. Judicial decisions have consequently assisted in the creation of a divided federal state in Canada.¹³⁹

2.4.3 German Federalism

In marked contrast to the divided model, the integrated model is, as the name suggests, designed to integrate or draw together the central and sub-national parts of government at all levels.¹⁴⁰ With respect to the division of powers, the integrated model makes use of wide areas of concurrency or shared responsibilities.¹⁴¹ In Germany, a limited number of powers are allocated to the central government; the remaining powers are devolved to the *Lander*. In cases of conflict, federal law prevails.¹⁴² In terms of article 72, the federation may legislate in cases where regulation might prejudice the interests of individual *Lander* or the country as a whole, in matters that cannot be effectively regulated by individual *Lander*, or where legislation is necessary for the maintenance of economic unity.¹⁴³

The model is primarily one of shared powers with the Constitution setting out a number of areas of joint responsibility.¹⁴⁴ There are few exclusive powers. Matters such as higher education, regional economic structures, and agriculture are joint tasks where the federal government may participate in *Land* tasks which are relevant to the country as a whole.¹⁴⁵ The

¹³⁷ Ibid at 54.

¹³⁸ Ibid.

¹³⁹ Ibid at 55.

¹⁴⁰ Ibid at 56.

¹³¹ Ibid at 42, 56.

¹⁴² Ibid at 56.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

central government has broad powers to act to shape *Land* legislative and administrative discretion. In practice, the extensive powers of the central government in legislative matters are balanced by the control which the *Lander* enjoy in the administrative sphere.¹⁴⁶

The fiscal model centres around shared revenues and taxing powers based on negotiated formulae.¹⁴⁷ Taxes accrue jointly to the *Lander* which have an equal claim on revenue to meet their expenditure.¹⁴⁸ Planning and budgeting follow a multi-year format and only a limited number of revenue sources are allocated exclusively to either sphere.¹⁴⁹ In the area of intergovernmental relations, Germany has a formalised and institutionalised set of intergovernmental institutions.¹⁵⁰

In marked contrast to the Canadian system, the *Lander* participate directly in the decision-making processes of the federal government.¹⁵¹ The second house of Parliament, the *Bundesrat*, consists of *Land* Ministers who represent the interests of the *Lander* in federal matters.¹⁵² In many areas central powers are limited by the need to obtain *Land* approval on matters. The German Constitutional Court has full power to interpret the law.¹⁵³ Finally, Germany has an integrated public service which is unified across state and federal lines.¹⁵⁴

2.4.4 Unitary versus Federal Systems

What, then, are the advantages and disadvantages of choosing either a unitary or a federal system of government? In the discussion of unitary government, some of the arguments advanced in favour of unitary government during the drafting of the South African Constitution were discussed. These factors include the limitation of ethnic factionalism; an emphasis on democratic and negotiated outcomes; consensus policy-making; and the benefits of a centralised revenue and fiscal management system in order to finance government programmes

¹⁴⁶ Ibid.

¹⁴⁷ Ibid at 57.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid at 58.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

and equalise service delivery across the geographic territory of a country.¹⁵⁵ Many of these considerations apply equally to integrated federal systems.

Divided federalism, on the other hand, is associated with democratic respect for the rights and autonomy of sub-national governments.¹⁵⁶ Perhaps the greatest advantage associated with divided federalism is that it promotes accountability and transparency in that it clearly demarcates functions. This means that citizens are able to hold governments directly to account.¹⁵⁷

As regards policy-making, the advantage of integrated federalism is its emphasis on consensus between the spheres which minimises the possibility of conflicting legislation and policy.¹⁵⁸ The downside is that it increases the possibility of compromise and the adoption of lowest-common-denominator solutions to policy formulation. Competitive or divided federalism, however, is positively associated with innovation and a multiplicity of policy outcomes.¹⁵⁹

From the discussion above, it is important to note that the determination of whether or not a constitution establishes a federal system cannot be decided solely by reference to the provisions of the constitution. Factors surrounding the constitution's implementation may have the result that a constitution intended at the time of drafting to introduce a particular model, once implemented develops into a totally different model through practice.¹⁶⁰ An example is Canada which is one of the world's oldest federal states. The original 1867 design of the Canadian Constitution has changed considerably over time through societal political changes, changes in the size and role of government, and judicial decisions.¹⁶¹ A thorough examination of the nature of South African government requires an analysis of factors exterior to the text of the Constitution. Factors such as evolving administrative, fiscal, and political practice of government, as well as emerging jurisprudence must be weighed.

¹⁵⁵ Devenish (2006) 17 *Stell LR* 137–8.

¹⁵⁶ *Ibid* at 138.

¹⁵⁷ *Ibid* at 137–9.

¹⁵⁸ *Ibid* at 137–8.

¹⁵⁹ *Ibid*.

¹⁶⁰ Simeon (1998) 13 *SA Public Law* 44.

¹⁶¹ *Ibid*.

2.5 Introduction to the Division-of-Powers provisions in the South African Constitution

The constitutional scheme for the allocation of powers is examined here. This discussion is introductory and serves to provide a framework for the legislative scheme adopted in the Constitution. In subsequent sections the administrative practice of government and judicial interpretation of the division-of-powers provisions are addressed in greater detail.¹⁶²

As indicated in the introductory chapter, the Constitution establishes three spheres of government – national, provincial, and local – and describes these spheres as ‘distinctive, interdependent, and interrelated’.¹⁶³ Legislative authority is divided between these three spheres of government.¹⁶⁴ The National Assembly (NA) may pass legislation amending section 1 of the Constitution with a 75 per cent majority and a supporting vote of at least six of the nine provinces. The other sections may be amended by two thirds majority, with a supporting vote of six provinces.¹⁶⁵ It may also adopt legislation on any matter listed in or inextricably connected to Schedule 4 to the Constitution.¹⁶⁶ National government may not legislate on Schedule 5 matters unless one of the conditions set out in section 44(2) of the Constitution is met.¹⁶⁷

The legislative authority of provincial government includes the power to enact a provincial constitution and to legislate with regard to any functional area listed in Schedules 4 or 5 to the Constitution. It may also legislate on those matters that have been expressly assigned to the provinces either by the Constitution or national legislation as well as those matters that are reasonably necessary for or incidental to the Schedule 4 and 5 matters.¹⁶⁸ The legislative

¹⁶² See Chaps 4 and 5.

¹⁶³ Constitution: s 40.

¹⁶⁴ Ibid s 43.

¹⁶⁵ Ibid ss 74(1) and (2).

¹⁶⁶ Ibid ss 44(1)(a), 44(2) and 44(3) read with s 74.

¹⁶⁷ In terms of s 44(2) of the Constitution, Parliament may pass legislation on a Schedule 5 matter, when it is necessary:

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential economic standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

¹⁶⁸ Constitution: s 104.

authority of provinces must be read subject to the power of the local sphere to legislate on Schedule 4 Part B and Schedule 5 Part B matters.

Local governments' powers are set out in section 156(1)(a) of the Constitution which confers legislative and executive authority over the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. The right of a municipality to administer the matters assigned to it is subject to the power of provincial and national government to monitor and support local government and, by regulating the municipalities' exercise of their executive authority, to ensure that municipalities perform their functions effectively.¹⁶⁹ However, national and provincial governments may not compromise or hinder a municipality's ability or right to exercise its powers or perform its functions.¹⁷⁰ In addition to the functions allocated to local government by Schedules 4 Part B and 5 Part B of the Constitution, the national and provincial spheres have the authority to assign powers and functions to local government. In this regard both national and provincial governments may assign the power to legislate over a matter to the local sphere.¹⁷¹

The drastic changes broadly outlined above have resulted in a number of challenges at the level of implementation.¹⁷² At times, the provinces have battled to understand the relative autonomy of local government bodies under the new system as opposed to the old. The role of the provinces and municipalities in respect of the administration of specific functional areas has also created practical difficulties and, unfortunately, where this has happened service delivery has often been negatively impacted.¹⁷³ To some extent, a number of these difficulties were anticipated. Accordingly, a complex regulatory system embodying principles of cooperative

¹⁶⁹ Ibid s 155(7).

¹⁷⁰ Ibid s 151(4).

¹⁷¹ Ibid s 44(1)(a)(ii), which provides: 'The national legislative authority as vested in Parliament -confers on the National Assembly the power to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.' Section 104(1)(c) provides: 'The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power to assign any of its legislative powers to a Municipal Council in that province.'

¹⁷² This thesis negotiates many of the challenges which have arisen at the level of implementation surrounding the interpretation and application of the division-of-powers provisions in the Constitution. For instance – Chapter 5 deals with the difficulty in delimiting the boundaries of concurrent functional mandates. The facts in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) discussed in Chapter 6 illustrate some of these the interpretational difficulties. In addition, implementation challenges may be compounded by the incomplete transition from one from constitutional system to another. In this regard, the legislative practice of the state covered in Chap 4 is instructive.

¹⁷³ The case studies in Chapters 4 and 5 amplify some of these challenges.

governance was enacted to manage the interfaces between the spheres of governance. This system is discussed in greater detail in Chapter 3.

2.6 The Drafting and Certification of the South African Constitution

2.6.1 Introduction

The history of the drafting of the South African Constitution and the process followed in arriving at the final text has provided fertile material for constitutional scholars. The drafters of the Constitution faced an unprecedented task. Not only had they to craft the covenant which would form the basis for the newly democratic state, but also to simultaneously create legitimacy for the constitutional project. To this end the *process* of drafting the social compact embodied in the Constitution gained in significance. Both in the process of drafting the Constitution, and in the content of its final provisions, the need for constant engagement and dialogue with communities was accorded pre-eminence. In this the drafters largely succeeded and in the process created a Constitution accepted by the people of South Africa as legitimate and lauded throughout the world.

This Constitution was required to embody a break with the past and, in particular, the system of parliamentary sovereignty which had supported the apartheid state. In the area of local government, the apartheid ideology informed a racially-based system which allocated resources based on racial classification.¹⁷⁴ The White Paper's vision for local government in the Constitution was in part a response to and a desire to address this inequality. This vision aimed to strengthen local government and address the disparities between well-resourced white local authorities and the impoverished black townships and informal settlements.¹⁷⁵

The adoption of the 1996 Constitution was the final step in a long process which began with the negotiation of the interim Constitution via a multi-party negotiating process. The interim

¹⁷⁴ Kriegler J in *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) described the situation as follows:

[T]he results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stone throw reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities....we find white suburbs... .

¹⁷⁵ DPSA 'White Paper on Local Government' (1997) Section A.

Constitution provided a framework for the first democratic election in South Africa. It also set out the constitutional principles which were to form the basis for the drafting of the provisions of the Constitution, and against which the Constitutional Court would test the content of the final draft. Some of the difficulties inherent in reaching consensus between the political parties on the question of the model of government to be adopted in the Constitution were traversed above. The process of negotiation leading up to the adoption of the Constitution was fraught with difficulties. Two issues caused deadlock – one was the status of the negotiating parties who had not been elected to their positions through free and fair elections; the other related to the fear that any constitution adopted by the existing regime might not adequately address the interests of all South Africans. A balance had to be struck which would allow both sides to satisfy their constituencies.¹⁷⁶

It was decided that instead of an outright transfer of power from old to new, there would be a two-phase transition. A coalition government in the form of a Government of National Unity (GNU), elected in terms of an interim Constitution, would govern the country (for a maximum of five years) until a final Constitution could be drafted and adopted. Key to this agreement was provision for a set of constitutional principles (CPs) – a set of guidelines agreed to in advance by the negotiating parties which would inform the final text. In December 1993, the negotiating parties reached a political settlement and shortly after that, Parliament adopted the interim Constitution.¹⁷⁷

The agreement set out in the interim Constitution provided for 34 CPs against which the final text of the Constitution would be tested for compliance by an independent arbiter (the Constitutional Court). The drafting of the final Constitution was to be undertaken by the Constitutional Assembly (CA) made up of the NA and the Senate sitting jointly as a ‘drafting chamber’. After the elections, the CA was given two years in which to draft the final Constitution. A constitutional committee consisting of 46 members appointed on the basis of proportional representation was established to assist with the drafting.¹⁷⁸

¹⁷⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) paras 11–14.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

The committee was mandated to draft a constitution based, inter alia, on democracy, the rule of law, and a Bill of Rights. It was tasked by the then Deputy-President to establish ‘a balanced horizontal and vertical division and devolution of powers and functions’.¹⁷⁹ Despite the division of powers receiving considerable and close attention – but not surprisingly given the differing views of the majority and smaller parties on this matter – the clauses in the draft Constitution dealing with the powers of the provinces presented to the Constitutional Court for certification during the first certification process, were found not to comply with the CPs.¹⁸⁰ The grounds on which the Constitutional Court arrived at this decision are discussed below.

2.6.2 First Certification Judgment

(a) Introduction

The *Certification Judgment* is discussed in some detail.¹⁸¹ It is important to note that under the doctrine of precedent, the interpretation of any provision of the Constitution by the Constitutional Court binds all future Courts. The Constitutional Court explained that ‘a future Court should approach the meaning of the relevant provision of the New Text (NT) on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances’.¹⁸² For this reason it is necessary to revisit sections of the judgment as the analysis proceeds in subsequent chapters.

The vast majority of the CPs deal with or are related to the division of powers. It is hardly surprising, then, that much of the argument presented during the nine days over which the certification of the final text of the Constitution was heard before the Constitutional Court dealt with this issue. For ease of reference the CPs are set out fully in table form below.

¹⁷⁹ Simeon (1998) 13 *SA Public Law* 43.

¹⁸⁰ *Ibid* at 44.

¹⁸¹ The Constitutional Court used the acronym NT to refer to the new text (the Constitution) and the acronym IC to refer to the interim Constitution.

¹⁸² *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 43.

Number	Constitutional Principle
CP I	The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.
CP II	Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.
CP III	The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.
CP IV	The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.
CP V	The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
CP VI	There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
CP VII	The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

Number	Constitutional Principle
CP VIII	There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.
CP IX	Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.
CP X	Formal legislative procedures shall be adhered to by legislative organs at all levels of government.
CP XI	The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.
CP XII	Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.
CP XIII	<p>1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the Courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.</p> <p>2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.</p>
CP XIV	Provision shall be made for participation of minority political parties in legislative process in a manner consistent with democracy.
CP XV	Amendments to the Constitution shall require special procedures lying special majorities.

Number	Constitutional Principle
CP XVI	Government shall be structured at national, provincial and local levels.
CP XVII	At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.
CP XVIII	<ol style="list-style-type: none"> 1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution. 2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a Constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution. 3. The boundaries of the provinces shall be the same as those established in terms of this Constitution. 4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed. 5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.
CP XIX	The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

Number	Constitutional Principle
CP XX	<p>Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.</p>
CP XXI	<p>The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:</p> <ol style="list-style-type: none"> 1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so. 2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be deemed in the Constitution. 3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states powers should be allocated to the national government. 4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government. 5. The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government. 6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia –

Number	Constitutional Principle
	<p>(a) for the purposes of provincial planning and development and the rendering of services; and</p> <p>(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.</p> <p>7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.</p> <p>8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.</p>
CP XXII	The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.
XXIII	In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a Court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.
XXIV	A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.
XXV	The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for

Number	Constitutional Principle
	appropriate fiscal powers and functions for different categories of local government.
XXVI	Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.
XXVII	A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.
XXVIII	Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.
XXIX	The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.
CP XXX	1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and

Number	Constitutional Principle
	<p>functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.</p> <p>2. Every member of the public service shall be entitled to a fair pension.</p>
XXXI	<p>Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.</p>
XXXII	<p>The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of his Constitution.</p>
XXXIII	<p>The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.</p>
CP XXXIV	<p>1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.</p> <p>2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination</p> <p>3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.</p>

(b) *Provincial powers*

CP XVIII.2 provides that the powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution. The Constitutional Court's approach to the evaluation of provincial powers was to analyse the particular provisions in order to determine whether the powers and functions of the provinces could be said to be 'substantially less than or substantially inferior to' the powers and functions of the provinces under the interim Constitution.¹⁸³ This entailed comparing like with like in order to determine whether any changes had resulted in a material extension or reduction in powers. If it found that powers had been reduced, the next step would be to determine whether the reduction was substantial.¹⁸⁴

Using this approach, the list of provincial legislative functions in Schedule 6 to the interim Constitution were compared with Schedules 4 and 5 to the NT. In the Constitutional Court's view more powers accrued to provincial governments under the new Constitution in that a new category of exclusive powers was included under Schedule 5 as national government was not permitted to legislate at all without the conditions set in section 44(2) having been met.¹⁸⁵ This section allows Parliament to legislate on Schedule 5 matters if this is necessary to maintain national security, economic unity, essential national standards, to establish minimum standards for the rendering of services, or to prevent unreasonable action taken by a province which is prejudicial to the country as a whole.¹⁸⁶

In respect of concurrent powers, the Constitutional Court found that the national government had gained an advantage through the inclusion of the presumption of necessity in NT section 146(4).¹⁸⁷ Section 146(3) provided that national legislation would prevail over provincial legislation if the national legislation is aimed at preventing any unreasonable action by a province that is prejudicial to the economic, health, or security interests of another province or

¹⁸³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 316.

¹⁸⁴ *Ibid* para 317.

¹⁸⁵ *Ibid* paras 256–7.

¹⁸⁶ *Ibid* para 257.

¹⁸⁷ *Ibid* para 336.

the country as a whole; or which impedes the implementation of national economic policy. Section 146(4) stated that if a dispute regarding the need for national legislation comes before a court, the court must have due regard to the approval or rejection of the legislation in the National Council of Provinces (NCOP). In terms of the original formulation of section 146(4), if the NCOP had approved the legislation, then it was presumed that it was necessary for national security and economic unity. In the view of the Constitutional Court, it would be very difficult to rebut this presumption.¹⁸⁸ The Court further found that an added advantage accrued to national government through the inclusion in the NT of the override in section 146(2)(b) which resulted in the extension of the grounds on which provincial legislation could be overridden.¹⁸⁹

The Constitutional Court's exercise in directly comparing the powers in Schedule 6 to the interim Constitution with those contained in Schedules 4 and 5 to the NT showed that there had been a marginal increase in powers. But, after weighing the areas in which this had occurred against the areas in which there had been some reduction, it found that the provinces had less powers.¹⁹⁰ The next leg in the enquiry required the Court to determine whether the powers were substantially less. This entailed an examination, inter alia, of the provisions dealing with the powers of local government.¹⁹¹

(c) *Local government legislative authority*

While section 175 of the interim Constitution conferred the legislative authority to establish local government and to determine its powers, functions, and structures on both national and provincial government, Schedule 6 to the interim Constitution conferred the power to make laws for local government on provincial government.¹⁹² The interim Constitution also provided that local government is autonomous and entitled to regulate its own affairs within the limits prescribed by law.¹⁹³ The Constitutional Court found a completely different set up in section 155 of the NT (new text), which provided:

¹⁸⁸ Ibid.

¹⁸⁹ Ibid para 337.

¹⁹⁰ Ibid para 341.

¹⁹¹ Ibid.

¹⁹² Ibid para 359.

¹⁹³ Ibid.

- (1) National legislation must determine –
 - (a) the different categories of municipality that may be established;
 - (b) appropriate fiscal powers and functions for each category; and
 - (c) procedures and criteria for the demarcation of municipal boundaries by an independent authority.
- (2) Provincial government, by legislative and other measures, must –
 - (a) establish municipalities;
 - (b) provide for the monitoring and support of local government in the province; and
 - (c) promote the development of local government capacity to perform its functions and its ability to manage its own affairs.
- (3) Subject to the provisions of sections 44, 151 and 154, -
 - (a) provincial government has the legislative and executive power to monitor the local government matters listed in Schedules 4 and 5; and
 - (b) national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of those matters, by regulating the exercise of municipalities' executive authority referred to in section 156(1).¹⁹⁴

Under the interim Constitution, national and provincial government enjoyed concurrent power in respect of local government, with the proviso that this power could not be exercised in a manner which compromised the status of local government. In the NT specific lists of local government competences were introduced.¹⁹⁵ Schedule 4A to the NT set out matters of concurrent national and provincial competence, while Schedule 5A listed matters of exclusive provincial competence. Part B of both Schedules set out a list of local government areas of legislative competence.¹⁹⁶ The extent to which national government could legislate on matters contained in Schedule 4A has been discussed above. In the Constitutional Court's view this afforded greater autonomy to local government at the expense of provincial and national government. However, as the Court pointed out, for the purposes of certification only the reduction of provincial power was relevant.¹⁹⁷

The Constitutional Court divided its consideration of whether the NT complied with CP XVIII.2 into the following areas:¹⁹⁸

- the source and ambit of provincial legislative powers and functions;

¹⁹⁴ Ibid para 361.

¹⁹⁵ Ibid para 356.

¹⁹⁶ Ibid para 362.

¹⁹⁷ Ibid para 364.

¹⁹⁸ Ibid para 365.

- direct provincial competence in respect of LG matters;
- the executive powers of the provinces; and
- exclusive or regulatory powers of the national legislature and executive.

(d) *The source and ambit of provincial legislative powers and functions*

The power of provincial government to legislate on matters listed in Schedules 4 and 5 is circumscribed by section 155(3).¹⁹⁹ In the Constitutional Court's view, the import of these sections was that the provinces' role in respect of local government was limited to the supervision, monitoring, and support of municipalities.²⁰⁰ The Court's interpretation is significant and binding, and because it is a seminal issue which arises again in our consideration of division of powers in later chapters and case law, the reasoning is examined in some detail.

The Constitutional Court reasoned that the provincial supervisory function is fully captured by NT 139. In this context, 'supervision' means that provinces must review local government's actions to establish whether they comply with the requirements of the relevant legislation. If a province is of the view that local government has not complied with its obligations, the province should prescribe corrective measures. This power of supervision may be exercised on an on-going basis subject to compliance with specific conditions and procedures set out in the law. The power of 'supervision' is used alongside the power to 'intervene' – i.e., the power of one sphere of government to intervene in the domain of another sphere.²⁰¹

Considering the content of the provincial duty of 'support', the Constitutional Court found that the power to support must be interpreted as subject to the duty of provincial government to use its legislative and executive authority to promote the development of local government's

¹⁹⁹ Section 155(3) of the Constitution provides that: 'National legislation must:

- establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
- establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
- subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

²⁰⁰ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 367.

²⁰¹ *Ibid* para 370.

capacity to perform its functions and manage its affairs.²⁰² The provinces may do this by regulating municipal executive authority to ensure the municipalities perform effectively. In the Court's view, these provisions afford provinces a means of controlling how municipalities administer their legislative and executive authority regarding Schedule 4B and 5B functions.²⁰³

The provincial power to 'monitor' LG (local government) was held to be a power underlying the obligation to promote, support, and supervise. The Constitutional Court stated:

We do not interpret the monitoring power as bestowing additional or residual powers of provincial intrusion on the domain of LG, beyond perhaps the power to measure or test at intervals LG compliance with national and provincial legislative directives or with the NT itself. What the NT seeks hereby to realise is a structure for LG that, on the one hand, reveals a concern for the autonomy and integrity of LG and prescribes a hands-off relationship between LG and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient or defective in a manner that compromises autonomy. This is the necessary hand-on component of the relationship.²⁰⁴

On the question of whether provincial powers and functions had been reduced as regards local government matters, the Constitutional Court concluded that provincial legislative and executive power had been reduced in the NT when compared with the IC.²⁰⁵ It then turned to the second leg of the enquiry – whether this amounted to a substantial reduction in power.²⁰⁶

In respect of the changes made to the allocation of powers in the Schedules, the Constitutional Court found that the provinces enjoyed control over a significant and extensive number of functional areas (excluding the local government functional areas in Parts B of Schedules 4 and 5).²⁰⁷ As regards local government matters excluded by the NT, provinces had the power to monitor municipalities. In comparing the functional areas assigned to the provinces in the interim and final texts, nothing had been excluded, but the powers in a few areas – including police powers, education, local government, traditional leadership, lotteries, sport, and pools – had been limited. However, in the total context of the powers conferred on provincial

²⁰² Ibid para 371.

²⁰³ Ibid.

²⁰⁴ Ibid paras 372–3.

²⁰⁵ Ibid paras 464, 471.

²⁰⁶ Ibid para 443.

²⁰⁷ Ibid para 475.

government, these changes were not sufficient for the Court to conclude that provincial powers in the IC were substantially less than in the NT.²⁰⁸

However, the changes in respect of concurrent national and provincial powers were substantial. The Constitutional Court held that these changes weakened the position of the provinces relative to national government in the entire field of concurrent powers.²⁰⁹ Taken together, the combined weight of the curtailment of powers and the override-provisions in the context of the entire NT, the changes were substantial and the Court found that the NT failed to satisfy CP XVIII.2.²¹⁰ In addition, the Constitutional Court found that the NT failed to comply with a number of other CPs and could therefore not be certified.²¹¹

2.6.3 *Second Certification Judgment*

After the Constitutional Court found that the text of the Constitution could not be certified, it remitted the text to the CA for amendment. The reconvened CA adopted an amended text (AT) which addressed the areas of concern raised by the Constitutional Court in the *First Certification Judgment*.²¹² The AT was duly transmitted to the Court to examine afresh whether it complied with the CPs as required by the interim Constitution.²¹³

In the *Second Certification Judgment* the scope of the inquiry before the Constitutional Court was not limited to a consideration of the areas in which the NT had been found to be deficient. Instead, the Court decided to err on the side of caution and to consider new areas raised by objecting parties irrespective of whether they had been considered in the first judgment.²¹⁴ Accordingly, the Democratic Party (DP) and the Inkatha Freedom Party (IFP), the province of KwaZulu-Natal, and eighteen private individuals and interest groups submitted written representations.²¹⁵ These fell under the main categories of: the Bill of Rights; Amendments to the Constitution; Local Government; Transitional Provisions; Traditional Monarchs;

²⁰⁸ Ibid para 479.

²⁰⁹ Ibid para 480.

²¹⁰ Ibid para 481.

²¹¹ Ibid paras 482–4.

²¹² The amended text was adopted by the Constitutional Assembly on 11 October 1996.

²¹³ The Constitutional Court used the acronym LG to refer to local government in its judgment.

²¹⁴ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997 (2) SA 97 (CC)* para 10.

²¹⁵ Ibid para 11.

Intervention permitted by AT 100; Public Protector; Auditor-General; Public Service Commission; and compliance with CP XVIII.2.²¹⁶ For the purposes of this investigation, the discussion is confined to those categories which impact on the division of powers between the spheres of government in the Constitution.

The main area of the *First Certification Judgment* relevant to this investigation concerned compliance of the NT with CP XVIII.2. To recapitulate, the CPs required that the powers and functions of the provinces defined in the Constitution should not be substantially less than or substantially inferior to those provided for in the IC. The Constitutional Court's reasoning and decision are discussed extensively in the consideration of the *First Certification Judgment* above.²¹⁷ Briefly, in the *First Certification Judgment* the Court found that the provinces' powers in the NT were substantially less than the corresponding powers of the provinces in the IC based on its assessment of the differences between NT 146(4) read with 146(2)(b) and IC 126(3). The AT made changes to these areas. It was therefore necessary for the Court to analyse the changes and to examine their importance. Schedule 6 to the IC set out the areas of concurrent national and provincial government legislative competence. If there was a conflict between a law passed by national government and a law passed by provincial government, the law passed by provincial government would prevail unless the conditions in section 126(3) had been met.²¹⁸

²¹⁶ Ibid para 3.

²¹⁷ See section 2.6.1 above.

²¹⁸ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997* (2) SA 97 (CC) paras 148–150. Section 126(3)-(5) of the IC provided as follows:

(3) A law passed by a provincial legislature in terms of the Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as:

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

The NT changed the allocation-of-powers provisions by introducing concurrent national and provincial powers in NT Schedule 4. A list of exclusive provincial functional areas was added in Schedule 5. Parts B of both Schedules listed areas in which local government was given legislative competence. The NT provided that a province could be assigned additional areas of legislative competence by an Act of Parliament. The final law-making power given to provinces in the NT was the power to adopt a provincial constitution.²¹⁹ Where a conflict arose between an Act of Parliament and a provincial law dealing with a Schedule 5 matter, it fell to be resolved in accordance with the provisions of NT 146.²²⁰

²¹⁹ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997 (2) SA 97 (CC) para 151.*

²²⁰ Section 146 of the NT stated:

- (1) This section applies to a conflict between national and provincial legislation falling within a functional area listed in Schedule 4.
- (2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions are met:
 - (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
 - (b) The interests of the country as a whole require that a matter be dealt with uniformly across the nation, and the national legislation provides that uniformity by establishing –
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
 - (c) The national legislation is necessary for –
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.
- (3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that –
 - (i) is prejudicial to the economic, health or security interest of another province or the country as a whole; or
 - (ii) impedes the implementation of national economic policy.
- (4) National legislation that deals with any matter referred to in subsection (2) (c) and has been passed by the National Council of Provinces, must be presumed to be necessary for the purposes of that subsection.
- (5) Provincial legislation prevails over the national legislation if subsection (2) does not apply.
- (6)(a) National and provincial legislation referred to in subsections (1) to (5) includes a law made in terms of an Act of Parliament or a provincial law only if that law has been approved by the National Council of Provinces.
 - (b) If the Council does not reach a decision within 30 days of its first sitting after the law was referred to it, the legislation must be considered for all purposes to have been approved by the Council.
 - (7) If the National Council of Provinces does not approve a law referred to in subsection (6)(a), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

In the *First Certification Judgment* the Constitutional Court compared IC 126(3) and NT 146 and concluded that the grounds upon which national legislation could override provincial legislation had been extended in the NT. The advantage accorded national government by the presumption in NT 146(4) weighed heavily in the Court's analysis in the first judgment. In terms of the presumption, if a law referred to in NT 146(2)(c) had been passed by the NCOP, it was presumed to be necessary in terms of NT 146(2)(c). This presumption tipped the balance in the Court's analysis and led it to find that provincial legislative powers had been substantially reduced in the NT.

The CA addressed the matters raised by the Constitutional Court with respect to these sections by reformulating the offending provisions. A stricter criterion for national legislation to prevail over provincial legislation was introduced by the inclusion of a requirement that the national legislation deal with a 'matter that, to be dealt with effectively requires uniformity across the nation'. Most importantly, the CA removed the presumption in favour of national legislation in NT 146(4) and replaced it with an obligation framed in the following terms:

When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a Court for resolution, the Court must have regard to the approval or the rejection of the legislation by the National Council of Provinces.²²¹

The Constitutional Court found that the removal of the presumption had cured the defect in that any conflict was objectively justiciable by a Court tasked with deciding a dispute. It, consequently, held that the AT differed materially from the NT in the very areas which had influenced the Court's finding of non-compliance in the *First Certification Judgment*. This led the Court to conclude that the amendments to the NT in AT 146(2) and (4) effectively restored the balance referred to in the preceding paragraph.²²²

Having found that amendments to the AT 146(2) and (4) were significant, the Constitutional Court still had to consider the other relevant sections of the AT impacting on provincial powers and functions. The CA had made no significant amendments to the four areas of provincial powers, tertiary education, local government, and traditional leadership. In the result, the

²²¹ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997 (2) SA 97 (CC) para 154.*

²²² *Ibid* para 157.

decision in the *First Certification Judgment* that there had been a reduction in provincial powers and functions in these areas which was not significant, stood.²²³

2.7 Conclusion

The constitutional design for the allocation of powers between provincial and national governments had to be implemented in the context of a state experiencing a paradigmatic shift from parliamentary sovereignty to constitutional democracy. In addition, the previous administration was unitary in nature, with a strong central government and four provinces which were merely administrative outposts of the centre. Against this background, the realisation of the constitutional vision required a dedicated effort to transfer powers and functions, assign national legislation on provincial functional mandates to provincial government, and build capacity in terms of the human resources and institutional capacity of the provinces. The political will to decentralise power assumed considerable importance. The prevailing culture within government departments accustomed to a system of parliamentary sovereignty and strict executive control also played a role. The ‘transformation’ of the civil service and the inculcation of democratic values and a human rights culture are intertwined with the realisation of the constitutional democracy which the division-of-powers provisions empower. The administrative practice of the government is examined in Chapter 7.

In this context, it is necessary also to consider the political climate in which government operates. The functioning of day-to-day governance, and the relations between the spheres are influenced by the culture of the ruling party. The culture of the ANC is decidedly hierarchical in nature. The party-list system of proportional representation facilitates governance from the centre. In drawing up the party lists, it is the National Executive Committee which has the final say. Members of the legislature are beholden to the party for their seats: loss of party membership results in the loss of a seat in the legislature. This strengthens the ability of the party to dictate policy from the centre.

All of these dynamics facilitate centralist rule. In the political realm and in the day-to-day government of the country, the ANC exercises power hierarchically.²²⁴ This has had a

²²³ Ibid paras 162–182.

²²⁴ Venter (2005) 40 *Journal of Public Administration* 484 at 489–90.

significant impact on the day-to-day operation of government in that the ANC policy of ‘cadre deployment’ has meant that high-ranking government officials are often members of the ruling party. It can be argued that this may impact decision-making and intergovernmental relations by favouring central government domination of policy even within areas of provincial and local government authority.²²⁵ In practice, for example, where the intergovernmental process set out in the Intergovernmental Relations Framework Act has failed to resolve a matter, an ANC-led municipality or province may be reluctant to challenge the matter in Court.²²⁶ It is submitted that in some instances this factor may have prevented Court challenges against potentially unconstitutional local government legislation on the statute book. Of course, the 2016 local government elections, which resulted in three metropolitan municipalities falling to the opposition, may add an interesting dynamic to relations between national and local government in South Africa. The courts may increasingly become the arbiter of disputes involving the interpretation of the Schedules.²²⁷ It may be that in future, notwithstanding the constitutional obligation on the spheres to work together in a constructive and cooperative manner, we may see an increase in intergovernmental relations disputes reaching the courts.

The discussion above has traversed the drafting, adoption, and early practice surrounding the constitutional division of powers. The discussions leading up to the adoption of the Constitution were addressed in order to provide context for the constitutional division of powers between the spheres of government. This discussion has shown that the advent of the Constitution brought with it a paradigmatic shift in the systems of governance in South Africa. This change is twofold. The principles of constitutionalism now underpin all aspects of governance. All decisions and actions by government must now be in line with the principles and provisions of the Constitution. Secondly, there has been a shift from an hierarchical form of government to a system where all levels of government have a defined area of authority in which to exercise their administrative powers. This is a distinct change from the situation which prevailed under the previous system, where national and provincial government exercised direct control over the various forms of local government which existed in the pre-constitutional dispensation.

²²⁵ The intergovernmental relations practice of the state is discussed in Chapter 4.

²²⁶ Intergovernmental Relations Framework Act 13 of 2005.

²²⁷ Humphries (1995) 3 *Indicator SA* 7 at 10.

Local government has developed into a fully-fledged sphere of government with powers and functions of its own – most notably, the power to draft original legislation in the form of by-laws.²²⁸ This power allows municipalities to exercise their executive authority over the areas which they administer in terms of the Constitution.

Likewise, national and provincial government have defined areas of functional authority with residual powers vesting in national government. Their role with respect to local government is to strengthen the capacity of municipalities to manage their own affairs and perform their functions.²²⁹ The emphasis is on assisting municipalities to manage their own affairs. This role which provincial governments have under the Constitution, is in marked contrast to that which previously prevailed where provinces were directly responsible for administering the various local government bodies.

From the discussion above, it is clear that the Constitution has given the provinces a significant voice in national legislative matters. The Constitution's conception of spheres as opposed to tiers, the allocation of powers between the spheres, the existence of an upper house in which the provinces are given a considerable voice in legislative matters, all point to a federal design – or at the very least a quasi-federal design. It is submitted that the formal design of the Constitution exhibits the following characteristics indicative of federalism:

- (a) South Africa is a democratic state founded on a Constitution which symbolises a sacred contract or agreement with the people;
- (b) a formal entrenched Constitution which cannot be easily amended;
- (c) a Constitutional Court as the highest Court and which has the authority to interpret the Constitution;
- (d) the division of powers between two or more spheres of government; and
- (e) a second House of Parliament (the NCOP) which is dedicated to the sub-national government.

In its design, the Constitution also displays many of the characteristics of the integrated model of federalism: a system which divides powers between the spheres of government in a manner which allows for concurrent or overlapping powers; a formalised system of intergovernmental

²²⁸ Constitution: s 156(2). See also *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 2.

²²⁹ Constitution: s 154(1).

relations; the ability of the provinces and national government to raise their own revenue (at least in theory); and the integration of the provinces in the national legislative process via the NCOP. However, this is not conclusive of the matter – there are also many factors which point to a unitary system. The existence of both federal and unitary characteristics in the design of the Constitution gives it a unique character. These contradictory elements have influenced the evolution of constitutional law and administrative practice to varying degrees and have resulted in a type of ‘institutional schizophrenia’ in certain instances. This has contributed to the academic debate on the nature of the South African Constitution. As discussed earlier, the Constitution does not expressly use the terms ‘federal’ or ‘unitary’ – however, it is submitted that the Constitution is quasi-federal in nature. This quasi-federal character of the Constitution’s design, combined with the institutionalised autonomous features of local government, has influenced the development of the Constitution in a manner which supports the view that the Constitution establishes a quasi-federal system.

CHAPTER 3

COOPERATIVE GOVERNANCE

3.1 Introduction

The functioning of government in decentralised states depends on effective cooperation between the spheres. Poor coordination between the spheres impacts negatively on government's capacity to implement its policies and programmes. This, in turn, negatively affects the delivery of services to communities. In Chapter 2, the constitutional distribution of powers between the three spheres of government in South Africa was discussed. This chapter examines the evolution of the practice of cooperative government and intergovernmental relations and its impact on effective administration in South Africa.

The coordination of government occurs daily across a multitude of institutions, government structures, and a complex web of relationships between officials and political representatives in all spheres of government. An examination of cooperative governance is a complex exercise – it involves the examination of institutional systems for cooperative governance together with the myriad relationships between the spheres. In a broad sense, all the chapters in this thesis involve an examination of different aspects of the relationship between the spheres. However, the current chapter focuses on the constitutional and legislative scheme for cooperative governance, the practice of government for managing intergovernmental relations, and a selection of cases in which intergovernmental disputes have come before the courts. The discussion is divided into cooperative governance practice before the enactment of the intergovernmental relations legislation envisaged by the Constitution, and practice following its enactment. The focus is on the efficacy of the system of intergovernmental relations and the institutions and systems through which it occurs.

3.2 South African Cooperative Governance

Intergovernmental cooperation may take place informally as in the Canadian tradition, or it may take place in a structured manner in governments where there has been an effort to formalise and institutionalise intergovernmental relations. As discussed earlier, under the influence of the German federal model the drafters of the South African Constitution opted for

institutionalised cooperation mechanisms. The division-of-powers provisions in our Constitution are complex. As a result, the complexities associated with governance in a decentralised system demand care and skill. Otherwise effecting coordination and cooperation of the spheres can be difficult. The model of cooperative governance can either promote integration or foster decentralisation. For example, practice has shown that the Canadian model of intergovernmental relations, which has no formal and institutionalised structures, favours decentralisation. On the other hand, the German model of institutionalised intergovernmental relations has distinct integrated elements. Over time, this has tended to influence intergovernmental relations in Germany in a manner which enhances central government's dominance over policy and decision-making.

A distinction can be drawn between cooperative government and intergovernmental relations. The former Department of Constitutional Development explained in its Discussion Document on Cooperative Governance, that cooperative government represents the basic values of the Constitution as set out in section 41(1) of the Constitution as well as the implementation of these values through the establishment of structures and institutions. Cooperative government, therefore, is a constitutional norm and represents a fundamental philosophy of government which governs all aspects and activities of government and includes de-concentration of power to sub-national spheres of government. It encompasses the structure of government as well as the organisation and exercise of political power.²³⁰ It is concerned with institutional, political, and financial arrangements for interaction between the spheres of government. Cooperative government is about partnership government and the values associated with it, such as national unity, proper cooperation and coordination, effective communication, and the avoidance of conflict. Intergovernmental relations is one of the means through which the values of cooperative government can be given both institutional and statutory expression.²³¹

The term intergovernmental relations refers to the complex and interdependent relationships between the different spheres of government and the coordination of public policies in national, provincial, and local governments through programme-reporting requirements, grants in aid, the planning and budgetary process, and informal communication between officials.²³² It is

²³⁰ Department of Constitutional Development 'Discussion Document on Strategic Issues and Options for Policy on Co-operative Government and Intergovernmental Relations' (1999) 4.

²³¹ Ibid at 12.

²³² Fox & Meyer *Public Administration Dictionary* 66.

important to distinguish between statutory bodies with legislative backing and non-statutory bodies which are constituted by government for a specific task.²³³ In his definition, Ile emphasises that intergovernmental relationships are directed towards achieving common goals through vertical and horizontal arrangements across all spheres of government. The primary goal, therefore, is to enable government activities, to sustain democracy, and to strengthen service-delivery capacity across all spheres of government for the common good.²³⁴ As pointed out in the introduction, the link between intergovernmental relations and service delivery is an important one as poor coordination can negatively impact on service delivery. The increase in service-delivery protests has rekindled interest in the debate around good governance. The increased service-delivery riots may be linked to poor coordination, institutional flaws, a skills deficit, poor management, ethical concerns in the public sector, and challenges in the interpretation and implementation of the division-of-powers provisions in the Constitution.

Older foreign constitutions, such as that of the United States of America (USA/US), paid scant regard to the notion of intergovernmental relations. It was only in the 1930s that the theory of inter-state cooperation began to take shape in the US. This was prompted by an increase in federal activities and responsibilities.²³⁵ Since then, Australia, Austria, Canada, Germany, Switzerland and the USA have developed voluntary, legal, formal and informal networks to facilitate intergovernmental relations.²³⁶ The search by the Constitutional Assembly for case studies increasingly pointed to the German constitutional model of cooperative relations with the result that sections of the South African Constitution are based on provisions in the German Constitution.²³⁷

In Germany, the relationship between the *Bund* and the *Lander* is based on the German concept of *Bundestreue*. The German Constitutional Court has described *Bundestreue* as ‘the constitutional obligation of trust and friendship that the *Bund* and the *Lander* have towards each other’.²³⁸ De Villiers describes this concept as an unwritten constitutional norm which is

²³³ Kuye, Thornhill & Fourie *Critical Perspectives on Public Administration* 45.

²³⁴ Ile (2010) 7 *Journal of US-China Public Administration* 53 available at upan1.un.org/intradoc/groups/public/documents/UN-DPADM/UNPAN044562.pdf accessed on 30 September 2017.

²³⁵ De Villiers (1994) 9 *SA Public Law* 430 at 431.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid* at 432.

dynamic and given content by the German Courts on a case-by-case basis as new problems arise and need to be addressed.²³⁹ He cites the following practical examples of the application of the principle:

- (a) the obligation of the economically stronger *Lander* to render support to the weaker Lander;
- (b) the duty of the respective levels of government to cooperate on matters of common concern;
- (c) the responsibility to take each other into account in the exercise of constitutionally allocated powers, such as the right to enter into treaties and the way that this affects others; and
- (d) to respect the interests of other *Lander* and/or of the *Bund* whenever a matter has implications wider than those affecting one particular *Land* – especially when the wider implications are financial.²⁴⁰

Bundestreue requires both levels of government to cooperate and to consult one another on matters of common interest. De Villiers describes this as a philosophical and legal basis from which to conduct intergovernmental relations in a multi-tiered system. In Germany, the application of *Bundestreue* has given rise to a network of relationships and agencies operating in the complex area of intergovernmental relations.²⁴¹

The German concept of *Bundestreue* has been given expression in Chapter 3 of the South African Constitution, immediately following the Bill of Rights. Its position in the structure of the Constitution suggests its prominence as a definitive cornerstone of the institutional design of government. The Cooperative Government Chapter in the Constitution begins with the words: ‘In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated.’²⁴² As has been canvassed in previous chapters, this provision encapsulates a move towards a form of decentralised government with all three spheres having the powers required to operate with a degree of autonomy in their individual areas of jurisdiction. In addition, section 40(1) emphasises the interrelatedness and interdependence of the three spheres. Section 40(2) binds all spheres of government to observe and adhere to the principles of cooperative governance set out in the Constitution.

The principles of co-operative government bind all spheres of government and all organs of state. They must:

- (a) preserve the peace, national unity and the indivisibility of the Republic;

²³⁹ Ibid.

²⁴⁰ Ibid at 433.

²⁴¹ Ibid at 434.

²⁴² Constitution: s 40(1).

- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, and accountable and coherent government for the Republic as a whole;
- (d) be loyal to the Constitution, the Republic, and its people;
- (e) respect the constitutional status, institutions, powers, and functions of government in the other spheres;
- (f) 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
- (g) 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) coordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.²⁴³

The Constitution provides that an Act of Parliament must be passed which establishes structures and institutions to promote and facilitate intergovernmental relations and to provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.²⁴⁴ Organs of state are discouraged from resorting to court proceedings against each other in an attempt to settle disputes. Section 41(3) provides that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose. The section requires that all possible remedies must be exhausted before resort is had to a court to resolve a dispute.²⁴⁵ In adjudicating any dispute between organs of state, a court must refuse to hear a matter where the parties have not exhausted all remedies in trying to resolve the dispute before approaching the court.²⁴⁶ The legislation envisaged by section 41(2) was not immediately passed by Parliament, leaving the courts to adjudicate intergovernmental matters by interpreting and applying the cooperative governance principles in the Constitution.

During the period between the adoption of the Constitution and the adoption of the legislation required by it, courts' only form of guidance was the interpretation of cooperative governance in the *First Certification Judgment*.²⁴⁷ In its judgment, the Constitutional Court considered the

²⁴³ Constitution: s 41(1).

²⁴⁴ Ibid s 41(2).

²⁴⁵ Ibid s 41(3).

²⁴⁶ Ibid s 41(4).

²⁴⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 291.

meaning of the cooperative government provisions of the Constitution, and in particular the injunction that organs of state are to avoid legal proceedings against each other in section 41(1)(h) which provides that: ‘All spheres of government and all organs of state within each sphere must cooperate with one another in mutual trust and good faith by avoiding legal proceedings against one another.’ The Court pointed out that this section must be read in conjunction with section 41(3) which requires that an organ of state ‘involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a Court to resolve the dispute.’ If, in the opinion of the Court, any organ of state has not complied with the requirements of section 41(3), it may refer the matter back to the organ of state involved.

It was contended before the Constitutional Court that these provisions represented an undue limitation of the autonomous powers of the provinces. The Court found that the provisions bind all departments of government in the national, provincial, and local spheres. The requirement was interpreted to mean that where possible, disputes should be resolved at a political level rather than through adversarial litigation. In the Court’s view, this provision did not oust the jurisdiction of the Courts to adjudicate disputes between the three spheres, nor did it limit the powers of any government sphere as prescribed by the Constitution.²⁴⁸

As discussed above, the general framework legislation envisaged by the Constitution was only passed by Parliament ten years after the adoption of the 1996 Constitution. In the interim, various fora were created to facilitate intergovernmental cooperation. Significant developments also occurred in the area of fiscal intergovernmental relations starting with the adoption of legislation in 1997.²⁴⁹ These developments impacted on the evolution of intergovernmental relations in a specific way. In the following section the development of intergovernmental relations during the period between the adoption of the interim Constitution and the promulgation of the Intergovernmental Relations Framework Act is considered.²⁵⁰

²⁴⁸ Ibid para 291.

²⁴⁹ Intergovernmental Fiscal Relations Act 97 of 1997.

²⁵⁰ Intergovernmental Relations Framework Act 13 of 2005.

3.3 Early practice of Intergovernmental Relations

3.3.1 Intergovernmental Relations Structures

(a) Introduction

As discussed above, before the adoption of the Intergovernmental Relations Act, cooperation between the three spheres of government was largely governed by the provisions of the Constitution. A number of intergovernmental relations (IGR) structures were established to manage the vertical and horizontal coordination of government activities. These structures can be divided into structures created by law (statutory or legislative IGR structures) and structures created by executive decision. Examples of statutory structures include the NCOP (National Council of Provinces), the Budget Council, the Financial and Fiscal Commission, the Local Government Budget Forum, and the Council of Education Ministers and the Heads of Education Department Committee. Executive (or non-statutory) IGR structures include the Intergovernmental Forum established by President Mandela, the President's Coordinating Council (established by President Mbeki), the IGR Committees of Ministers and Members of Provincial Executive Councils (MinMecs), and the Forum for South African Directors-General (FOSAD).

(b) National Council of Provinces

Possibly the most important intergovernmental relations body created by the Constitution is the NCOP which is created by section 60 of the Constitution.²⁵¹ The purpose of the NCOP is to provide a forum for the inclusion of provincial and local government interests in the national legislative process. Each province is represented by a delegation of ten members headed by the provincial Premier. The NCOP has a role in the approval of a national intervention in a province for failure to perform an executive function in terms of section 100(2) of the Constitution. The NCOP also plays a role when either national or provincial government intervene in a municipality in terms of section 139 of the Constitution. It must also review the halting of the transfer of funds to a province by Treasury in terms section 216(3) of the Constitution for

²⁵¹ Constitution: s 60.

breaches of sound financial management by that province. Finally, it participates in the Judicial Services Commission in order to ensure that provincial interests are taken into account in the appointment of judges.²⁵²

As regards the NCOP's legislative oversight role, the Constitution provides different processes by which it may consider the following categories of legislation – Bills amending the Constitution; money Bills; ordinary Bills not affecting the provinces; and ordinary Bills affecting the provinces. The NCOP may consider, pass, amend, propose amendments to, or reject any legislation before it. It is empowered to initiate legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but it may not initiate money Bills.²⁵³

In terms of section 44(1)(b) of the Constitution, the support of six of the provinces in the NCOP is required in order to amend the Constitution. Two separate procedures are set for the adoption of legislation in sections 75 and 76. These procedures distinguish between ordinary Bills affecting the provinces and ordinary Bills not affecting the provinces. As regards ordinary Bills not affecting the provinces, the NCOP may consider the Bill and either pass it with or without amendments or reject it. On receiving the Bill from the NCOP, the NA may take the amendments proposed by the NCOP into account or reject them and pass the Bill in its original form.

The NCOP has a greater say with regard to section 76 Bills – referred to as ordinary Bills affecting the provinces. Here an impasse between the two Houses of Parliament (NCOP and NA) is referred to the Mediation Committee (MC). The MC may agree to the Bill as passed by the NA, the amended Bill passed by the NCOP, or a different version of the Bill. If the MC cannot break the deadlock, the Bill lapses unless the NA again passes it. However, an increased majority of two thirds is required to pass the Bill in these circumstances.²⁵⁴

The Constitution replaced the Senate with the NCOP. The Constitutional Court considered the impact of these changes and their compliance with the constitutional principles in the *First*

²⁵² Section 178(i) of the Constitution provides for the appointment of four provincial representatives to the Judicial Services Commission.

²⁵³ Constitution: s 68.

²⁵⁴ *Ibid* s 76.

Certification Judgment. In the Court's view the Senate 'had not been constituted in a manner that is calculated to promote provincial interests' because it had been put together to represent party political interests. In relation to the changes made to the Constitution and the powers of the provincial house, the Court stated that although it was satisfied that the structure and functioning of the NCOP was better suited to the representation of provincial interests than the structure and functioning of the Senate, it was not able to say that the collective interest of the provinces would necessarily be better served by the changes.²⁵⁵

The question that arises is whether, in practice, the NCOP has contributed to provincial autonomy. There were early indications that the NCOP was not, in fact, living up to its potential to represent collective provincial interests in the legislative process. Writing in 1997, Devenish noted that the functioning of the NCOP had been sharply criticised in the media. He cited examples of the NCOP rubber-stamping Bills referred to it within a very short period – for example, in November 1997 some 30 Bills were sent to the NCOP and were passed in only three days.²⁵⁶ Early practice in the NCOP appeared to confirm this initial impression that proceedings in the upper house of Parliament had little effect on the legislation passed in the NA. Consequently, in 2008 the parliamentary assessment report found that the NCOP was not fulfilling its constitutional mandate to represent provincial interests in the law-making process. The report found a number of institutional weaknesses in the functioning of the NCOP which negatively impacted on its performance, including that its committees were not aligned with provincial mandates and interests under the Constitution.²⁵⁷

In contradistinction to the findings in the parliamentary assessment report, Mafilika conducted a study of the legislation considered by the NCOP during the period of the third Parliament (2004 to 2009) and concluded that the NCOP remained relevant and had achieved its constitutional mandate of representing the interests of provinces.²⁵⁸ Mafilika's study consisted of a quantitative and qualitative assessment of Bills considered by the NCOP during the period under review. In the study, Bills were divided into the constitutional categories for the passing of legislation – Bills amending the Constitution, ordinary Bills not affecting the provinces (s

²⁵⁵ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) paras 330–1.

²⁵⁶ Devenish (1997) 4 *South African Human Rights Yearbook* 42.

²⁵⁷ Parliament of RSA 'Report of the Independent Panel Assessment of Parliament' (2008) available at <https://pmg.org.za/policy-document/63/> accessed 23 September 2017.

²⁵⁸ Mafilika *Impact of the National Council of Provinces* available at etd.uwc.ac.za/bitstream/handle/11394/3613/Mafilika_LLM_2013_pdf?sequence=1 accessed on 9 October 2017.

75 Bills); ordinary Bills affecting the provinces (s 76 Bills); money Bills (s 77 Bills); and mixed Bills (Bills with aspects falling under both ss 75 and 76 and which were split by the State Law Advisor before entering the legislative process but reconstituted into a single piece of legislation after the public participation and legislature processes had been completed). She found that the NCOP frequently considered and passed section 75 Bills on the same day. One possible reason for this is that the NCOP's powers insofar as section 75 Bills are limited. While it may delay the enactment of a section 75 Bill, it cannot prevent the enactment of such a Bill.

The Constitution gives the NCOP a greater say in respect of section 76 Bills, but provides for two different procedures which allow such a Bill to be introduced either in the NA or in the NCOP. Although Parliament dealt with 38 section 76 Bills during the relevant period, only nine were introduced in the NCOP. The remaining 29 were all introduced in the NA. The study notes in this respect that the preference for introducing section 76 Bills in the NA, as opposed to the NCOP, was anonymously explained by a Cabinet Minister as the preferred option because of the likelihood that the NCOP would feel pressured to agree to a Bill which had already been passed by the NA. This has the added advantage of speeding up the passage of Bills through the legislature.²⁵⁹

In her study, Mafilika also notes that all nine of the Bills that were introduced in the NCOP were amended by the House. As regards the quality of the amendments, while most changes were grammatical, 'in some Bills there were both technical and substantive amendments'.²⁶⁰ She states that the number of Bills introduced in the NCOP is insufficient to compare the quality of amendments between Bills introduced in the NCOP and those introduced in the NA. Only two Bills were referred to the Mediation Committee. The study found that:

- (a) Bills amending the Constitution comprised 2% of all Bills considered during the Third Parliament. The NCOP played a role in both Bills.
- (b) Section 75 Bills made up 69% of all Bills during the Third Parliament. The NCOP considered these Bills only superficially and passed them on the same day as they are introduced; and
- (c) Only 17% of Bills dealt with during the Third Parliament were section 76 Bills. Most were introduced in the NA as opposed to the NCOP. The NCOP proposed both grammatical and substantive changes.

²⁵⁹ Ibid at 48.

²⁶⁰ Ibid at 49.

Therefore the NCOP has fulfilled its constitutional mandate of representing the provinces interests in the legislative process.²⁶¹

On the basis of these findings, the study recommended that:

- (a) the NCOP should assess whether it wants to use its limited resources to play a role on section 75 Bills;
- (b) the NCOP's role in respect of section 76 Bills should be strengthened by requiring the executive authority to introduce more section 76 Bills in the NCOP;
- (c) the electoral process should be reviewed with a view to granting the delegates in the NCOP greater political power to represent the electorate;
- (d) the NCOP should reprioritise its work and limit its committees to focus on issues of provincial competence; and
- (e) it would be useful to conduct research on the meaning of 'provincial interests' in order to assess whether the NCOP has indeed fulfilled its constitutional mandate.²⁶²

While one may agree with Mafilika's recommendations, it is submitted that the conclusion that the NCOP has achieved its constitutional mandate of representing the interests of the provinces is not supported by the evidence. In the first place, the reluctance of the Executive to introduce section 76 Bills in the NCOP needs to be addressed. The likelihood that this is done in order to subvert the legitimate right of the provinces to make an input in legislation affecting them is a cause for concern. In this regard, the fact that the members of the NCOP are *de facto* politically subordinate to the members of the NA may be the underlying issue. Indeed, the fact that a Cabinet Minister has anonymously stated that Ministers prefer to introduce Bills in the NA because the NCOP will not make changes once the NA has approved a Bill, is troubling. These difficulties could be what was envisaged by the Constitutional Court when it was not prepared to find that the composition and powers of the NCOP would ensure that provincial interests would trump party-political interests. It is submitted that in preferring to introduce section 76 Bills in the NA, the Executive may not be complying with the spirit of the constitutional provisions regulating cooperative government.

The conclusion that the NCOP is representing provincial interests is not supported by the study producing examples of substantive amendments introduced to section 76 Bills. In this regard, the fact that there were only two referrals to the Mediation Committee during the period under

²⁶¹ Ibid at 61–3.

²⁶² Ibid at 63–5.

review may be indicative of the fact that NCOP members are reluctant to make substantive changes. This may be because they are in practice politically subordinate to the members of the NA. Many authors have highlighted the fact that due to the manner in which the ANC list-system works, the ‘best’ candidates have already been deployed by the time the NCOP composition is decided.²⁶³ This may contribute to a skills deficit in the NCOP which may in turn affect the quality of inputs made into the legislative process. Whatever the cause, the study fails to provide convincing evidence of substantive amendments to section 76 Bills considered by the NCOP. It is submitted that this omission detracts from the credibility of the finding that the NCOP is indeed fulfilling its constitutional duty to represent provincial interests.

Furthermore, the author neither considers nor discusses the *First Certification Judgment* and the reluctance of the Constitutional Court to declare that the NCOP is constituted in a manner which will advance provincial interests. It must be borne in mind that the independent review of Parliament conducted in 2008 concluded that the NCOP was not fulfilling its constitutional mandate to represent the interests of the provinces. It is submitted that there is a difference between a finding that the representation of provincial interests in the legislative process is a legitimate constitutional aim, and a finding that the NCOP is actually fulfilling its purpose to represent provincial interests. If the NCOP is not fulfilling its role adequately, one must ask why this is so. Is it due to structural, institutional difficulties with the way in which the NCOP is constituted? Or is it a result of political factors such as a preference for centralised policy and law making within the ANC? Or perhaps a combination of these factors? It is submitted that this is an area which could benefit from reform. A sound argument can be made for strengthening the composition and functioning of the NCOP so as to enhance its participation in the legislative process. It is submitted that this review should seek to effect changes to the composition and functioning of the NCOP and the system should be revised in order to promote the advancement of provincial interests over party-political concerns. Also, the discretion to initiate legislation affecting the provinces in the NA as opposed to the NCOP should be removed from the Constitution so that all section 76 legislation is introduced in the NCOP.

²⁶³ De Vos ‘Don’t say goodbye to the NCOP yet’ available at <http://constitutionallyspeaking.co.za/dont-say-goodbey-ncop-yet/> accessed on 6 September 2019.

(c) *Intergovernmental Forum*

The Intergovernmental Forum (IGF) was formally established after the implementation of the interim Constitution as a forum for national Ministers and Premiers (and sometimes the President) to meet. It was institutionally located in the Department of Provincial and Local Government (although Intergovernmental Relations matters had previously been dealt with by the former Department of Constitutional Development). The IGF was South Africa's first attempt at an inclusive IGR structure where officials and politicians could meet to discuss strategically important matters. The terms of reference of the IGF were:

- (a) to promote consensus between spheres of government;
- (b) to ensure implementation of identified programmes;
- (c) to provide a multilateral, intergovernmental, policy planning and implementation directive platform;
- (d) to provide a strategic political platform for policy dialogue, intergovernmental consultation, co-ordination, consultation and joint decision making between political executive office bearers and the bureaucracy across all three spheres of government; and
- (e) to facilitate interaction at the highest political level.²⁶⁴

Initially the IGF met monthly, changing later to bi-monthly as its workload decreased. Mathebula states that the IGF operated like an 'un-elected Parliament' because there was no limit on the issues it discussed. This led to its eventual demise.²⁶⁵ The last mention of IGFs in the literature noted that participants in the IGF had expressed frustration with the body's functioning due to its want of a clear mandate.²⁶⁶ This, together with its unwieldy size eventually led to its failure. It was replaced by the President's Coordinating Council.

(d) *President's Coordinating Council*

The President's Coordinating Council (PCC), which replaced the IGFs, emerged from discussions during the 1999 Intergovernmental Forum Conference. It consisted of the President, the Minister of Provincial and Local Government, and provincial Premiers.

²⁶⁴ Department of Provincial and Local Government 'The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government' (1999).

²⁶⁵ Mathebula *Intergovernmental Relations Reform* 162.

²⁶⁶ Layman T 'Intergovernmental Relations and Service Delivery in South Africa: A Ten year review commissioned by the Presidency' (2003) available at <http://sarpn.org/documents/d000078751docs/Layman%20Tim.pdf> accessed on 23 September 2017.

Organised local government attends by invitation. The PCC was intended to have a more limited focus than the IGF by concentrating on provincial governance and providing national government with a forum for oversight, monitoring, and evaluation of provincial government. It was retained when the intergovernmental relations legislation was enacted and is discussed further below.

(e) *MinMecs*

MinMecs were set up for all functional areas in which national and provincial governments have concurrent powers under the Constitution as a forum for the national Ministers and provincial MECs to meet. The MinMecs were set up on the instruction of Cabinet by individual national departments. Cabinet provided no directives for the establishment and functioning of the MinMecs; this was left to national departments' discretion.²⁶⁷ The generic terms of reference for MinMecs are:

- (a) the provision of mutual advice on sectoral issues;
- (b) anticipating potential areas of inter-governmental conflict;
- (c) co-ordinating the policy and legislative development process;
- (d) determining long and short term priorities within a national framework;
- (e) discussion of fiscal and budgetary matters affecting the provincial sphere of government; and
- (f) exchanging information and discussing any matter referred to it by participating executives.²⁶⁸

Only the financial and education sectors have formalised their structures into statutory bodies.²⁶⁹ The SALGA represents local government when local government matters are discussed.

One of the early areas of concern regarding the functioning of MinMecs was the overlapping of functional areas between departments – especially provincial departments. De Villiers notes that:

²⁶⁷ Ibid at 210.

²⁶⁸ Department of Provincial and Local Government 'The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government' (1999) 36.

²⁶⁹ Layman T 'Intergovernmental Relations and Service Delivery in South Africa: A ten-year review commissioned by the Presidency' (2003) at 13 available at <http://sarpm.org/documents/d000078751docs/Layman%20Tim.pdf> accessed on 23 September 2017.

[I]n some provinces functional areas such as health, welfare and culture are combined in one department, while at the national level there are three separate departments. Some of the consequences of this asymmetry are that provincial departments in many cases do not have the know-how to provide policy inputs that equal those of national departments; that policy initiatives are de facto under the control of national departments; and that provincial departments are stretched to their limits to attend and prepare for all the monthly meetings with their national counterparts.²⁷⁰

This problem was meant to be addressed to some extent by the introduction in 1999/2000 of the new cluster system in Cabinet in terms of which the work of ministries and departments in related functional areas is 'clustered' together. This system also provides for the inclusion of provincial directors-general to allow for provincial participation.²⁷¹

(f) *Cabinet Cluster System*

In the South African system, the Cabinet consists of the President, the Deputy President, and the ministers of the various government departments. Historically, the South African Cabinet operated as a committee system. However, a review to evaluate government's performance commissioned by President Mandela, recommended that the twelve inter-ministerial committees operating at that stage be rationalised and clustered into more manageable service-delivery areas.²⁷² Under the Mbeki administration, a Cabinet system similar to the British super ministerial cabinet system was adopted.²⁷³ Six Cabinet cluster committees were established, chaired by the President or Deputy President and managed by the Cabinet Office located in the Presidency (later revised to five Cabinet clusters). Cabinet committees meet at least once, but not more than twice a month. The clusters are replicated by meetings of Directors General (DGs) which act as a clearing house for policies and submissions intended for submission to the Cabinet cluster meeting. 'Working groups' of lower level officials, in turn constitute another committee for each cluster which clears documents intended for the cluster DGs' meeting. Through its managing committee, the Forum of South African Directors General (FOSAD) sits as the coordinating and oversight structure of the DG cluster committees.

²⁷⁰ Ibid at 208.

²⁷¹ Ibid.

²⁷² Mathebula *Intergovernmental Relations Reform* 177.

²⁷³ Mathebula *Intergovernmental Relations Reform* 177.

(g) Operation of the Cabinet Cluster system²⁷⁴

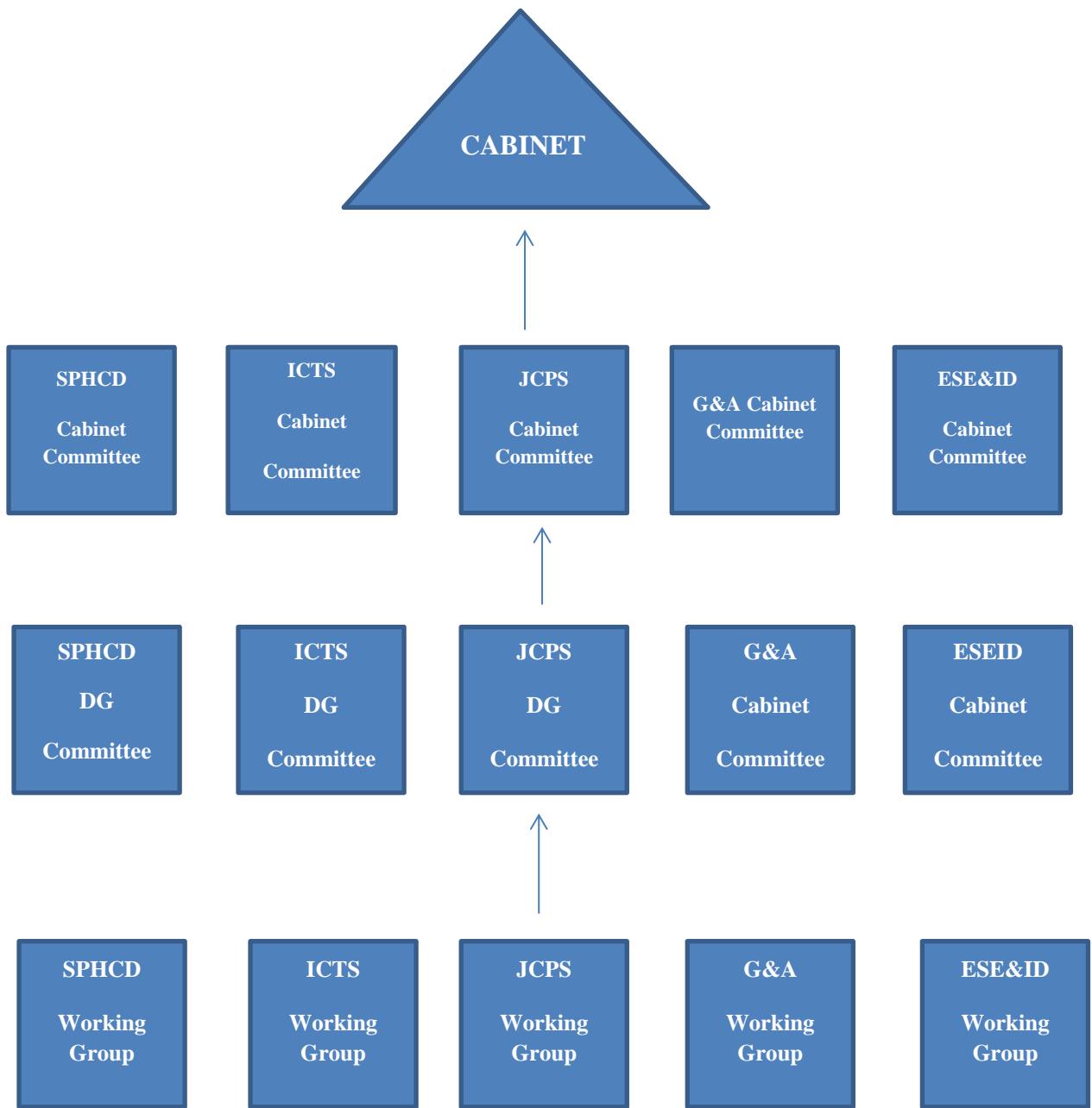


Figure 1 Cabinet Cluster System

What follows is an example of how the system works in practice.

²⁷⁴ SPHCD - Social Protection, Community and Human Development; ICTS – International Co-operation, Trade and Security; JCPS – Justice, Crime Prevention and Security; G&A – Governance and Administration; and ESEID - Economic Sectors, Employment and Infrastructure Development.

The Department of Justice and Constitutional Development wishes to initiate a policy on courts to deal with sexual offences. The policy is first introduced in the Justice, Crime Prevention, and Security (JCPS) Officials' working meeting. The officials representing the various departments in the cluster examine the proposal and either send it back to the Department of Justice and Constitutional Development for amendment, or agree that it may proceed to the next level. Once cleared, the policy is submitted to the JCPS DGs meeting. The JCPS DG's meeting then scrutinises the document and either sends it back to the initiating department for amendment, or agrees that it may be tabled at the Cabinet Cluster Committee by the relevant DG. If given the go-ahead, the DG presents the proposed policy at the next ministerial Cabinet Committee meeting for recommendation and onward transmission to Cabinet. The diagram above illustrates the structure of the cabinet cluster system and how work advances through the system.

According to Mathebula, the value of the cabinet cluster system is that it increases collective control of Ministers and the President over policy matters.²⁷⁵ However, it is submitted that the system has a number of disadvantages.

- (a) There is duplication of work – the same policy has to be submitted to three different committees consisting of increasingly senior officials, and each committee conducts exactly the same inquiry.
- (b) The process is time consuming and cumbersome – it can take months for a single policy to reach Cabinet.
- (c) The responsibility of individual Cabinet Ministers over their portfolios is diluted.
- (d) The expertise of subject specialists is diluted and policies are subjected to changes introduced by officials who may not be subject experts in the particular area under discussion.
- (e) There is an inherent risk of 'lowest-common-denominator' outcomes on policy matters as there are many 'decision makers' to satisfy.
- (f) Democratic consultation processes followed by the initiating departments during the drafting process may be subverted by policy changes introduced at the last minute by the various officials who have authority to make an input as the policy traverses the system.

²⁷⁵ Ibid at 178.

- (g) The difficulty of coordinating meetings especially for senior officials means that lower-level officials are often delegated work which ought to have been attended by DGs. This is seen especially at DG cluster meetings.
- (h) Costs are multiplied because of the multiplicity of meetings officials must attend.
- (i) There is a great deal of coordination required to comply with the technical and procedural aspects of the process as well as to coordinate the administrative and political centres which are based in Pretoria and Cape Town respectively.
- (j) A policy with a subject matter that straddles several clusters will have to be processed through each of these clusters, a cumbersome and time consuming exercise, which tends to be repetitive for the line department proposing the policy. The increase in the number of officials who must ‘approve’ the policy carries with it the risk of multiple amendments.
- (k) Interactions in the various committees are often coloured by a competitive and adversarial spirit as opposed to one of cooperation.
- (l) Finally, sub-national government in the form of local government, is not represented at any time – not even where policies affecting these levels are discussed.

It is submitted that there may be a need to review how the cluster system functions in order to address the issues identified above. Of particular concern is the reduction in accountability, the dilution of expertise, the possibility of lowest-common-denominator outcomes, and the lack of effective representation of sub-national governments in the process of adopting policies and legislation. It is submitted that this is an area that could benefit from reform.

The area of accountability is also important as it is linked to the democratic ideals expressed in our Constitution. This, in turn, is linked to the way in which the current process subverts the policy choices of the responsible department as regards collective decision making. Finally, the issues of duplication and coordination need to be addressed in order to develop a more streamlined and cost effective process while still realising the goal of cooperative governance.

(h) *Forum of South African Directors-General (FOSAD)*

The various technical fora are meetings of the administration which come together to implement the decisions of the political intergovernmental relations structures. The most important of these is the Forum of South African Directors-General (FOSAD) which consists

of national and provincial DGs.²⁷⁶ How the FOSAD participates in cooperative governance via the cluster system has been described in the preceding section.

(i) *Fiscal and Financial Commission*

The Fiscal and Financial Commission (FFC) was established by the interim Constitution to advise government on the financial and fiscal requirements of the provincial, national, and local spheres of government. Its functions included advice on fiscal policy, ensuring equitable distribution of resources, and setting criteria for the allocation of financial and fiscal resources.²⁷⁷ After its establishment on 25 August 1994, the FFC took at least eighteen months to begin to impact on the system.²⁷⁸ Unlike other intergovernmental relations bodies such as the Commission on Provincial Government whose significance waned with the adoption of the Constitution, the FFC's continued existence was ensured by its inclusion in section 220 of the Constitution. In addition, in order to clarify its role, the Financial and Fiscal Commission Act was adopted in 1997.²⁷⁹ This Act confirms the role of the FFC as a consultative body which makes recommendations and advises organs of state and the local, provincial, and national spheres of government on financial and fiscal matters.²⁸⁰

The Act further mandates that the FFC must first be notified of any decision to assign a power or functions to an organ of state in a different sphere of government. The FFC must be informed as regards the implications of the proposed assignment of power for the division of revenue raised nationally, any transfer of employees which may result, and, in the case of an assignment to a provincial or local body, information on the fiscal power, fiscal capacity, and efficiency of the relevant province or municipality. The organ of state wishing to assign the power must request the recommendation or advice of the commission on the assignment of power.²⁸¹

²⁷⁶ Layman Intergovernmental Relations and Service Delivery in South Africa: A ten-year review commissioned by the Presidency' (2003) at 14 available at <http://sarpn.org/documents/d000078751docs/Layman%20Tim.pdf> accessed on 23 September 2017.

²⁷⁷ Interim Constitution: s 199.

²⁷⁸ De Villiers (1997) 12 *SA Public Law* 197 at 206.

²⁷⁹ Financial and Fiscal Commission Act 99 of 1997.

²⁸⁰ *Ibid* s 3.

²⁸¹ *Ibid* s 3 (2A).

During the period immediately following the adoption of the Constitution, most developments in the area of cooperative governance involved financial matters. Consequently, the Intergovernmental Fiscal Relations Act (the Fiscal Relations Act) was enacted in 1997 with the aim of promoting cooperation between the national, provincial, and local spheres of government on fiscal, budgetary, and financial matters. In the result, the area of fiscal intergovernmental relations evolved at a fast rate and impacted on developments in other functional areas. A study of the early development of intergovernmental relations would therefore be incomplete without an examination of fiscal intergovernmental relations.²⁸²

The Intergovernmental Fiscal Relations Act established a Budget Council consisting of the Minister of Finance, and the MEC for finance of each province.²⁸³ The Budget Council is a consultative structure in which national and provincial government consult on fiscal, budgetary, and financial matters affecting provincial government as well as proposed legislation and policy with financial implications for the provinces.²⁸⁴ The Act also establishes a Local Government Budget Forum consisting of the Minister of Finance, the MEC for finance for each province, five representatives from the SALGA, and one representative from each of the provincial local government associations.²⁸⁵ The Local Government Budget Forum performs similar functions to the Budget Council but with a focus on local government financial matters. Part 3 of the Fiscal Relations Act sets out the process for revenue-sharing between the national, provincial, and local spheres of government.

The extent to which the administrative practice of government has supported the constitutional design for the division of powers can in part be reviewed by an examination of the fiscal practice of government. The recognition of the provinces as ‘spheres’ is given further support in the fiscal provisions of the Constitution.²⁸⁶ In line with its status as an equal partner with national government, the national government no longer ‘grants’ funds to the provinces but rather ‘transfers’ their share of revenue.²⁸⁷ The remainder of the constitutional provisions suggest provincial autonomy in fiscal matters. Provinces are accorded the freedom to allocate their resources as they see fit in section 226(1). In terms of section 217 of the Constitution,

²⁸² Intergovernmental Fiscal Relations Act 97 of 1997.

²⁸³ *Ibid* s 2.

²⁸⁴ *Ibid* s 3.

²⁸⁵ *Ibid* s 5.

²⁸⁶ Constitution: ss 214–215, 217, 227–228.

²⁸⁷ Van Zyl (2003) 22 *Politeia* 23.

provinces may determine their own policy for the procurement of goods and services, whilst national government's power is limited to determining a framework for the implementation of the policy. Section 227 guarantees provinces an equitable share in revenue raised nationally and contains provisions which protect provinces from arbitrary deprivation of funds allocated by the national government.²⁸⁸ Provinces are given the power to raise provincial taxes, levies, and other duties (with the exception of income tax, value-added tax, rates on property, or customs duties).²⁸⁹ Surcharges on national taxes are also permitted. In addition, provinces are granted authority by the Constitution to raise loans for capital or current expenditure (but loans for current expenditure may only be raised when necessary for bridging purposes).²⁹⁰ Read together, these provisions provide the provinces with the framework for a great deal of autonomy in financial administration. However, it appears that many of the laws and policies which have been adopted facilitate central government control of provincial government, including the Intergovernmental Fiscal Relations Act, the Division of Revenue Act, and the budget process and measures for expenditure control.²⁹¹

The Budget Council was established in terms of the Intergovernmental Fiscal Relations Act in order to coordinate financial relations between provincial and national government. The council operates by consensus and is permanently chaired by the Minister of Finance. Its recommendations go directly to the national Cabinet. Van Zyl describes the existence of a 'team spirit' culture where the broader national impact takes precedence over regional matters. The Budget Council does not discuss the vertical split which determines the total amount of

²⁸⁸ Section 216 of the Constitution provides that:

- (2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.
- (3) A decision to stop the transfer of funds due to a province in terms of section 214(1)(b) may be taken only in the circumstances mentioned in subsection (2) and-
 - (a) may not stop the transfer of funds for more than 120 days; and
 - (b) may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76(1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision of national treasury.
- (4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).
- (5) Before Parliament may approve or renew a decision to stop the transfer of funds to a provinces –
 - (a) the Auditor-General must report to Parliament; and
 - (b) the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee.

²⁸⁹ Constitution: s 228.

²⁸⁷ Van Zyl (2003) 22 *Politeia* 22.

²⁹¹ *Ibid* at 26.

money to be divided amongst the provinces, neither does the explanatory memorandum give any real basis for the allocation.²⁹²

The annual Division of Revenue Act is used by national government to set conditions for certain categories of revenue and expenditure such as the ‘supplementary allocations’. This incentivises the desired provincial behaviour. A system of sectoral review teams established by national Treasury monitor and influence programme allocations within the social sector departments.²⁹³ National government in this way secures indirect control over provincial government programmes and activities.²⁹⁴ Finally, the system of centralised wage bargaining has robbed provinces of a large measure of control over their budgets.²⁹⁵ The creation of a single public service further serves to increase central control of the provinces.

Van Zyl argues that the non-implementation of certain constitutional provisions and the manner in which others have been implemented, have facilitated central control over provincial revenue and expenditure.²⁹⁶ He advances four hypotheses to explain why this pattern has emerged.²⁹⁷ The first relates to the lack of administrative capacity on the part of provinces. The process of rationalising disparate administrative systems has further constrained administrative capacity. Differing skill levels, a shortage of skilled professionals, and difficulty in attracting skilled professionals further exacerbates the situation. Capacity shortages have often manifested as failed service delivery and failure to pay creditors.²⁹⁸

Secondly, Christiansen argues that the organisational culture of many provincial departments lacks any distinct ‘provincial identity’. This culture has resulted in provincial departments easily buying into the centralised system espoused by national Treasury.²⁹⁹ Thirdly, the system of cooperative governance subordinates provincial priorities to national imperatives.³⁰⁰

²⁹² Ibid at 27.

²⁹³ Ibid at 28

²⁹⁴ Ibid at 28.

²⁹⁵ Ibid at 22.

²⁹⁶ Ibid at 28–31.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Ibid at 32.

³⁰⁰ Ibid at 33.

The final factor driving central dominance in fiscal policy is a global shift in thinking on the relationship between budgets and policy towards a strategy which puts the budget and macro-economic balance before other policy considerations.³⁰¹ In terms of this school of thought, the macroeconomic framework drives decisions regarding expenditure, revenue, and borrowing in the annual budget. This results in top-down decisions based on whether or not expenditures are affordable which, in turn, results in rigid expenditure limits for line ministries and provinces.³⁰² Fiscal decentralisation is reduced in this model of thinking and sub-national governments are only free to fit into the spending limits set by the national Treasury. At provincial level, the model is again repeated with provincial treasuries setting the limits for provincial line departments. In this way provincial policy and autonomy are subordinated and rendered subservient to national policy.³⁰³

Calitz and Essop³⁰⁴ conducted a study of fiscal data to establish whether the constitutional and public-law argument that government in South Africa was becoming increasingly centralised could be established on an empirical basis. In their analysis three indicators were used: the grant dependency ratio which indicates the extent to which sub-national government is dependent on grants for revenue purposes; the tax coverage ratio which reflects the ability of sub-national government to finance its expenditure from its own tax revenue; and the tax-wage coverage ratio which measures the ability of sub-national government to fund salaries and wages from its own tax revenue.

The grant dependency ratio and the tax expenditure coverage ratio are mirror images under a balanced budget, while as regards the tax-wage ratio, data indicated that provinces were able to foot less than 3,5 per cent of their wage bills.³⁰⁵ The study concludes that over time, intergovernmental fiscal relations in South Africa have become increasingly centralised, leading to the *de facto* erosion of the quasi-federal state and a deviation from the Constitution. The study does not consider the implications of these findings in detail, but does note an analysis of 55 countries in two studies by Oates and Panizza which respectively found that country size and income per capita correlate negatively to fiscal centralisation. Panizza, in

³⁰¹ Ibid at 34–5.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Calitz & Essop (2013) 17(3) *South African Business Review* 131.

³⁰⁵ Ibid at 143.

addition, found that democracy and ethnic fractionalisation are negatively correlated with fiscal centralisation (although they have unstable coefficients).³⁰⁶

This section has considered the early development of intergovernmental relations. The discussion of fiscal intergovernmental relations above showed a tendency towards centralisation in the area of fiscal relations with national priorities trumping those of the other spheres of government. It is submitted that over time there has been a reduction in the role of the provinces. The discussion points to an emphasis on intergovernmental fiscal relations in early practice. A tendency towards centralisation in fiscal matters emerges from an examination of fiscal practice in the Budget Forum and the division-of-revenue process.

3.3.2 Judicial Interpretation

(a) Introduction

It was noted above that while the Constitution provided for the enactment of legislation to create structures and institutions to promote and facilitate intergovernmental relations, the envisaged legislation was only enacted a decade later. In the interim, the Constitutional Court decided intergovernmental disputes on the basis of the principles set out in the Co-operative Governance Chapter of the Constitution.³⁰⁷ In this section, three key judgments handed down prior to the enactment of the Intergovernmental Relations Framework Act³⁰⁸ are considered, namely: *Premier, Western Cape v President of the Republic of South Africa & Another*;³⁰⁹ *National Gambling Board v Premier of KwaZulu-Natal & others*;³¹⁰ and *Uthukela District Municipality & others v President of the Republic of South Africa & others*.³¹¹

³⁰⁶ Ibid at 137.

³⁰⁷ *Premier, Western Cape v President of the Republic of South Africa & another* 1999 (3) SA 657 (CC); *National Gambling Board v Premier of KwaZulu-Natal & others* 2002 (2) SA 715 (CC); *Uthukela District Municipality & others v President of the Republic of South Africa & others* 2003 (1) SA 678 (CC).

³⁰⁸ Intergovernmental Relations Framework Act 13 of 2005.

³⁰⁹ *Premier, Western Cape v President of the Republic of South Africa & another* 1999 (3) SA 657 (CC).

³¹⁰ *National Gambling Board v Premier of KwaZulu-Natal & others* 2002 (2) SA 715 (CC).

³¹¹ *Uthukela District Municipality & others v President of the Republic of South Africa & others* 2003 (1) SA 678 (CC).

(b) *Premier, Western Cape v President of the Republic of South Africa & another*³¹²

(i) The facts

This case concerned a dispute between the Western Cape provincial government and the national government over the constitutionality of amendments to the Public Service Act.³¹³ This case is important for a number of reasons – it addresses cooperative government and interprets the Chapter 3 requirements of the Constitution, but also has important implications for provincial autonomy and cooperation and coordination in the provinces in that it dealt with the structure of provincial administrations and the powers of Premiers. It is submitted that the decision in this case has had an inordinate impact on provincial autonomy and on the evolution of cooperative governance. For this reason, the facts of the case are considered in some detail.

Before the amendment to the Public Service Act, the public service was divided into the national government and provincial administrations. The provincial administration, headed by the provincial Director-General (DG), exercised administrative control over the provincial administration. The provincial administration was, in turn, further subdivided into departments. The new legislative scheme elevated provincial departments to the status of national departments, giving provincial heads of department (HODs) the same status, functions, and responsibilities as heads of national departments. This meant that provincial HODs would no longer fall under the administrative control of the provincial DG. The provincial DG's powers were amended so as to make him or her responsible for the administration of the Office of the Premier, intergovernmental relations, and cooperation between the various departments of the provincial administration, including coordination of their actions and legislation.³¹⁴ In addition, the provincial DG was to become the Secretary to the Executive Council of the province.³¹⁵

³¹² *Premier, Western Cape v President of the Republic of South Africa & another* 1999 (3) SA 657 (CC).

³¹³ Public Service Laws Amendment Act 86 of 1998.

³¹⁴ Public Service Act 103 of 1994: s 7(3) (c), (d).

³¹⁵ Public Service Act 103 of 1994: s 7(3) (c). See also *Premier, Western Cape v President of the Republic of South Africa & another* 1999 (3) SA 657 (CC) para 5.

(ii) The Western Cape Government's argument

The Western Cape government contended that the amendment was unconstitutional because it infringed on the executive power of the provinces to structure their administrations.³¹⁶ Although there was much argument before the Constitutional Court regarding whether the new scheme was substantively better or worse than the old scheme, the Court declined to enter into this area. Instead it confined itself to a consideration of 'whether Parliament has the competence to prescribe how provincial administrations in the public service are to be structured. It also considered whether the new legislative scheme falls foul of the cooperative governance provisions of the Constitution'.³¹⁷

(iii) The Judgment

The executive powers of provinces are set out in section 125 of the Constitution which provides:

- (1) The executive authority of a province is vested in the Premier of that province;
- (2) The Premier exercises the executive authority, together with the other members of the Executive Council, by –
 - (a) implementing provincial legislation in the province;
 - (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
 - (c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
 - (d) developing and implementing provincial policy;
 - (e) co-ordinating the functions of the provincial administration and its departments;
 - (f) preparing and initiating provincial legislation; and performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.
- (3) A province has executive authority in terms of subsection 2(b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).
- (4) ...
- (5) ...

³¹⁶ Ibid para 6.

³¹⁷ Ibid para 7.

- (6) The provincial executive must act in accordance with –
- (a) the Constitution; and
 - (b) the provincial constitution, if a constitution has been passed for the province.

The Constitutional Court noted that section 125 does not deal specifically with the power to structure the public service. The Western Cape government argued that the power to establish a structure for the provinces is implicit in section 125.³¹⁸ The Court then considered section 197 of the Constitution dealing with the structuring of the public service. Section 197 provides:

- (1) Within the public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day;
- (2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation;
- (3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause; and
- (4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.

The Constitutional Court reviewed section 197 in the *First* and *Second Certification Judgments* and noted that between the two judgments, the text of the Constitution had been amended to vest the power to ‘recruit, appoint, promote, transfer and dismiss’ employees in provinces. The text retained the power of national government to make laws for the structure and functioning of the public service.³¹⁹ This, in the Court’s view, supported the constitutional vision for a single public service. This ideal had to be balanced against provincial autonomy resulting in a compromise ‘that the framework set for the public service must be set by national legislation, but employment, transfers etc. are the responsibility of the various administrations of which the public service is composed.’³²⁰

With respect to the principle of cooperative government established by section 40 of the Constitution, the Constitutional Court noted that Chapter 3 of the Constitution is ‘designed to

³¹⁸ Ibid para 9.

³¹⁹ Ibid para 45.

³²⁰ Ibid para 46.

ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest.’ This requires that all reasonable efforts be made to settle a dispute before a Court is approached.³²¹

The need to cooperate in the area of law making was particularly emphasised by the Constitutional Court in order to avoid possible legislative conflicts and to settle matters related to implementation such as budgeting and the assignment of powers of enforcement.³²² Section 41(g) requires that: ‘All spheres of government and all organs of state within each sphere must 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.’ This provision reflects CP XXII, namely that ‘[t]he national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional and institutional integrity of the provinces.’

In the Constitutional Court’s view, section 41(1)(g) is concerned with the way in which a power is exercised. The purpose of the section

seems to be to prevent one sphere of government from exercising its powers in ways which undermine other spheres of government or prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.³²³

Turning to a consideration of whether the scheme contravenes section 41, the Constitutional Court noted that the scheme was adopted after comprehensive investigations which included the opportunity to make representations concerning the draft legislation. The scheme included amendments made to accommodate objections raised by the Western Cape government. The Court found that this government had not been deprived of any constitutional powers. The Premier retained the right to appoint members of the Executive Council, to establish departments, and to assign functions to departments. This, according to the Court, meant that

³²¹ Ibid para 54.

³²² Ibid para 56.

³²³ Ibid paras 57–8.

‘political direction and executive responsibility for the functions of provincial Governments remain firmly in the hands of the Premier and the Executive Council’.³²⁴ Members of the Executive Council appoint and give instructions to ensure that policy is implemented and that the department is administered efficiently.³²⁵ The scheme was found to be rational and consistent with the structure of government contemplated in the Constitution.³²⁶

The rationale for the Constitutional Court’s decision can be found in the *First Certification Judgment’s* consideration of the PSC provisions in the NT. The interim Constitution had provided for the establishment of provincial PSCs, a right which was removed in the Constitution which provides for the establishment of a single PSC. In the *First Certification Judgment*, this change was one of the reasons why the Court refused certification. It held that the effect of the change could not be adequately measured because the powers and function of the proposed single, national PSC were not set out. When the amended text was considered in the *Second Certification Judgment*, the Court found that ‘there had been a small diminution in the powers of the provinces arising out of the alteration in the functions of the PSC, the change in composition, and the disestablishment of the provincial service commissions.’³²⁷ A fuller discussion of the reasoning of the Constitutional Court on this issue is set out in 2.6 above.

(iv) Analysis

It is submitted that the acceptance by the Constitutional Court of this reduction in provincial powers in the *Second Certification Judgment* contributed to the erosion of provincial autonomy. In the *Premier Western Cape* case, the Court carried this reasoning further – in its view, the creation of a single public service implied that the power to structure the administration did not necessarily lie with provinces. It is submitted that the power of the provinces to administer themselves and to coordinate their functions and provincial administration and its departments contained in section 125 of the Constitution, should be interpreted to include the power to structure the provincial administration. It is further submitted that the substantive changes which were effected following this decision have led to

³²⁴ Ibid para 92.

³²⁵ Ibid paras 89–92.

³²⁶ Ibid para 93.

³²⁷ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997 (2) SA 97 (CC) para 198.*

fragmentation in provincial administrations and weakened the role and powers of provincial Premiers. This has, in turn, contributed to the erosion of provincial autonomy.

The Constitutional Court's interpretation of the cooperative governance provisions in the Constitution points to deference towards the executive – the Court avoided an evaluation of executive actions, and was careful to observe the separation of powers. Although considerable argument on the substance of the amendments and how they were better or worse than the previous scheme was presented, the Court declined to make a pronouncement. Instead it confined itself to a consideration of the legal question of whether Parliament had the power to structure provincial administrations.³²⁸ Secondly, the Court emphasised the duty of the spheres to cooperate with each other. It stressed the requirement that all reasonable efforts had to be made to settle disputes before a Court is approached.³²⁹ It is noteworthy that the Court considered and remarked upon the fact that the Western Cape government had been given an opportunity to make representations on the draft law, and that the law had been amended in order to accommodate certain of the objections raised.³³⁰ Finally, in its consideration of the cooperative governance provisions, the Court noted in relation to section 41(1)(g), that the section is primarily concerned with the manner in which a power is exercised – powers must not be exercised by one sphere in such a manner as to prevent another sphere from functioning effectively or in a manner which undermines the other sphere.³³¹

(b) *National Gambling Board v Premier of KwaZulu-Natal & others*³³²

In this case, the Constitutional Court had to consider a dispute between the National Gambling Board (NGB) and the Premier of KwaZulu-Natal. The dispute concerned whether there may be only one central electronic monitoring system (CEMS) in the Republic, or whether provinces are permitted to have their own monitoring systems. According to the facts, a process to identify a monitoring system suitable for South African needs was begun soon after the establishment of the NGB in terms of the National Gambling Act.³³³ This process was regularly discussed with members of the various provincial executive councils at MinMec meetings. At

³²⁸ *Premier, Western Cape v President of the Republic of South Africa & another* 1999 (3) SA 657 (CC) para 7.

³²⁹ *Ibid* paras 54-8.

³³⁰ *Ibid* para 90.

³³¹ *Ibid* paras 57-58.

³³² *National Gambling Board v Premier of KwaZulu-Natal & others* 2002 (2) SA 715 (CC).

³³³ National Gambling Act 33 of 1996.

the MinMec meeting on 30 August 1999, it was agreed that one centralised system might be more effective and efficient. A member of the KwaZulu-Natal executive was present at that meeting and did not object to the decision. Regulations providing for a single CEMS for the whole country were drafted in terms of the National Act. On 6 November 2000, the Premier wrote to the NGB, informing it that KwaZulu-Natal did not intend participating in a single CEMS, but would rather establish its own provincial system.³³⁴

On 11 February 2000, the regulations promulgated under the KwaZulu-Natal Gambling Act were amended by the addition of regulation 58(8) which provides that ‘the electronic monitoring system referred to in this Regulation, shall be a single one operated by the province or an entity contracted by the province which shall have no interest in respect of gaming in the province.’³³⁵ The amendment escaped the notice of both the Minister for Trade and Industry and the National Gambling Board.³³⁶ The NGB continued to invite proposals for the single CEMS. At two subsequent meetings where the matter was discussed, KwaZulu-Natal’s concerns about the single CEMS were noted. The Minister undertook to meet with the Premier to discuss his concerns but continued with the process which resulted in the awarding of the contract to the fourth respondent in April 2001. In May 2001, the Minister met with the Premier to discuss the CEMS. The Minister left the meeting with the impression that the Premier had agreed to the system, a view which the Premier claimed was incorrect.³³⁷ The KwaZulu-Natal Gambling Board then initiated a call for proposals to implement the KwaZulu-Natal CEMS. The NGB launched urgent proceedings to halt this process after sending a letter to the KwaZulu-Natal Gambling Board calling upon it to halt proceedings had been ignored.³³⁸

The Constitutional Court had to decide whether the matter constituted ‘a dispute between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state’ within the meaning of section 167(4)(a) of the Constitution which provides that such matters may only be heard by the Constitutional Court.³³⁹ The Court found that although the parties were organs of state in the national and provincial spheres, the dispute did not concern the power to make the legislation but rather the

³³⁴ *National Gambling Board v Premier of KwaZulu-Natal & others* 2002 (2) SA 715 (CC) para 6.

³³⁵ KwaZulu-Natal Gambling Act 10 of 1996.

³³⁶ *National Gambling Board v Premier of KwaZulu-Natal & others* 2002 (2) SA 715(CC) paras 6–7.

³³⁷ *Ibid* paras 8–9.

³³⁸ *Ibid* para 10.

³³⁹ *Ibid* para 23.

effect of the legislation. It was accordingly not a dispute within the meaning of section 167(4)(a) and did not fall within the Court's exclusive jurisdiction.³⁴⁰

Turning to the application for direct access, the Constitutional Court considered the obligation placed on all spheres of government by section 40(2) in Chapter 3 of the Constitution to observe and adhere to the principles of cooperative governance. The Court referred to the duty of organs of state to make every reasonable effort to settle disputes and 'exhaust all other remedies before it approaches a Court to resolve the dispute'.³⁴¹ It referred to section 41(4) which provides that: 'If a Court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.'

The Constitutional Court then reviewed the conduct of the parties and found that they had made no meaningful effort to comply with their constitutional obligation of cooperative government. It emphasised that the obligation on organs of state to avoid litigation entails much more than an effort to settle a pending Court case. It requires each organ of state to re-evaluate its position fundamentally. In the present context, it required of each of the organs of state to re-evaluate the need or otherwise for a single CEMS, to consider alternative possibilities and compromises, and to do so with regard to the expert advice the other organs of state have obtained.³⁴² The parties' failure to comply with the obligations of Chapter 3 of the Constitution was considered sufficient ground for refusing direct access. As in the decision in *Premier, Western Cape v President of the Republic of South Africa & another*, this case indicates the importance of adherence to cooperative governance principles by government bodies engaged in intergovernmental relations. It is clear from the Court's decision that at this stage, the Court was unwilling lightly to enter into the adjudication of matters with an intergovernmental character.

³⁴⁰ Ibid para 12.

³⁴¹ Constitution: s 41(3).

³⁴² *National Gambling Board v Premier of KwaZulu-Natal & others* 2002 (2) SA 715 (CC).

(d) *Uthukela District Municipality & others v President of the Republic of South Africa & others*³⁴³

In this case, three district municipalities (Category C municipalities) in KwaZulu-Natal challenged the failure of the 2001 Division of Revenue Act³⁴⁴ 1 of 2001 to allocate funds to district municipalities. The applicant municipalities succeeded in the High Court which issued an order declaring section 5(1) of the Act unconstitutional and ‘invalid to the extent that it excludes Category C municipalities from sharing with Category A and B municipalities in the local government allocation of revenue raised nationally’.³⁴⁵ The applicants sought an order from the Constitutional Court confirming the High Court order as well as an order directing national government to pay them their respective equitable shares.

During the course of the matter, the parties settled the matter on the basis that national government would pay the applicants a specified amount. The settlement was not made an order of Court and the applicants did not withdraw their application for confirmation of the High Court order. Accordingly, the Constitutional Court was still seized with the confirmation proceedings. The Court noted that although the Act had subsequently been repealed, if an order may have some practical effect, the Court has a discretion to decide whether or not to deal with the confirmation.³⁴⁶ As this matter concerned organs of state, the duty to foster cooperative government and to avoid legal proceedings against one another must be taken into account. The Court referred to the *First Certification Judgment*, which interpreted Chapter 3 to mean that ‘disputes should where possible be resolved at a political level rather than through adversarial litigation’.³⁴⁷

The Constitutional Court stated that ‘it would rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level.’³⁴⁸ This required first that they make every reasonable effort to settle the dispute

³⁴³ *Uthukela District Municipality & others v President of the Republic of South Africa & others* 2003 (1) SA 678 (CC).

³⁴⁴ Division of Revenue Act 1 of 2001.

³⁴⁵ *Ibid* para 5.

³⁴⁶ *Ibid* para 8.

³⁴⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 291.

³⁴⁸ *Uthukela District Municipality & others v President of the Republic of South Africa & others* 2003 (1) SA 678 (CC) para 14.

by means of mechanisms and procedures provided for, and second, that they exhaust all other remedies before approaching a Court to resolve a dispute.³⁴⁹ It went on to state that a dispute-resolution mechanism was provided in Part 2 of the Intergovernmental Fiscal Relations Act to cater for disputes between organs of state in the national and local spheres.³⁵⁰ Accordingly, the Court found that municipalities aggrieved by the omission of district municipalities from the 2001 equitable share must make use of the dispute resolution procedures in the Intergovernmental Fiscal Relations Act. If this fails, they must approach the relevant Minister directly. The Court elected not to exercise its discretion to decide the confirmation issue in the circumstances and in the interests of cooperative governance.³⁵¹

The cases discussed reveal an unwillingness on the part of the judiciary to traverse the substantive merits of national government's decisions (*Premier of the Western Cape v President of the Republic of South Africa & another*). The Constitutional Court emphasised the duty of the spheres to cooperate with each other and to make every effort to settle matters before approaching the courts (the *First Certification Judgment*; *Premier of the Western Cape v President of the Republic of South Africa & another*; *National Gambling Board v Premier of KwaZulu-Natal & others*). This reliance on political means to settle disputes is also found in the reasoning of the Court in the *Second Certification Judgment*. In this case the Court reasoned that weaker protection for the appointment and removal of PSC commissioners was justifiable on the basis that the PSC was concerned mainly with administrative functions.

In the Constitutional Court's view political considerations would be sufficient to restrain negative conduct. But what happens when political considerations trump the interests of the institution and of good governance? There is a real possibility that the fact that the same party controls all three spheres in most provinces, will prevent sub-national governments from declaring a dispute with national government. In such cases, it is submitted, a more balanced approach to IGR which strengthens institutional mechanisms to constrain power and to provide checks and balances benefits good governance.

³⁴⁹ Ibid para 19.

³⁵⁰ Intergovernmental Fiscal Relations Act 97 of 1997.

³⁵¹ *Uthukela District Municipality & others v President of the Republic of South Africa & others* 2003 (1) SA 678 (CC) para 8.

3.4 The Practice of Cooperative Governance following the enactment of the Intergovernmental Relations Legislation

3.4.1 The Intergovernmental Relations Framework Act

In 2003 the Presidency commissioned a review of intergovernmental relations. The study noted the following key challenges for improving intergovernmental cooperation.

- (a) Uncertainty and confusion about the roles and status of intergovernmental fora. Lack of clarity regarding the status of decisions of IGR structures was highlighted as an area requiring attention. In practice, decisions by MinMec were taken as binding on the executive of the provinces. Such a practice, however, undermined the executive authority of the provinces.³⁵²
- (b) The need to formalise the composition and functions of the President's Coordinating Council.³⁵³
- (c) The exclusion of local government from full participation in existing IGR structures undermined participatory governance. It was recommended that the participation of local government be institutionalised.³⁵⁴
- (d) The complete absence of IGR fora and the ineffective functioning of IGR fora in provinces where they do exist.
- (e) Lack of coordination of information flowing between the PCC, MinMec, and provincial IGR fora.³⁵⁵

A key recommendation of the study was that comprehensive legislation be adopted by Parliament to give effect to section 41(3) of the Constitution which requires an Act of Parliament to establish and provide structures and mechanisms to promote and facilitate intergovernmental relations, and to provide appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes.³⁵⁶ The envisaged legislation, the Intergovernmental Relations Framework Act, was eventually passed in 2005 with the aim of

³⁵² Layman T 'Intergovernmental Relations and Service Delivery in South Africa: A Ten year review commissioned by the Presidency' (2003) at 21 available at <http://sarpn.org/documents/d000078751docs/Layman%20Tim.pdf> accessed on 23 September 2017.

³⁵³ Ibid.

³⁵⁴ Ibid at 22.

³⁵⁵ Ibid.

³⁵⁶ Ibid at 11.

establishing a general legislative framework applicable to all spheres of government to ensure the conduct of intergovernmental relations in the spirit of the Constitution.³⁵⁷

The stated objects of the Act are to provide for:

- (a) coherent government;
- (b) effective provision of services;
- (c) monitoring and implementation of policy and legislation; and
- (d) realisation of national priorities.³⁵⁸

The Act gives statutory recognition to existing intergovernmental structures. The system it establishes creates a hierarchy of structures from the President's Coordinating Council down to national intergovernmental fora, provincial intergovernmental fora, and municipal intergovernmental fora. The membership, powers, and functions of each structure are set out and recognition is afforded to existing MinMecs. The diagram below illustrates the structural framework created by the Act.

³⁵⁷ Intergovernmental Relations Framework Act 13 of 2005: Preamble.

³⁵⁸ Intergovernmental Relations Framework Act 13 of 2005: s 4.

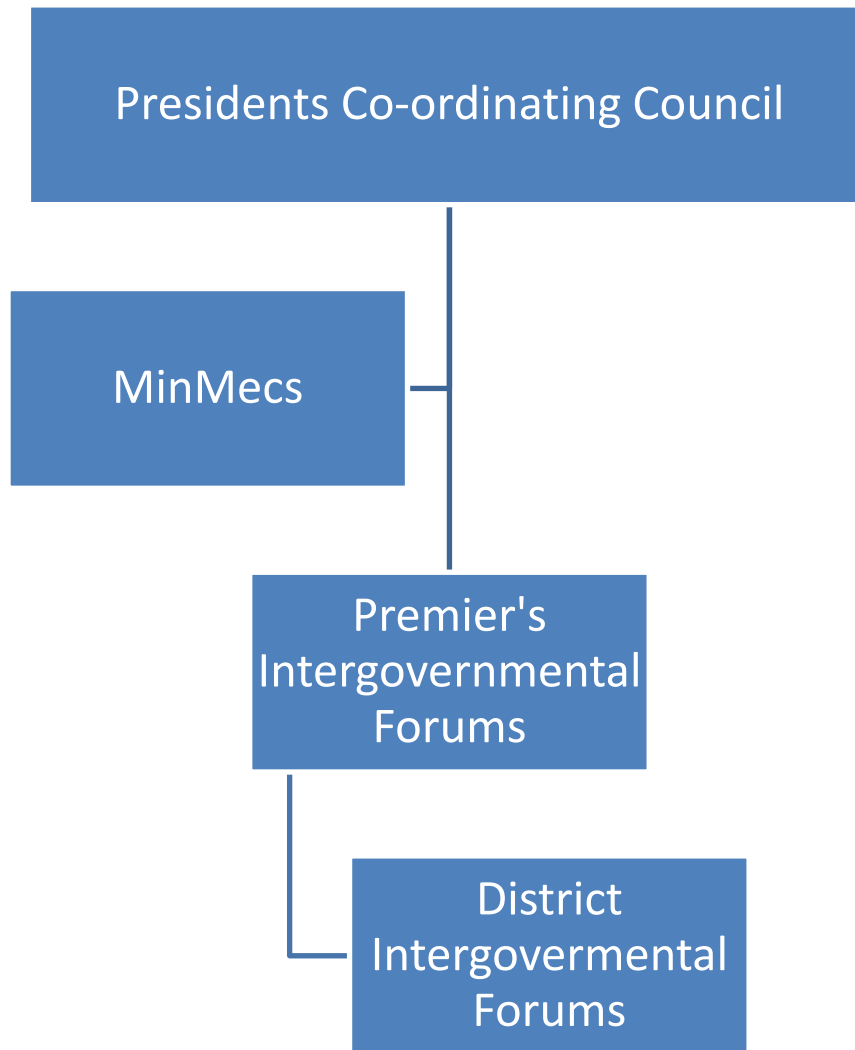


Figure 2: Structures created by the Intergovernmental Relations Framework Act

A further objective of the Act is to set out a formal process for the settlement of intergovernmental disputes between the three spheres of government. Section 40(1) elaborates on the constitutional duty of government departments to avoid disputes and to settle matters without resorting to judicial proceedings. Various steps are set out which provide detail as to how a dispute must be escalated from one level to the next. These are as follows:

- Step 1: Every effort, including direct negotiations, must be made to settle the dispute.
- Step 2: An intergovernmental dispute may be declared by notifying the other party in writing.
- Step 3: Once a formal dispute has been declared, the parties must promptly convene a meeting to determine the nature of the dispute and the material issues. At this meeting they must identify mechanisms available to resolve the dispute (other

than judicial settlement) and must designate a person to act as facilitator. (The relevant Minister or MEC may convene this meeting if the parties fail to do so.)

- Step 4: The parties must make every effort to settle the matter using the mechanism identified in Step 3.
- Step 5: The facilitator must assist the parties to settle the dispute and must provide the relevant Minister or MEC with regular progress reports.
- Step 6: The process above must be exhausted before any party may approach a court to settle the matter.

It is important to note that in terms of the Act, no negotiations and discussions undertaken in terms of the Act to settle the dispute may be used as evidence in any judicial proceedings if the matter is not settled.³⁵⁹

It is strange that the Act provides that in cases of conflict with another Act, the provisions of that other Act will prevail. Cooperative government is of paramount importance in a decentralised state – an importance recognised in Chapter 3 of the Constitution – yet the Act which governs relations between the spheres of government is, in terms of its own provisions, subordinate to other Acts. This may have been included in light of the time-lapse before the Act was eventually adopted, during which intergovernmental processes had been included in other Acts. This points to the difficulty of fragmentation in the legislative framework for managing intergovernmental relations.

The design of the Act appears to reflect a ‘top down’ approach to intergovernmental relations which is at odds with the approach required in a developmental state which has included decentralised features in its design. The Integrated Development Planning Process is designed to promote participatory democracy and ‘bottom up’ planning. It is not clear how the structures established in terms of the Act tie into this process which is set out in the Municipal Systems Act. The way in which local government is incorporated into the structures, mutes the voice of this sphere – for example, a single representative sits on the President’s Coordinating Council and is expected single-handedly to represent the diverse interests of local government as a whole. The diversity of interests would present a challenge to effective representation. This issue is compounded by the political superiority of the other representatives on the structure

³⁵⁹ Intergovernmental Relations Framework Act 13 of 2005: Chapter 4.

and the fact that they outnumber the local government representative. Such arrangements tend to foster the domination of national interests in discussions in the forum.

Malherbe argues that the design of the Act facilitates national dominance. He finds it significant that the objects clause in the Act lists the realisation of ‘national priorities’ as an object of the Act.³⁶⁰ The development and implementation of national priorities is further addressed in sections 4(d), 7(a) and (b), 11(a) and (b), 18(a)(i), (iii) and (iv), 26(1)(a) and (b), 35(2)(a), and 36(1)(a), whereas only a single provision – section 18(a)(v) and (vi) – deals with provincial policy and legislation.³⁶¹ The trend towards national dominance continues with section 36 which requires provincial governments to take account of national priorities in drafting any legislation and to consult with local government. It is notable that there is no equivalent provision compelling local government to consult with the other spheres (other than a general duty to cooperate set out in the objects). Malherbe argues that from this ‘the only logical explanation is that the Act’s primary purpose is not to regulate the relationship among the spheres of government, but to ensure the smooth feeding down of national policies and implementation by the other spheres’.³⁶²

A further notable feature of the Act is that it does not apply to Parliament, the NCOP, or the provincial legislatures. The NCOP, as the primary forum representing provincial interests in the formulation of government policy, was surprisingly excluded from government’s review of intergovernmental relations which gave rise to the drafting of the intergovernmental relations legislation. Also notable is that although the review pointed to a lack of coordination in the national government and the province’s approach to the regulation of local government, the need to set up a ‘clearing house’ for legislation impacting on local government is not addressed by the Act. This is a significant oversight and one which is discussed further in the following chapter.

In *Minister of Police & others v Premier of the Western Cape & others*, the Constitutional Court had to consider an intergovernmental dispute under the Act.³⁶³ The facts of the case were briefly that the Minister of Police and the National Commissioner of the South African Police

³⁶⁰ Malherbe (2006) 4 TSAR 810 at 816.

³⁶¹ Ibid at 818.

³⁶² Ibid at 816.

³⁶³ *Minister of Police & others v Premier of the Western Cape & others* 2014 (1) SA 1 (CC).

Service contested the power of the Premier of the Western Cape to appoint a provincial commission of enquiry with powers to subpoena members of the South African Police Service (SAPS) to appear before it regarding allegations of police inefficiency. The High Court upheld the power of the Premier to appoint the commission and dismissed the contention that the Premier had violated the principles of cooperative governance and intergovernmental relations set out in section 41 of the Constitution. However, in a minority judgment Saldanha J disagreed and stated that the parties had not exhausted their obligations under section 41 to find appropriate means to resolve the situation. He concluded that he would have granted the interdict and ordered the parties to take steps to resolve the conflict.³⁶⁴

On appeal, the Constitutional Court dismissed the application. In the course of deciding the matter the Court noted that section 40(2) requires organs of state to comply with the principles of cooperative government, while section 41(3) requires that all reasonable efforts be made to settle the dispute using the mechanisms and procedures provided before approaching the Court. The Court noted that although it has a discretion to refuse to hear a dispute if it is not satisfied that the parties have made a reasonable effort to resolve it, it is not precluded from hearing the dispute in these circumstances.³⁶⁵

The applicants advanced three bases for contending that the Premier had breached her cooperative governance obligations. First, that the establishment of the commission usurped the powers of the Minister and the commissioner in breach of section 41(e) which requires all spheres of government and all organs of state to respect the constitutional status, institutions, powers, and functions of government in the other spheres. The Constitutional Court held that there was no merit in this contention as the Premier had exercised the power given to her in terms of section 206(5) of the Constitution. Section 41 does not require the Premier to declare a dispute before exercising a power conferred on her by the Constitution.³⁶⁶

The second contention was that although the Premier was acting in terms of powers conferred by the Constitution, she was still required by section 41(1)(h)(iii) and (iv) of the Constitution to inform other members of government and to consult them on matters of common interest as well as to coordinate her actions. The Constitutional Court held that the Premier was indeed

³⁶⁴ Ibid paras 11–12.

³⁶⁵ Ibid para 58.

³⁶⁶ Ibid para 61.

obliged to consult the Minister and the commissioner before appointing the commission, but it was clear from the facts that the Premier had over a nine-month period engaged in extensive correspondence with the provincial commissioner and that this correspondence had been copied to the Minister and the national commissioner.³⁶⁷

The final contention was that the Premier had not made every reasonable effort to settle the matter while the Minister and the commissioner had made such efforts. The difficulty with this contention was that the dispute arose after the Premier had established the commission. It was only at this stage that the Minister expressed his opposition to the commission. ‘Even so, the Minister and the Commissioner did not declare a dispute as required by the Framework Act; instead they approached the High Court.’³⁶⁸ Accordingly, the Constitutional Court found that it had not been shown that the Premier had failed to comply with the Constitution and the Act.³⁶⁹

It is submitted that in this case the Constitutional Court appears to have moved away from its earlier position of executive deference. In this regard, although the facts demonstrated that efforts had been made to resolve the dispute, the Court referred to the fact that it enjoyed a discretion to hear disputes even when it is not clear that all reasonable efforts have been made to resolve the dispute. The fact that a number of municipalities are in opposition hands may contribute to an increase in the number of intergovernmental disputes ending up in Court. There are indications that even in ANC-led municipalities, there is greater willingness to approach the courts. For example, in the *Ingonyama Trust* case, the eThekweni Municipality instituted action in the KwaZulu-Natal High Court for an order that the property of the Trust which falls under its jurisdiction be declared rateable for the relevant period. This was a politically-charged case considering that the land in question (worth a huge amount in rates to the municipal *fiscus*) was owned predominantly by the Zulu king in the province.³⁷⁰ It can be argued that the fact that the case was brought, taken together with changes in the political control of municipalities, indicates a greater willingness to seek judicial adjudication of intergovernmental disputes.

³⁶⁷ Ibid para 62.

³⁶⁸ Ibid para 63.

³⁶⁹ Ibid.

³⁷⁰ *eThekweni Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC).

3.4.2 The Role of Intergovernmental Relations in promoting Service Delivery

In 2012 Harouvi conducted a study into the role played by intergovernmental relations in promoting effective service delivery in the Amathole District Municipality in KwaZulu-Natal.³⁷¹ The study sample consisted of 70 respondents including municipal officials, intergovernmental relations practitioners, representatives of community-based organisations, and residents from the district and local municipalities. The findings provide important insights into the functioning of the intergovernmental relations system at local government level. Only three of the seven local municipalities were found to be active in intergovernmental relations in the district. Reasons cited for this lack of participation included lack of coordination and lack of political will on the part of provincial and national government fully to support local government.

Participants were asked to respond to the question whether there was a strong bond of cooperation between the Amathole District Municipality, its local municipalities, and the provincial and national governments. Sixty-nine per cent of respondents indicated that there was not such a bond between the three spheres of government. The following challenges impacting on intergovernmental relations were identified by the study:³⁷²

- (a) Poor structural design of intergovernmental forums.
- (b) Government's planning cycle is fragmented and disorderly (there are various and divergent planning cycles in the various government departments).
- (c) Political infighting and factionalism manifest in intergovernmental forums and hamper the achievement of service delivery goals.
- (d) Local municipalities do not participate actively in intergovernmental relations.
- (e) Sector forums and government departments do not actively participate in intergovernmental relations (non-attendance at meetings is widespread as is delegation to junior officials to attend).
- (f) The Intergovernmental Relations Framework Act is a paper tiger which exists only in theory. In practice there are many loopholes and failures.

³⁷¹ Harouvi M *The Role of Co-operative Government and Intergovernmental Relations in Promoting Effective Service Delivery: A Case Study of Amathole District Municipality* available at vital.seals.ac.za/vital/access/manager/Repository/vital:11668?site_name=GlobalView accessed on 16 March 2016.

³⁷² *Ibid* at 182–190.

- (g) Local government is not integrated into the intergovernmental relations system created by the Act.
- (h) Intergovernmental relations is fragmented and the three spheres act in isolation. The spirit of cooperative government is not being respected and promoted.

Harouvi makes the following recommendations based on the finding of his study:³⁷³

- (a) The relevant stakeholders in intergovernmental relations should be fully dedicated to cooperation.
- (b) The National Planning Commission should assume an oversight role in intergovernmental relations.
- (c) The planning cycles for public entities need to be synergised.
- (d) Legislation which includes a punitive clause for failure to cooperate in intergovernmental relations should be enacted.
- (e) National, provincial, and local government should cooperate in prioritising access to basic services in communities.

It is difficult to fault the findings based on the qualitative research in the study. In fact, the findings correlate with research conducted by the SALGA and the Department of Monitoring and Evaluation, as well as with the writer's experience in more than ten years spent in the local government sector. However, it is submitted that apart from the recommendation to synergise planning cycles, the remaining recommendations would not result in positive improvements in cooperative governance. Recommendations (a), (d) and (e) lack substantive detail. As regards the 'punitive clause' recommended in (d) – one must ask against whom the action would be aimed. Would lowly officials be targeted? Or would punitive action be aimed at senior management and the political leadership of the department? As for oversight by the National Planning Commission, this is not the mandated function of the NPC. There is a need to oversee the implementation of intergovernmental relations, but it is submitted that this role is better suited to a government department with a sufficiently broad mandate and political backing to support its role in this cross-cutting and vitally important area of governance.

³⁷³ Ibid at 190-195.

3.4.3 The Practice of Supervision of Local Government

As discussed in Chapter 2, the autonomy of local government and its power to administer the functional areas listed in Schedules 4B and 5B to the Constitution is constrained by the constitutional duty of provincial government to monitor and support local government in the province by legislative and other means.³⁷⁴ The provincial and national governments have the legislative and executive authority to ensure that municipalities perform their functions in respect of the matters listed in Schedules 4B and 5B effectively, by regulating the exercise by municipalities of their executive authority,³⁷⁵ and the national and provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.³⁷⁶

In order to fulfil its duty to monitor and support, the Constitution has given provinces powers to intervene in circumstances where local government fails to carry out its constitutional mandate. The Constitutional Court considered this scheme in the *First Certification Judgment*³⁷⁷ and noted that the Constitution seeks to realise a structure for local government that on the one hand shows a concern for the autonomy and integrity of local government and 'prescribes a hands-off relationship between LG and other levels of government, and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient'.³⁷⁸ These provisions form an important part of the framework within which cooperation between the spheres must occur in order to ensure that service delivery is prioritised. In this section, the practice of supervision of local government is considered with particular reference to provincial interventions in local government.

Mathenjwa's 2017 study published as *The Supervision of Local Government*, examines a number of provincial interventions in local government in order to establish whether the practice of supervision corresponds to the legal framework for supervision of local government.³⁷⁹ He considered a number of case studies in order to establish whether or not

³⁷⁴ Constitution: s 155(6)(a).

³⁷⁵ Ibid s 155(7).

³⁷⁶ Ibid s 151(4).

³⁷⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).

³⁷⁸ Ibid para 373.

³⁷⁹ Mathenjwa *Supervision of Local Government* (2017).

general trends could be identified from the practice of provincial governments. Most case studies were drawn from the province of KwaZulu-Natal. The author examined provincial interventions in the following municipalities: Utrecht, Imbabazane, Abaqulusi, Umhlabuyalingana, Langeberg, and in Umvoti and Mquma Local Municipalities, and Umgungundlovu and Overberg District Municipalities.

From an analysis of the interventions in the cases mentioned above, Mathenjwa found that the exercise of the power of supervision by provincial government in some provinces points to an incorrect understanding by provincial government of its powers over local government. A trend in which provincial government disrespects the constitutional autonomy of local government was also discerned. The study found that party political considerations often marred provincial interventions and that this trend was particularly evident where the province was led by a political party other than the party leading the municipality. He argues that the failure of provincial government to conceptualise and understand the legal requirements when intervening in local governments requires the attention of national government.³⁸⁰

While the influence of party-political considerations on the use of government powers is not a phenomenon confined to the South African context, the observations of this study are cause for concern – not least because of their negative impact on cooperative governance. Taken together with the findings in the Harouvi and the SALGA studies discussed above, they are indicative of an intergovernmental system in need of intervention.

3.4.4 Institutional Location of responsibility for Cooperative Government

In this section, the institutional location of responsibility for co-operative governance is discussed in order to examine whether this factor has impacted on the practice of co-operative governance. Before June 1999, the mandate to ensure cooperative government lay with the Department of Constitutional Development which was responsible for development and implementation of the Constitution. This portfolio included the administrative branches:

- (a) Constitutional Development (management, cooperative governance, constitutional affairs, and provincial and traditional affairs).

³⁸⁰ Ibid at 24–215.

- (b) Administration (financial management, personnel and provisioning administration, legal support, office support, and policy formulation).
- (c) Local Government Affairs (local government development and support, finance, infrastructure and planning, disaster management, equitable shares).
- (d) Auxiliary and associated services (communication services, contributions to the Training Fund for Local Government Affairs and the Represented Political Parties Fund, and support for the Municipal Demarcation Board and the National House of Traditional Leaders).³⁸¹

The Constitutional Development Department oversaw much of the early policy development which produced the restructured local government system. This included the development of the White Paper on local government and the discussion document on cooperative government referred to earlier in this thesis.

However, in June 1999 the Department of Constitutional Development was restructured and provincial and local government affairs and traditional affairs were shifted to a new department – Provincial and Local Government Affairs. Constitutional Affairs was shifted to the Department of Justice, which became the Department of Justice and Constitutional Development.

Following the restructuring, the Department of Provincial and Local Government comprised of the following administrative components.

- (a) Cooperative Governance and Traditional Affairs (support, development of constitutional principles and practices surrounding intergovernmental relations, cooperative governance, and traditional affairs).
- (b) Auxiliary and Associated Services (communication services, contributions to the Training Fund for Local Government Affairs and the Represented Political Parties Fund, and support for the Municipal Demarcation Board and the National House of Traditional Leaders).
- (c) Development and Support (support to local government and the promotion of development).
- (d) Administration (financial management, personnel, administration and legal services).

³⁸¹ See www.treasury.gov.za/documents/national%20budget/1999/ene/vote_04.pdf accessed on 4 March 2016.

It is submitted that the effect of this restructuring on the constitutional-development sector of the Department of Justice has been to hollow out the development and implementation functions of its mandate. Shackled to the justice portfolio, the goal of constitutional development was dwarfed by the administration of justice components of the newly constructed portfolio. The majority of its budget went the way of the Department of Local Government, and with its loss of status and identity, constitutional development in the overarching sense faded away. For the most part, the constitutional development branch busied itself with human rights advocacy funded by the European Union, and raising awareness of the Constitution. The ‘development’ part of its title exists in name only. Functionally, the branch has an organogram for a Constitutional Research and Review Chief Directorate, but no staff has been appointed. In the result, not much work of any policy significance regarding constitutional matters has emanated from the branch in recent years. Constitutional development has been swallowed whole by the Department of Justice.

As a result of the institutional changes, the deliberate, coordinated, and planned development of the Constitution ceased. The unfortunate result of this is the disjointed and fragmented intergovernmental relations framework which has developed and its unfortunate tendency of silo planning. Another unfortunate result is that cooperative governance has come to be viewed purely in relation to the dynamic between provincial and local government. It is submitted that cooperative government entails more than the management of municipal oversight, monitoring, and support of local government. Its central importance to the constitutional scheme in the South African government structure has been negatively affected by assigning complete responsibility for it to the Department of Provincial and Local Government. The function of coordinating government functions and overseeing implementation and development of the Constitution, is an important objective. The negative consequences of the failure to apply resources and research in the development of our system of cooperative government are becoming evident. It is submitted that the institutional responsibility for co-operative government needs to be revisited urgently.

3.4.5 Service Delivery Protests

The increasing intensity of service delivery protest in South Africa is cause for grave concern. The SALGA noted 4 493 protest actions attributed to local service delivery between 2009 and

2013.³⁸² Municipal IQ, a specialised local government data and intelligence organisation in South Africa, defines a ‘service delivery protest’ as ‘a protest which is galvanised by inadequate local services or tardy service delivery, the responsibility for which lies with the municipality’.³⁸³ Its research has found a five-fold increase in major service protests between 2007 and 2017. Gauteng, the Eastern Cape, KwaZulu-Natal, and the North West, collectively accounted for three quarters of all major protests in 2017.³⁸⁴

Unpacking the reasons for service delivery protests is complex. Research has indicated that the reasons for service delivery protests are most often attributed to poor service delivery for housing, electricity, water, and sanitation centred mainly in informal settlements in the large metropolitan municipalities.³⁸⁵ But the data from the 2016 Community Survey conducted by Statistics South Africa, shows that the composite service delivery index was highest for Metros.³⁸⁶ If Metros deliver the best services, why are they also the site of most service delivery protests? Some researchers attribute the high rate of service delivery protests in urban areas to high levels of migration and the migrants’ proximity to informal settlements. It is argued that the perceived disadvantage of informal-settlement dwellers engenders feelings of dissatisfaction and anger creating a fertile environment for protest.³⁸⁷ This may be a compelling argument but it fails to take account of the high levels of dissatisfaction with municipal delivery across all sectors of South Africans – the 2016 Community Survey found that 75 per cent of all households surveyed nationally did not believe that municipalities were trying to solve the problems/difficulties they had identified. This indicates a high level of dissatisfaction with local government service delivery in all communities surveyed, and not solely in households within

³⁸² ‘Community Protest: Local Government Perceptions’ available at <https://www.salga.org.za/.../Community%20Protest%202016%20without%20BLEED.pdf> accessed on 28 September 2017.

³⁸³ See www.municipaliq.co.za/publications/press/2017/press/20171024101239784.pdf accessed on 28 September 2017.

³⁸⁴ Ibid.

Allan K & Heese K ‘Understanding why service delivery protests take place and who is to blame’ available at www.municipaliq.co.za accessed on 28 September 2017.

³⁸⁵ ‘Public protest in democratic South Africa’ available at <http://sahistory.org.za/article/public-protest-democratic-south-africa> accessed on 28 September 2017.

³⁸⁶ ‘The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data’ available at www.statsa.gov.za/publications/Report%2003-01-22/Report%2003-01-222016.pdf accessed on 28 September 2017. The composite service delivery index combines the individual index scores calculated for sanitation, water, refuse disposal, and electricity in order to create an overall measure of service delivery across municipalities.

³⁸⁷ See www.municipaliq.co.za/publications/press/2017/press/20171024101239784.pdf accessed on 28 September 2017. See also Allan K & Heese K ‘Understanding why service delivery protests take place and who is to blame’ available at www.municipaliq.co.za accessed on 28 September 2017.

the informal settlements.³⁸⁸ The general conclusion is that South Africans are unhappy with the quality of service delivery.

Many factors linked to institutional, governance, financial, and human capacity constraints limit service delivery, but the question is: Could the cause for poor service delivery lie partly in poor coordination between the three spheres of government? The SALGA appears to think so. In 2010 it published a study into local government perceptions of community protests which found that community protest bore limited relation to demanding service delivery. In the follow-up 2015 study, most interviewees stated that protest action was not primarily aimed at local government.³⁸⁹ The sample group included mayors, speakers, municipal managers, and senior officials in municipalities. In response to the statement: ‘Local government believes that these actions from other spheres of government would contribute to reducing protest action’, the overwhelming majority of respondents identified ‘improved coordination of shared services between spheres of government’ and ‘more strategic and thorough consultation with local government when establishing national priorities’.³⁹⁰ These responses indicate a widely-held perception of poor coordination by senior officials and politicians in local government.³⁹¹

Accordingly, the SALGA study makes the following recommendations related to improving coordination between the spheres:³⁹²

- (a) Local government participation structures must be the primary structures through which redress activities occur. National and provincial spheres of government must assist and build capacity in public participation structures at local level, contribute to improvements in coordination between the spheres of government, and ensure that all spheres of government are accessible to communities at grassroots level.
- (b) Additional resources should be channelled into local government to enable it to perform its service delivery mandates in accordance with the subsidiarity principle.

³⁸⁸ ‘The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data’ available at www.statsa.gov.za/publications/Report%2003-01-22/Report%2003-01-222016.pdf accessed on 28 September 2017.

³⁸⁹ ‘Community Protest: Local Government Perceptions’ 8 available at <https://www.salga.org.za/.../Community%20Protest%202016%20without%20BLEED.pdf>, accessed on 28 September 2017.

³⁹⁰ Ibid.

³⁹¹ Ibid at 47.

³⁹² Ibid at 9.

The Twenty-Year Review of Local Government Paper released by the Department of Performance Monitoring and Evaluation has highlighted the need to improve cooperative governance in its policy proposals.³⁹³ This finding is reinforced by the National Development Plan which has made the following recommendations for improving cooperative government:

- (a) Improving the intergovernmental system, including strengthening intergovernmental protocols between district and local municipalities where there is conflict over the allocation of responsibilities and resources.³⁹⁴
- (b) Recognising the variance in capacity across municipalities and devolving more responsibilities where capacity exists while allowing only core functions along with capacity building in weaker municipalities.³⁹⁵
- (c) Strengthening local government by improving systems of active support and monitoring by provincial and national government for local government, including improvements to mainstream citizen participation.³⁹⁶

3.5 Conclusion

This chapter has examined the practice of cooperative governance and intergovernmental relations during the period 1996 to 2017. It has argued that there are significant shortcomings in the area of cooperative government which require attention:

- (a) Changes made to the composition and functions of the PSC/s between the interim and 1996 Constitutions have negatively impacted on the independence of the PSC and on the autonomy of the provinces.
- (b) The delay in passing the intergovernmental legislation required by the Constitution and the provisions of the IGRF Act has hampered the evolution of good practice in cooperative governance and led to fragmentation of the intergovernmental relations system.
- (c) Fiscal intergovernmental relations have had a significant impact on the evolution of cooperative government. A tendency towards centralisation is discernible in the practice of fiscal intergovernmental relations for with national priorities taking

³⁹³ Department of Monitoring and Evaluation 'Twenty-year Review South Africa 1994-2014 Background Paper: Local Government' 5, 46.

³⁹⁴ National Planning Commission 'National Development Plan' (2012) 385–386 available at <https://www.gov.za/issues/national-development-plan-2030> accessed on 30 September 2017.

³⁹⁵ Ibid at 391.

³⁹⁶ Ibid at 44-46, 74-75.

precedence over the other spheres. Over time this has resulted in a reduction in provincial autonomy.

- (d) The NCOP is not fulfilling its constitutional mandate to represent provincial interests. This is in part due to the failure of the NA to introduce section 76 legislation in the NCOP.
- (e) The Cabinet-Cluster system has significant shortcomings including duplication of work, time consuming and cumbersome processes, dilution of accountability and expertise, risk of lowest-common-denominator outcomes, and the exclusion of local government from the system.
- (f) The institutional relocation of the cooperative governance function to the Department of Local and Provincial Government, and the reconstitution of the former Constitutional Development Department as part of the Department of Justice and Constitutional Development has impacted negatively on the importance of cooperative governance to the detriment of good governance in the South African administration.

In this light, it is submitted that the following areas require intervention:

- (a) The Cabinet Cluster system must be reviewed in order to address the many problems with the system identified in this study.
- (b) The legislative framework for intergovernmental relations needs to be reviewed. The Intergovernmental Relations Framework Act needs to be overhauled and the fragmented provisions which govern the area but are contained in other statutes need to be aligned.
- (c) Linkages between existing but fractured IGR institutions must be created.
- (d) The role of local government in existing IGR structures must be strengthened.
- (e) The 'top-down' nature of the current IGR structures must be reviewed and aligned with the requirements of developmental government which necessitates 'bottom-up' planning. The integrated development planning process needs to become a central focus in government's coordination of its plans and programmes.
- (f) The community participation processes in municipalities must be strengthened. In this regard the poor level of functioning of ward committees requires particular attention.
- (g) The planning and budgeting cycles of local, provincial, and national government must be aligned.

- (h) The fiscal intergovernmental relations framework and the manner in which allocations are made to provincial and local government need to be reviewed, and the participation of sub-national government in the allocation process must be strengthened.
- (i) The institutional arrangements at provincial level must be revisited and the Premiers' Offices strengthened in order to align and synergise planning and address 'silo-planning' in provincial departments. This will also improve monitoring and evaluation of provincial performance against national objectives.
- (j) There must be a concerted effort to move away from viewing cooperative government as an event. Cooperative government needs to be inculcated as a constitutional value across government departments, at the same time competitive and adversarial politics between government departments and between the three spheres need to be addressed.
- (k) The institutional responsibility for cooperative government and the constitutional development function in the administration must be revisited.
- (l) The possibility of reviewing certain aspects of the cooperative governance provisions in the Constitution must be investigated. For instance, the legislative process would benefit from a provision compelling the introduction of section 76 Bills in the NCOP.

CHAPTER 4

A REVIEW OF LEGISLATIVE PRACTICE IN LOCAL GOVERNMENT FUNCTIONAL AREAS

4.1 Introduction

In Chapter 3, the practice of cooperative government and intergovernmental relations was discussed. The discussion revealed that there is a disconnect between the principles of cooperative governance enshrined in the Constitution, and the day-to-day practice of intergovernmental relations in the state. A centralisation of power was evident in intergovernmental institutions together with a competitive and adversarial form of interaction between officials and government in all three spheres which has negatively impacted on policy coherence and implementation (service delivery). In the current chapter the focus is on the interaction between national and provincial law-making power and the legislative authority of local government. As has been pointed out, the constitutional power of national and provincial government to regulate local government is clear and undisputed.³⁹⁷ This regulation is intended to occur within the bounds defined by the Constitution and the Constitutional Court in the *First Certification Judgment*.³⁹⁸ This means that both national and provincial government retain authority to legislate in local government functional areas within defined parameters. As discussed above, there is broad consensus that the monitoring of local government by national government should not occur by passing overly prescriptive laws but rather by legislative frameworks or ‘norms and standards legislation’.³⁹⁹ In practice, however, the complexity of the constitutional framework for the allocation of powers means that different departments have differing understandings of their powers when it comes to local government matters. For local government this has translated into an increasingly complex web of legislation and policy which municipalities are required to navigate in order to fulfil their functions.

³⁹⁷ See Section 2.6 above.

³⁹⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) discussed in Section 2.7.1(a) above.

³⁹⁹ Discussed in Section 2.7.1(a) above.

The lack of coordination of their regulatory programmes with respect to local government by national and provincial governments was highlighted in the *Intergovernmental and Service Delivery Review: Ten Year Review*. The Review found that:⁴⁰⁰

The practice of regulation suggests that there is no consistency in approach to local government by line departments at both national and provincial level. National and provincial legislation are sometimes at odds. Furthermore, national government does not set integrated medium term policy priorities for local government as a sphere of government. Rather each national department has considerable discretion to determine its own strategic priorities for local government, which may or may not correspond with other sector priorities or the interests of the local sphere as a whole.

There are currently no institutions which deal directly with the problem. There is no clearing house for national policy affecting local government. The MinMec on Local Government is not able to address multi-sectoral issues. In particular, the disjunction between financial budgeting and sectoral planning must be bridged. What is required is a ‘whole of government’ approach to local government.⁴⁰¹

The lack of coordination between national departments has resulted in the adoption of a large number of seemingly disconnected pieces of legislation by various national and provincial departments. In this chapter the design of the division-of-powers provisions in the Constitution is unpacked. Some key developments in legislative practice during the period under consideration are examined. The particular focus of this section is on the way in which the constitutional allocation of legislative authority between the spheres has been implemented with an emphasis on local government. First, the constitutional allocation of powers is examined together with the mechanism for resolving conflicts between laws. Next, some common problems associated with the concurrent allocation of powers and responsibilities are considered. In the final part of the chapter, four case studies which illustrate various aspects of state practice are considered.

⁴⁰⁰ Layman T ‘Intergovernmental Relations and Service Delivery in South Africa: A Ten-year review commissioned by the Presidency’ (2003) 24 available at <http://sarpn.org/documents/d000078751docs/Layman%20Tim.pdf> accessed on 23 September 2017.

⁴⁰¹ Ibid at 22.

4.2 The Constitutional Division of Powers

4.2.1 National Legislative Authority

The Constitution establishes three spheres of government – national, provincial, and local – and describes these spheres as distinctive, interdependent, and interrelated.⁴⁰² Legislative authority is divided between the national, provincial, and local spheres of government.⁴⁰³

National government's power to legislate is bound only by the Constitution. It must act within the limits of the Constitution.⁴⁰⁴ Only Parliament may pass legislation amending the Constitution. It may also pass legislation with respect to 'any matter' listed in Schedule 4 to the Constitution and with respect to matters which are incidental to Schedule 4 matters.⁴⁰⁵ In terms of this formulation, the residual powers vest in Parliament. The national legislature may assign any of its legislative powers, save the power to amend the Constitution, to another legislative body in another sphere of government.⁴⁰⁶

National government is excluded from adopting legislation with respect to a matter within a functional area listed in Schedule 5 to the Constitution unless it is necessary:⁴⁰⁷

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.⁴⁰⁸

⁴⁰² Constitution: s 40.

⁴⁰³ Ibid s 43.

⁴⁰⁴ Ibid s 44(4).

⁴⁰⁵ Ibid ss 44(1) (a), 44(2), and 44(3). Schedule 4 to the Constitution sets out the functional areas of concurrent national and provincial legislative competence.

⁴⁰⁶ Ibid s 44(1) (a) (iii).

⁴⁰⁷ Schedule 5 to the Constitution sets out the areas of exclusive provincial legislative competence.

⁴⁰⁸ Constitution: s 44(2).

4.2.2 Provincial Legislative Authority

The legislative authority of provincial government is vested in the provincial legislature and includes the power to pass a provincial constitution and to legislate with regard to any functional area listed in Schedule 4 or 5 to the Constitution. A province may legislate on matters which are reasonably necessary for or incidental to the effective exercise of a power concerning a Schedule 4 matter.⁴⁰⁹ It may also legislate on matters which have been expressly assigned to the province by national legislation.⁴¹⁰ Provinces may also legislate on any matter for which the Constitution envisages the enactment of provincial legislation. A provincial legislature may assign any of its legislative powers to a municipal council in that province.⁴¹¹

Provincial legislatures are accorded the ability to recommend legislation to the NA concerning any matter which falls outside of the legislative authority of the provinces.⁴¹² The provinces participate in the national legislative process by their participation in the NCOP. Each province sends a delegation of ten members headed by the provincial Premier to the NCOP.⁴¹³ The NCOP may consider, pass, amend, propose amendments to, or reject any legislation before it. It is further empowered to initiate legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3) but it may not initiate money Bills.⁴¹⁴

In terms of section 44(1)(b) of the Constitution, the support of six of the provinces in the NCOP is required in order to amend the Constitution. Two separate procedures are set for the adoption of legislation in sections 75 and 76. This procedure distinguishes between ordinary Bills affecting the provinces and ordinary Bills not affecting the provinces.

In respect of ordinary Bills not affecting the provinces, the NCOP may consider the Bill and either pass it with or without amendments, or reject it. Upon receiving the Bill from the NCOP, the NA may take the amendments proposed by the NCOP into account, or reject them and pass the Bill in its original form.

⁴⁰⁹ Ibid s 104(4).

⁴¹⁰ Ibid s 104.

⁴¹¹ Ibid s 104(1) (c).

⁴¹² Ibid s 104(5).

⁴¹³ Ibid s 60.

⁴¹⁴ Ibid s 68.

The NCOP has a greater say with regard to section 76 Bills – referred to as ordinary Bills affecting the provinces. Here an impasse between the two Houses is referred to the Mediation Committee. This committee may agree on the Bill as passed by the NA, the amended Bill passed by the NCOP, or another version of the Bill. If the Mediation Committee cannot break the deadlock, the Bill lapses unless the NA again passes it. However an increased majority of two thirds is required in the NA to pass the Bill in these circumstances.⁴¹⁵

4.2.3 Local Government Legislative Authority

Section 156(1)(a) of the Constitution provides that a municipality has executive authority over and the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution. In terms of the Constitution, municipalities may exercise any power concerning a matter reasonably necessary for or incidental to the effective performance of their functions.⁴¹⁶

Municipalities may make and administer by-laws for the effective administration of the matters which they have a right to administer.⁴¹⁷ This is an original legislative power and confirms the status of local government as a fully-fledged sphere of government.⁴¹⁸ Under the previous system, authority to make by-laws was delegated to municipalities under national legislation and provincial Ordinances.⁴¹⁹

The right of a municipality to administer the matters conferred upon it is subject to limitation. First, provincial government must provide for monitoring and support of local government in the province by legislative and other means.⁴²⁰ Second, the provincial and national governments have the legislative and executive authority to ensure that municipalities effectively perform their functions in respect of the matters listed in Schedules 4B and 5B by regulating the exercise by municipalities of their executive authority.⁴²¹ However, the national

⁴¹⁵ Ibid s 76.

⁴¹⁶ Ibid s 156(5).

⁴¹⁷ Ibid s 156(2).

⁴¹⁸ *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 2.

⁴¹⁹ Steytler & De Visser *Local Government Law* (2008) at 2.4.

⁴²⁰ Constitution: s 155(6)(a).

⁴²¹ Ibid s 155(7).

and provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.⁴²²

Section 156(4), which encapsulates a presumption based on the principle of subsidiarity, provides that provincial and national government must, by agreement, assign any Schedule 4 Part A matter or Schedule 5 Part A matter which necessarily relates to local government if that matter would be most effectively administered locally and the municipality has the capacity to administer it.

The Constitution entrenches participatory democracy and local government structures are obliged to fulfil the developmental mandate of government and to conduct their business in a manner that encourages public participation and promotes the legitimacy of the local government sphere. In administering the matters assigned to local government, the municipal council must, within its capacity, strive to achieve the constitutional objects of local government. These constitutional objects are:

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in matters of local government.⁴²³

The Constitution also assigns developmental duties to municipalities. Section 153 provides that a municipality must structure and manage its administration, budgeting, and planning processes to accord priority to the basic needs of the community, and to promote the social and economic development of the community, and participate in national and provincial development programmes.

⁴²² Ibid s 151(4).

⁴²³ Ibid s 152.

Mechanisms are built into local government legislation to ensure that the developmental mandate is entrenched. In terms of the Municipal Structures Act, the municipal council must meet at least quarterly.⁴²⁴ The Act also requires the council to review, on an annual basis:⁴²⁵

- (a) the needs of the community;
- (b) its priorities in meeting those needs;
- (c) its processes for involving the community;
- (d) its organisational and delivery mechanisms for meeting the needs of the community; and
- (e) its overall performance in achieving the constitutional objectives outlined above.

4.2.4 National and Provincial Governments' Powers in Schedule 4 Part B matters

Schedule 4 of the Constitution sets out the functional areas of concurrent national and provincial legislative competence. Local government has legislative and executive authority to administer Schedule 4 Part B and Schedule 5 Part B matters. These powers are conferred on local government to the extent set out in section 155(6)(a) and (7) of the Constitution.

The question arises as to the extent of national and provincial governments' powers to legislate in respect of Schedule 4 Part B and Schedule 5 Part B matters. In respect of provincial powers, section 155(6) gives provinces the power to establish municipalities in their respective jurisdictions. This section places an obligation on provincial government to provide for monitoring and support of local government in the province, and to promote the development of local government capacity to enable municipalities to perform their own functions and manage their own affairs.

The meaning of the obligation to 'monitor and support' was considered by the Constitutional Court in the *First Certification Judgment*.⁴²⁶ The Court found that the meaning of 'monitor' must be considered in the context of the Constitution and in particular section 139. In this context 'supervision' connotes a process of provincial review of the actions of local government in order to measure the fulfilment of its obligations and a process of implementing corrective measures where local government falls short.⁴²⁷

⁴²⁴ Local Government: Municipal Structures Act 117 of 1998.

⁴²⁵ *Ibid* s 19.

⁴²⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).

⁴²⁷ *Ibid* para 370.

In the context of section 154(1), the Constitutional Court considered the extent of national and provincial government's legislative and executive powers to support local government. It noted that provincial governments' powers are not insubstantial and must ensure the maintenance of existing local government structures, powers, and functions to prevent a decline in those structures, powers, or functions. The provinces must use their legislative authority to promote the development of local government's capacity to perform its functions and manage its own affairs.⁴²⁸

In relation to the power to 'monitor', the Constitutional Court noted that the monitoring power could not be interpreted as bestowing additional or residual powers of provincial intrusion on the domain of local government, beyond the 'power to measure or test at intervals local government compliance with national and provincial legislative directives' or with the Constitution itself. The Court stated that the Constitution seeks to realise a structure for local government that on the one hand reveals a concern for the autonomy and integrity of local government and 'prescribes a hands-off relationship between local government and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient.'⁴²⁹

Section 155(7) of the Constitution deals with both national and provincial governments' powers with respect to local government. It provides that (subject to s 44) the provincial and national governments have the legislative and executive authority to ensure that municipalities effectively perform their functions in respect of the matters listed in Schedules 4B and 5B by regulating the exercise by municipalities of their executive authority.

In the *First Certification Judgment*, the Constitutional Court considered the meaning of 'regulate' as connoting broad managing or controlling rather than a direct prescriptive function.⁴³⁰ There is a fair amount of agreement amongst academics that the regulatory power conferred by section 155(7) permits national and provincial governments to prescribe framework legislation laying down norms and standards. Such a regulatory power does not

⁴²⁸ Ibid para 372.

⁴²⁹ Ibid para 373.

⁴³⁰ Ibid para 377.

extend to the ‘core’ of local government functional competencies.⁴³¹ Accordingly, it is submitted that national and provincial legislation which goes beyond establishing frameworks or the prescription of norms and standards may be attacked on the ground of constitutional invalidity.

4.2.5 National Government’s Powers in Schedule 5 Part B matters

Schedule 5 of the Constitution sets out the functional areas of exclusive provincial competence. However, provincial competence is subject to section 44(2) which empowers national government to legislate on Schedule 5 matters when this is necessary:

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

It is submitted that the same qualification applies here – the legislative power of national government over Schedule 5 Part B matters relates to the ability to set norms and standards and monitoring requirements and does not extend to the ‘core’ of Schedule 5 B matters.

4.2.6 Provincial Government’s Powers in Schedule 5 Part B matters

Provincial government’s powers with respect to Schedule 5 Part B matters are similar to its power over Schedule 4 Part B matters. On the face of it then, it would appear that provincial government has wider powers over Schedule 5 Part B matters than national government since provincial government it is not limited to the grounds set out in section 44(2).⁴³² This accords with the quasi-federal design for the provinces discussed in the preceding chapter.

⁴³¹ Mettler J ‘The legislative powers of local government’ (2000) LG Working Paper Series No 1 at 10 Community Law Centre University of the Western Cape available at www.mlgi.org.za accessed on 16 March 2016; De Visser J ‘Powers of Local Government’ (2002) LG Working Paper Series No 2 at 6 Community Law Centre University of the Western Cape available at www.mlgi.org.za accessed on 16 March 2016; Steytler (2008) 3 TSAR 519.

⁴³² De Visser *ibid* at 11.

4.2.7 Assignment of Powers to Local Government

In addition to the functions allocated to local government by Schedules 4 Part B and 5 Part B to the Constitution, the national and provincial spheres have the authority to assign powers and functions to local government. In this regard both national and provincial government may assign the power to legislate over a matter which falls outside of Schedule 4 Part B and Schedule 5 Part B to the local sphere by passing an Act to that effect. An assignment of legislative power may also be made to a specific municipality. An assignment of this nature, made in terms of section 44(1)(a)(iii) or section 104(c) does not have to be a blanket transfer; national or provincial government may restrict the legislative power in the assignment Act.⁴³³

The Municipal Systems Act provides additional requirements for general assignment by legislation. In terms of these requirements, the relevant Minister or Deputy Minister must publish the Bill for public comment; consult with the Minister of Local Government, the Minister of Finance, and the SALGA; and request an assessment of the financial implications of the assignment from the Financial and Fiscal Commission.⁴³⁴

In addition, the Minister (or Deputy Minister) initiating the assignment must assess whether the assignment imposes a duty on the municipalities concerned; whether the duty falls outside of Schedules 4B and 5B; and whether the performance of the duty has financial implications. In deciding whether the duty imposes financial implications, the assessment of the Financial and Fiscal Commission must be taken into account. If the answer to the preceding three questions is in the affirmative, the Minister (or Deputy Minister) must ‘take appropriate steps to ensure that sufficient funding and capacity building initiatives’ are made available to the municipalities concerned.⁴³⁵ These provisions apply equally and with the necessary changes for the context, in respect of general provincial assignments to municipalities.

Sections 99 and 126 of the Constitution permit the assignment of executive powers to municipal councils. Assignment of an executive power differs from transfer of a legislative power in that it assigns executive powers only and not legislative powers. Further, an executive

⁴³³ Ibid at 17.

⁴³⁴ Local Government: Municipal Systems Act 32 of 2000: s 9(1).

⁴³⁵ Ibid s 9(3).

power entails a compulsion by allocating a duty to do something. For this reason, it must be done by agreement with the municipality concerned.⁴³⁶

The requirements prescribed by the Municipal Systems Act for transfer of an executive obligation require the Minister initiating the assignment to consult the Minister for Local Government before concluding the agreement. In addition he or she must ensure provision of funding and capacity building if the assignment has financial implications.⁴³⁷

As discussed earlier, the Constitution also entrenches subsidiarity in section 16(4) by mandating national and provincial governments to assign to a municipality the administration of any matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government if:

- (a) the matter would most effectively be administered locally;
- (b) the municipality has the capacity to administer it; and
- (c) the municipality agrees to the assignment.⁴³⁸

The rationale behind the requirements and procedures for the transfer of legislative and executive powers outside of those allocated to local government in the Schedules is the ‘protection’ of local government against the assignment of responsibilities without resources (unfunded mandates).

4.3 Conflict of Laws

It has been established above, that local government’s powers to legislate on Schedule 4 Part B and Schedule 5 Part B matters are not exclusive. In line with their oversight role, national and provincial governments are given the power to pass legislation which regulates the exercise of municipal authority and ensures that municipalities are performing their functions effectively. What happens, then, when a municipality passes a by-law on a matter and later,

⁴³⁶ De Visser J ‘Powers of Local Government’ (2002) LG Working Paper Series No 2 at 11, 19 Community Law Centre University of the Western Cape available at www.mlgi.org.za accessed on 16 March 2016.

⁴³⁷ Local Government: Municipal Systems Act 32 of 2000: s 10(3).

⁴³⁸ De Visser J ‘Powers of Local Government’ (2002) LG Working Paper Series No 2 at 11, 20 Community Law Centre University of the Western Cape available at www.mlgi.org.za accessed on 16 March 2016.

national or provincial government passes a law regulating the same matter? How will the conflict as to which law prevails be resolved?

In terms of section 156(4) of the Constitution, a by-law that conflicts with national or provincial legislation is invalid. However, the operation of this section is subject to section 151(4) which provides that the national and provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. The apparent impact of this provision is that there are circumstances in which a by-law will prevail over national or provincial legislation.

De Visser has proposed a test which may be applied to determine whether a by-law or the national or provincial Act prevails. The test comprises of four questions:

- (a) Is there national or provincial legislation on the subject matters of the by-law?
- (b) If yes, does the by-law conflict with that legislation?
- (c) If there is conflict, is the national or provincial law valid?
- (d) Does the national or provincial law impede or compromise the municipality's ability to perform its task?⁴³⁹

(a) Is there national or provincial legislation on the subject matter of the by-law?

Once it has been established that the subject matter of the by-law and the national or provincial law are the same, the matter proceeds to the second leg of the enquiry.

(b) If yes, does the by-law conflict with that legislation?

Whether there is a conflict involves enforcement. If it is possible to enforce both the by-law and the other law with regard to the same events, there is no problem. However, if neither the by-law nor the national law can be enforced, then on the face of it, there is conflict and it is necessary to proceed to the next step.

⁴³⁹ Ibid at 14.

(c) *If there is conflict, is the national or provincial law valid?*

The national or provincial law must be enacted within the respective legislative competency of the relevant sphere of government. This is the most complex part of the enquiry. As discussed above, the powers of national and provincial governments to legislate on local government matters are limited. The national or provincial law can only prevail if it is enacted in an area in which legislative competence exists (refer to the discussion above).

(d) *Does the national or provincial law impede or compromise the municipality's ability to perform its task?*⁴⁴⁰

Section 151(4) states that both 'national and provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.' Section 41(g) in Chapter 3 (cooperative governance) of the Constitution contains a similar principle – 'All spheres of government ... must ... exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.' In applying this section the Constitutional Court emphasised that section 41(1)(g) deals with *the way power is exercised*, not with *whether or not a power exists*.⁴⁴¹ De Visser argues that the meaning of section 151(4) is similar, and that national and provincial legislation must still comply with section 151(4) even if the relative spheres are competent to legislate in a particular functional area.⁴⁴² This leg of the test deals with how national or provincial government have exercised their powers. If the exercise is such that the legislation limits the municipality in its right to exercise its powers or perform its functions, the strong wording of section 151(4) appears to connote a permanent defect and the national or provincial legislation is accordingly invalid.⁴⁴³

⁴⁴⁰ Ibid at 4.

⁴⁴¹ *Premier of the Province of the Western Cape v President of the RSA & others* 1999 (4) BCLR 382 (CC).

⁴⁴² De Visser J 'Powers of Local Government' (2002) LG Working Paper Series No 2 at 13 Community Law Centre University of the Western Cape available at www.mlgi.org.za accessed on 16 March 2016.

⁴⁴³ Ibid at 13-14.

4.4 Concurrency in the South African Constitution

A number of common problems manifest in government administrations which use common competencies or concurrent allocation of powers as found in the South African Constitution. These include the duplication of services, ineffective service delivery, unfunded mandates for the lowest sphere of government, the domination of the lowest sphere by the higher spheres, and the lack of transparency and accountability.⁴⁴⁴ These issues are shared by many decentralised federal systems as they are characteristic of the division of powers between two levels of government. Therefore it can be seen that the Brazilian, German, Indian, and Nigerian Constitutions each contains various manifestations of concurrent powers and each is faced with the difficulties that accompany concurrent powers. The problems of concurrency which negatively impact on government functioning become even more pronounced where a third sphere of decentralised government is added as has been done in South Africa.⁴⁴⁵

The formulation of the division-of-powers provisions has resulted in a number of practical complexities for interpretation and implementation. The most obvious difficulties arise in the case of ‘overlapping mandates’. An overlapping mandate occurs where a functional area is shared between two or more spheres. In South Africa, national and provincial governments may regulate the exercise of municipal authority by passing legislation which establishes a framework or sets standards for municipal services. However, such national or provincial legislation may not restrict the municipality’s right to govern (see the De Visser test above). The problem with framework legislation is that in many cases it exceeds the boundaries set by the Constitution and becomes prescriptive to a point which encroaches on the autonomy of the sub-national sphere of government. This has occurred in Germany and it is also prevalent in South Africa as the case studies in this chapter demonstrate.

Another difficulty arises where the Constitution assigns the same power to all three spheres, merely qualifying the allocation by a geographical or jurisdictional condition. For instance, ‘health services’ is a Schedule 4 Part A competence – ie, an area of concurrent national and provincial competence. But ‘municipal health services’ is an area of local government competence in terms of Part B of Schedule 4. The difficulty lies in defining where ‘municipal

⁴⁴⁴ Steytler (2005) 2 *CILSA* 271.

⁴⁴⁵ *Ibid.*

health services’ end and ‘health services’ begin. This is not merely a theoretical question; the implications for service delivery are grave and can be a matter of life and death for those who rely on the public sector for healthcare.

From the point of view of government administration, the practical difficulties of unclear functional mandates may be compounded in practice by changes from the old system of local governance to the new – for example, where a function that was administered by local government under the old dispensation is shifted to a provincial government department by the Constitution. Over the years very real gaps in service delivery have occurred simply because the staff for one function are deployed in one sphere of government, and the constitutional mandate in another. This problem is often exacerbated by the failure to transfer budgets. It is submitted that the administrative structure of government is not aligned to its functional mandates. This is particularly so at the provincial and national levels. It is consequently necessary to restructure and align the administration of government in order to bolster the realisation of the constitutional vision for developmental local government.

Another difficulty relates to the interpretation of the precise meaning and ambit of the functional areas. The Constitution defines none of the functional areas. An example is the area of development planning – ‘regional planning and development’ falls within an area of concurrent national and provincial competence – it is a Schedule 4 Part A competence, as is ‘urban and rural development’. Compare these two functional areas with ‘building regulations’ and ‘municipal planning’ which are local government areas of functional competence in terms of Schedule 4, Part B, and the result is a recipe for confusion.

Working through the various difficulties related to concurrency can prove a nightmare for government administrators. In the South African context this problem has been exacerbated by a number of factors. In the first place, the decentralisation process was not organic but was imposed by the Constitution – in many federal dispensations a number of constituent states come together to form a federation. Thus, at the time of federation they have a number of entrenched local competences. In South Africa, decentralisation occurred in the opposite way. A constituent and largely unitary state apparatus was sought to be transformed into a decentralised state through the Constitution. In practice, the result has been that the provincial and national governments have struggled to adapt to the constitutional system, while the ‘new’ local sphere has embraced autonomy more readily, particularly in the larger metropolitan

municipalities. Added to the complexity of the constitutional and legislative arrangements, is the shortage of skills. All of these factors have had a significant impact on the efficacy of post-constitution government administration.

4.5 Overregulation

4.5.1 Introduction

Over the past two decades, national government has passed a number of local government laws aimed at giving practical effect to the constitutional vision of developmental local government. At the same time, various national departments have passed a variety of laws within their departments' functional areas which are directed at local government. As a result municipalities have become the convergent point for a large number of laws which were drafted by departments with varying levels of understanding as to how local government operates. There appears to be no policy coherence between the laws passed by the national and provincial governments and often these laws amount to overregulation in that they exceed the constitutional limits permitted for framework legislation by prescribing detail in local government functional areas. This problem is illustrated in two case studies. The first focuses on waste management in the eThekweni Municipality and the second on animal pounds in KwaZulu-Natal.

4.5.2 Case Study: Overregulation in relation to waste management : eThekweni Municipality

The practical implications of overregulation in the municipal sphere are illustrated in this case study. In August 2012 the following regulations made in terms of the National Environmental Management Waste Act⁴⁴⁶ were published in the *Government Gazette* for public comment:

- (a) Draft standards for disposal of waste to landfill.⁴⁴⁷
- (b) Draft standards for assessment of waste for landfill disposal.⁴⁴⁸
- (c) Draft waste classification and management regulations.⁴⁴⁹

⁴⁴⁶ National Environmental Management: Waste Act 59 of 2008.

⁴⁴⁷ GN 431 of 1 July 2011.

⁴⁴⁸ GN 432 of 1 July 2011.

⁴⁴⁹ GN 435 of 1 July 2011.

eThekwini Municipality's Legal and Solid Waste Departments responded to the request for comments on the draft legislation by submitting comments drafted by their legal department with input from the solid waste department. In essence, the municipality argued that the draft standards, which fall within the functional area of 'refuse removal, refuse dumps and solid waste disposal', were unconstitutional due to the level of prescriptive detail they contained which exceeded the bounds set out in the Constitution for national government's legislative authority over local government competencies. The municipality pointed to the problem and requested that the national department allow them to focus on their service delivery mandate. They argued that while the regulatory framework governing the functional area of 'refuse removal, refuse dumps and solid waste disposal' had previously been based on two by-laws and was relatively simple, it was becoming increasingly complex and unmanageable.

To illustrate the volume of legislation applicable to local government, the eThekwini Municipality pointed to the large number of laws which have been passed relating to local government.

- (a) In the general administration category of local government there are twelve 'main' national laws.
- (b) These national Acts cover some 3 046 pages – excluding attendant legislation such as the Promotion of Access to Administrative Justice Act (PAJA), the promotion of Access to Information Act (PAIA), etc.⁴⁵⁰ The tally also does not include subject specific legislation, for example, the National Health Act, the KwaZulu-Natal Provincial Health Act, and Health by-laws.⁴⁵¹ Municipalities must interpret and implement all of these Acts.
- (c) In addition, to these Acts local government must administer provincial laws impacting local government.
- (d) Added to these national and provincial laws are the many by-laws.

The municipality highlighted the fact that the regulatory environment of local government is exceptionally complex with the result that it is becoming increasingly difficult to focus on the core business of municipalities as they are becoming 'bogged down' in regulations, technical

⁴⁵⁰ Promotion of Administrative Justice Act 3 of 2000 (PAJA); Promotion of Access to Information Act 2 of 2000 (PAIA).

⁴⁵¹ National Health Act 61 of 2003; KZN Health Act 1 of 2009.

specifications, and the like. To illustrate this point further, the eThekweni Metro pointed out that where municipalities previously used a single by-law to administer refuse disposal, there is now a national Act – the National Environmental Management: Waste Act.⁴⁵² In terms of this Act, the national government has proposed the following regulations and notices.

- (a) Waste management activities that have, or are likely to have, a detrimental effect on the environment.⁴⁵³
- (b) Draft Waste Information Regulations.⁴⁵⁴
- (c) National Domestic Waste Collection Standard.⁴⁵⁵
- (d) Draft Policy on Free Basic Refuse Removal.⁴⁵⁶
- (e) Draft Integrated Industry Waste Management Plan for the South African Tyre Recycling Process (SATRP) Company relating to Waste Tyre Regulations.⁴⁵⁷
- (f) Draft National Waste Management Strategy.⁴⁵⁸
- (g) Waste Information Regulations.⁴⁵⁹
- (h) List of waste management activities that have, or are likely to have a detrimental effect on the environment.⁴⁶⁰
- (i) Change of licensing authorities.⁴⁶¹
- (j) Draft national standards for the scrapping or recovery of motor vehicles.⁴⁶²
- (k) Draft national standard for disposal of waste to landfill.⁴⁶³
- (l) Draft standard for assessment of waste for landfill disposal.⁴⁶⁴
- (m) Draft national standards for the extraction, flaring or recovery of landfill gas in South Africa.⁴⁶⁵
- (n) Draft waste classification and management regulations.⁴⁶⁶
- (o) Draft national norms and standards for the storage of waste.⁴⁶⁷

⁴⁵² National Environmental Management: Waste Act 59 of 2008.

⁴⁵³ GN 409 of 30 April 2009.

⁴⁵⁴ GN 430 of 8 May 2009.

⁴⁵⁵ GN 1475 of 6 November 2009.

⁴⁵⁶ GN 1476 of 6 November 2009.

⁴⁵⁷ GN 198 of 5 March 2010.

⁴⁵⁸ GN 575 of 8 June 2010.

⁴⁵⁹ GN 718 of 23 July 2010.

⁴⁶⁰ GN 1113 of 14 December 2010.

⁴⁶¹ GN 77 of 18 February 2011.

⁴⁶² GN 431 of 1 July 2011.

⁴⁶³ GN 432 of 1 July 2011.

⁴⁶⁴ GN 433 of 1 July 2011.

⁴⁶⁵ GN 434 of 1 July 2011.

⁴⁶⁶ GN 435 of 1 July 2011.

⁴⁶⁷ GN 436 of 1 July 2011.

- (p) Waste Tyre Regulations: Draft Integrated Waste Tyre Management Plan for the Recycling and Economic Development Initiative of South Africa (REDISA).⁴⁶⁸
- (q) Fee structure for applications for environmental authorisations and waste management licences.⁴⁶⁹
- (r) Draft national norms and standards for the remediation of contaminated land and soil quality.⁴⁷⁰
- (s) Regulations for site assessments and reports.⁴⁷¹
- (t) Draft Integrated Industry Waste Tyre Management Plan of the Recycling and Economic Development Initiative of South Africa (REDISA).⁴⁷²

The eThekweni Municipality pointed out that this amounts to hundreds and thousands of pages of legislation which the municipality must implement. The municipality submitted that it was drowning under the sheer weight of legal regulation which it was required to implement. It pointed out that as a high-capacity municipality – the only Metro in the province of KwaZulu-Natal – it should be the best placed to be able to implement the proposed regulations. Unfortunately, this was not the case; the waste management department indicated that they did not have the capacity to implement the regulations or the competence to run landfills to the standard required by the regulations due largely to the lack of skilled, trained personnel. Further that this applies to most, if not all of the technical specifications. The municipality pointed out that if it could not implement the proposed regulations, then certainly the district and local municipalities in the provinces would not be able to do so. In fact, since many local municipalities in KwaZulu-Natal do not have legal advisors – one wonders how they would interpret the legislation in the first place.

The failure of national and provincial departments to include municipalities in the drafting process merely exacerbates the problem. A practice has developed whereby municipalities first gain sight of new legislation affecting local government when it is published in the *Government Gazette*. Municipalities submit comments on the draft legislation and very often, apart from an acknowledgement of receipt, that is the end of the process for individual municipalities. It is doubtful whether this process can be considered a cooperative process which meets the

⁴⁶⁸ GN 457 of 8 July 2011.

⁴⁶⁹ GN 784 of 11 November 2011.

⁴⁷⁰ GN 233 of 19 March 2012.

⁴⁷¹ GN 234 of 19 March 2012.

⁴⁷² GN 337 of 17 April 2012.

requirements of section 41 of the Constitution. The inclusion of organised local government has not provided a voice for all municipalities. This may be because the interests of local government vary, or perhaps the SALGA is constrained by capacity. Whatever the reason, most metropolitan municipalities prefer to engage directly with national departments' proposed legislation.

The manner in which framework regulation has exceeded constitutional bounds has impacted negatively on local government autonomy and local innovation. As Steytler puts it

the question posed is whether the sheer, volume, style, nature and scope of the legislative framework that has emerged is facilitating or impeding the achievement of this mandate. Is the legislative framework undermining the fundamental constitutional principle that a 'municipality has the right to govern, on its own initiative, the affairs of the local community, subject to national and provincial legislation?'⁴⁷³

In examining the contention that local government has been overregulated two aspects must be considered – first, the volume or amount of legislation that has been passed; and second, the 'depth' of that legislation. Legislation which prescribes in detail how local government is required to carry out constitutionally mandated functions goes beyond what is constitutionally permitted. This tendency to prescribe detailed processes and procedures appears to be based on a mistrust of the ability of municipal councillors and officials to perform their functions.⁴⁷⁴ It is also partly in response to the view that law can solve governance problems. In many cases proper administration, support, and supervision would be a more appropriate response than throwing more law and regulation at the problem.⁴⁷⁵ Finally, Schmidt ascribes the penchant for overregulation to an ambivalent acceptance by national government of the 'spheres' concept of government, while in reality still clinging to the idea of 'tiers of government'.⁴⁷⁶

The case study illustrates the difficulties faced by municipalities in dealing with the increasing volumes of legislation adopted by national government directed at local government. The example speaks to the many ways in which overregulation occurs – the volume, complexity, and prescriptive nature of the regulations are clear, as is the difficulty of adopting a 'one-size-fits-all' approach to regulation. In the example above, it is obvious that local and district

⁴⁷³ Steytler (2008) 3 *TSAR* 518.

⁴⁷⁴ *Ibid* at 520.

⁴⁷⁵ *Ibid*.

⁴⁷⁶ Schmidt 'From spheres to tiers' 117.

municipalities would have great difficulty in implementing legislation which even the metropolitan municipalities have limited capacity to implement. What is also clear is that those drafting the legislation at national level have no grasp of the practicalities involved in administering the functional area which is the subject of the regulations. It would appear also that there was little or no engagement with local government in the formulation of the legislation – or if there was engagement, the input of local government was not accorded due weight.

The unfortunate consequences of the overregulation of local government have been summarised as:⁴⁷⁷

(a) *Increasing costs of compliance*

Compliance with the vast and elaborate legal framework costs money. The large metros have in-house legal departments. Unfortunately, many of the smaller municipalities do not have legal advisors and have to rely on private attorneys (ironically often at greater cost).

(b) *Opting out of governing*

Where processes are too difficult, municipalities who can afford it may simply opt to outsource the process. This occurred in the area of Integrated Development Plans where many municipalities outsourced to consultants.

(c) *Stifling innovation, experimentation, and local initiative*

The detailed prescription of the manner in which processes are to be implemented makes any form of innovation impossible as no room is left for local initiative.

(d) *Ticking boxes*

Perhaps one of the most unfortunate consequences of overregulation is the elevation of compliance with the rules above the object behind the rules – replacing substance with form.

⁴⁷⁷ Steytler (2008) 10 *Local Government Bulletin* 6–8.

(e) *Opting for lawlessness*

Finally, and perhaps most serious, is the possibility that local government practitioners, bogged down by the sheer weight of regulation and overwhelmed by the impossibility of compliance, opt to do what is necessary and avoid legal regulations. This sort of ‘the end justifies the means’ mentality has the exact opposite result to what the laws were intended to achieve – an increase in lawlessness rather than compliance.⁴⁷⁸ An example of this is discussed in the case study, below.

4.5.3 Case Study: Management of Animal Pounds in KwaZulu-Natal⁴⁷⁹

(a) *Introduction*

In *Zondi v MEC for Traditional and Local Government Affairs & others*⁴⁸⁰ certain provisions of an old provincial Ordinance which remained on the KwaZulu-Natal statute books were held to be unconstitutional. The facts of the case concerned the impounding of livestock belonging to Mrs Zondi, the widow of a farm labourer, by the farm owner who was acting in terms of the Natal Pound Ordinance.⁴⁸¹ The Ordinance allowed for the immediate seizure of trespassing animals without notice to the livestock owner and provided for the assessment of damages by two ‘interested persons’ who had to be registered voters. Provision was made for the payment of impounding fees and damages by the livestock owner, as well as for the sale in execution of impounded animals if the owner could not pay the fees. There was no provision for judicial process in the procedures laid down in the Ordinance.⁴⁸²

The Constitutional Court held that the need to take action against trespassing animals had to be weighed against the rights of livestock owners. Section 34 of the Constitution guarantees the right of access to the Courts and once animals had been impounded the judicial process had to be allowed to oversee the sale in execution as the need for immediate action had fallen away.

⁴⁷⁸ Ibid at 6.

⁴⁷⁹ The example discussed in this section is based on the experience of the writer whilst working as a senior manager in the eThekweni Municipality.

⁴⁸⁰ *Zondi v MEC for Traditional and Local Government Affairs & others* 2005 (3) SA 589 (CC).

⁴⁸¹ Natal Pounds Ordinance 32 of 1947.

⁴⁸² Baaitjies (2005) 7(4) *Local Government Bulletin* 14.

The Ordinance was accordingly held to be unconstitutional, but the Constitutional Court suspended the order of invalidity in order to allow the KwaZulu–Natal government an opportunity to correct the inconsistency. This case highlights the need for provincial governments carefully to re-evaluate all Ordinances predating the Constitution – many may indeed be unconstitutional.⁴⁸³

(b) *The KwaZulu-Natal Pounds Act*

The KwaZulu-Natal Department of Cooperative Governance and Traditional Affairs drafted the KwaZulu-Natal Pound Act, 2006 (KZN Pounds Act), in response to the decision of the Constitutional Court in *Zondi*.⁴⁸⁴ In terms of the constitutional distribution of functions, ‘facilities for the accommodation, care and burial of animals’ is a Schedule 5 Part B matter over which local government has legislative and executive authority. Clearly, any legislation drafted by the provincial government would need to take account of this. It must be borne in mind that the local government functional area of ‘facilities for the accommodation, care, and burial of animals’ overlaps with the national and provincial governments’ competence over both ‘agriculture’ and ‘animal control and diseases’ in terms of Schedule 4 Part A. The KZN Pounds Act attempts to navigate the allocation of powers and functions by providing that the: ‘Act applies to all municipalities within the province [and] is administered by the responsible Member of the Executive Council’ with the added proviso that the: ‘Act does not apply to a municipality which, in the opinion of the responsible Member of the Executive Council, has established a pound in terms of a municipal by-law that complies with the principles of the Act.’⁴⁸⁵

Despite attempts by the provincial department to navigate the tricky allocation of powers issues which the ruling in *Zondi* involves, the eThekweni Municipality has consistently stuck to the view that it is not bound to implement the provisions of the KZN Pounds Act because, in its view, the Act is unconstitutional, impractical, and costly to implement. Animal pounds in the municipality are administered by the Society for the Prevention of Cruelty to Animals (SPCA) which receives a grant-in-aid from the municipality. The eThekweni Metropolitan area is serviced by three SPCA’s – Durban & Coast; Kloof & Highway; and Amanzimtoti. The cost

⁴⁸³ Ibid.

⁴⁸⁴ KwaZulu-Natal Pound Act 3 of 2006.

⁴⁸⁵ Ibid s 2.

of implementing the KZN Pounds Act was calculated by the eThekweni Municipality's Treasury Department to amount to approximately sixteen times the cost of the extant system.

The non-implementation of the KZN Pounds Act points to some of the pitfalls that bedevil the drafting of provincial legislation to guide municipalities in the execution of their duties. The practical and administrative difficulties inherent in the legislation which the province enacted may have been avoided if municipalities had been fully engaged in the drafting process instead of being treated as 'implementers'. Unfortunately, the tendency to regard local government as the implementing arm is widespread and examples of laws which are impractical, costly to implement, or of questionable constitutional validity abound. The position taken by the municipality in this instance, may or may not be defensible, but the point that emerges clearly is that the vast volume of legislation being directed at local government may in fact be increasing lawlessness and breeding a culture of non-compliance – hardly what the law-makers intended! At the time of writing, the eThekweni Municipality had not taken steps to establish a pound or to enter into an agreement with a service provider to establish a pound on its behalf.

4.5.4 National Legislation in Municipal Legislative areas of competence

In 2013, the Department of Public Service and Administration (DPSA) published the draft Public Administration Management Bill for comment.⁴⁸⁶ The aim of the Bill is to provide for the organisation and management of personnel within the three spheres of government. Lindiwe Sisulu, the then Minister of Public Service and Administration, described the Bill as the 'longest-serving Bill'. According to the Minister, the Bill should have been passed in 1996 after the Constitution had come into operation, but this never happened.⁴⁸⁷

The Bill used Chapter 10 of the Constitution (dealing with Public Administration) as its point of departure. Key features of the Bill included the creation of a single public service which allowed for the transfer of public servants across spheres. According to the DPSA, this would improve service delivery by ensuring an equitable distribution of resources across all three spheres of government. The Bill dealt with discipline, ethics, and integrity – requiring disclosure of financial interests by government employees – and sought to create a Disciplinary

⁴⁸⁶ Draft Public Administration Management Bill, 2013, GN 519 of 2013 GG 36521.

⁴⁸⁷ See <https://pmg.org.za/committee-meeting/16716/> accessed on 19 July 2019.

Technical Assistance Unit to deal with disciplinary matters. It also provided for a national School of Government to deal with capacity-building and the training of government employees.

The Public Administration Management Bill was resisted by municipalities and the SALGA as an unconstitutional infringement of local government's autonomy. The eThekweni Municipality and KZN SALGA were quick to point out that section 160(1)(a) of the Constitution enables a municipal council to decide on the exercise of all the powers and the performance of all the functions of the municipality; while subsection (d) empowers a municipal council to employ the personnel necessary for the effective performance of its functions.

Municipalities argued that the constitutional allocation of power to municipalities to structure their personnel cannot be circumvented by a national Act. Local government claimed that reading section 160(1) with Chapter 10 of the Constitution, supported its argument that the Bill in its current form was unconstitutional. Section 196 of the Constitution provides that there is a single PSC for the Republic. Section 196(4)(f)(iv) states that the Commission is to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge, and other aspects of the careers of employees. It is clear from the provisions governing the establishment of the PSC, that this Commission has powers over the national and provincial spheres of government only. The intention was to vest the powers to regulate and oversee personnel practices in the local government sphere in the municipal council. Both the Local Government: Municipal Systems Act⁴⁸⁸ and the Local Government: Municipal Structures Act⁴⁸⁹ contain further provisions regulating a municipal council's exercise of this constitutionally enshrined power.

Local government turned to the Constitutional Court's consideration of the provisions relating to the PSC in the *First* and *Second Certification Judgments* to support its argument. Under the interim Constitution, the provinces were empowered to establish Provincial PSCs which, when established, would have powers and functions similar to those of the National PSC in respect of provincial public servants. The Constitution changed this arrangement by providing for a

⁴⁸⁸ Local Government: Municipal Systems Act 32 of 2000.

⁴⁸⁹ Local Government: Municipal Structures Act 117 of 1998.

single PSC with power over both the national and provincial spheres. This change was approved by the Constitutional Court which necessitated amendments to the constitutional provisions dealing with the PSC in order to safeguard the autonomy of the provincial sphere with respect to the staffing of provincial administrations. Even following these amendments, the Constitutional Court found in the *Second Certification Judgment*, that there had been a reduction of the ‘powers of the provinces arising out of the alteration in the functions of the PSC, the change in its composition, and the disestablishment of the provincial service commissions.’⁴⁹⁰

From this it is clear that the Constitutional Court considered the amendment of the powers of the PSC between the interim and the 1996 Constitution sufficiently significant to require amendments to the text so as to afford provincial governments some representation on the PSC mooted in the final text. This supports the contention that the Bill would not withstand constitutional scrutiny in so far as it seeks to erode the powers of local government as a distinct sphere of government. Only an amendment to the Constitution can achieve the aims of the Bill, and such an amendment would no doubt be subjected to a detailed analysis of the extent to which it violates the constitutional allocation of powers between the three spheres. One cannot circumvent the constitutional design by merely extending the ambit of the PSC’s role to include the municipal sphere via an Act of Parliament. If it was legally competent to effect a disguised amendment to the Constitution in the manner proposed by the Bill (which it is not), such a course of action would violate the authority of the Constitution as the supreme law of the country. Accordingly, the argument went, allowing Acts of Parliament to amend the Constitution undermines the hierarchy of laws established by the Constitution and compromises the integrity of our statute book. Therefore, they argued that in future, when reading section 160(1) or Chapter 10 of the Constitution, it would be necessary to cross-reference to another Act which overrides the Constitution.

If the Public Administration Management Bill is considered in the context of the discussion of fiscal practice in Chapter III, a tendency toward centralisation in the legislation begins to emerge. It is interesting to note that a raft of regulations dealing with municipal personnel and human-resource issues has been made in terms of the existing suite of local government

⁴⁹⁰ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997 (2) SA 97 (CC) para 198.*

legislation. These include the following regulations made in terms of the Municipal Systems Act:

- (a) the Local Government: Municipal Planning and Performance Regulations;⁴⁹¹
- (b) the Local Government: Municipal Performance Regulations for Municipal Managers and Managers directly accountable to Municipal Managers;⁴⁹²
- (c) Local Government: Disciplinary Regulations for Senior Managers;⁴⁹³ and
- (d) Local Government: Regulations on Appointment and Conditions of Appointment of Senior Managers.⁴⁹⁴

Also made in terms of the Municipal Systems Act, but still in draft form, are the following:

- (a) the Draft Competency Guidelines for Municipal Managers and Managers directly accountable to Municipal Managers;⁴⁹⁵ and
- (b) the Local Government Remuneration Framework: packages payable to Municipal Managers and Managers directly accountable to Municipal Managers.⁴⁹⁶

In 2012, National Treasury also released draft regulations made in terms of the Municipal Finance Management Act dealing with municipal staff misconduct – the Draft Municipal Financial Misconduct Regulations.⁴⁹⁷ The latter are presumably still in draft form as they contained provisions which conflicted with the Local Government: Disciplinary Regulations for Senior Managers⁴⁹⁸ drafted by the National Department of Cooperative Governance and Traditional Affairs. The argument can certainly be made that all of these regulations dealing with personnel and human-resource management in local government are constitutionally flawed in the same way as the draft Public Administration Bill. If that argument fails, then it is submitted that they constitute overregulation and breach the permissible constitutional limits for national and provincial oversight in terms of the Constitution.

⁴⁹¹ Local Government Municipal Planning and Performance Regulations, 2001, GN R796 of 24 August 2001.

⁴⁹² Local Government Municipal Performance Regulations for Municipal Managers and Managers directly accountable to Municipal Managers, 2006, GN R805 of 1 August 2006.

⁴⁹³ Local Government Disciplinary Regulations for Senior Managers, 2010, GN 344 of 21 April 2011.

⁴⁹⁴ Local Government Regulations on Appointment and Conditions of Appointment of Senior Managers, 2014, GN 21 of 17 January 2014.

⁴⁹⁵ Draft Competency Guidelines for Municipal Managers and Managers directly accountable to Municipal Managers, 2006, GNR 347 of 23 March 2007.

⁴⁹⁶ Local Government Remuneration Framework: Packages payable to Municipal Managers and Managers directly accountable to Municipal Managers GN 348 of 25 April 2015.

⁴⁹⁷ Draft Municipal Financial Misconduct Regulations GN 556 of 13 July 2012.

⁴⁹⁸ Local Government Disciplinary Regulations for Senior Managers 2010 GN 344 of 21 April 2011.

The difficulty faced by local governments is that they have no effective way of bringing their concerns regarding draft legislation to the fore. Comments submitted to the department which is in fact the sponsor of the Act are very often ignored. In the result, there are many examples of legislation currently on the statute book which is of questionable constitutional validity. Local government is required to implement that legislation although it may harbour a very strong conviction that the legislation is unconstitutional. Municipalities which are under the control of provincial and national governments administered by the same political party, lack the political will to challenge the constitutionality of these laws. The result is that year after year more and more legislation is enacted which gradually undermines the constitutional design for the allocation of powers between the three spheres.

4.5.5 Case Study: Rabies Outbreak in the eThekweni Municipality⁴⁹⁹

(a) Introduction

A real and painful example of how these factors play out in practice is illustrated by a rabies outbreak which began on the outskirts of the eThekweni metropolitan area in 2007. When the outbreak resulted in the death of a child in one of the rural areas of the municipality, the city's health department contacted the legal unit for advice. On the facts provided by the health department it appeared that the city's programme to vaccinate dogs had been discontinued on the basis of the city's belief that the function would be performed by the provincial Department of Agriculture and Veterinary Services. The staff performing this function had been moved to other areas. The city's health department's capacity was stretched with the environmental health, air pollution, and primary health functions. (The latter function is often cited as an unfunded mandate.) From discussions between the health and legal departments at eThekweni Municipality, it was apparent that a response to the rabies outbreak would require action on a number of fronts, including immunisation, control of animals, licensing, removal of ownerless and diseased animals, euthanising of diseased animals, removal and burial of destroyed animals.

⁴⁹⁹ The example discussed in this section is based on the experience of the writer whilst working as a senior manager at eThekweni Municipality.

According to the Constitution, ‘animal control and diseases’ falls within a functional area of concurrent national and provincial competence (Schedule 4, Part A of the Constitution). Schedule 5B assigns the following functional areas impacting on responses to the rabies outbreak, to local government:

- (a) control of public nuisance;
- (b) facilities for the accommodation, care, and burial of animals;
- (c) licensing of dogs; and
- (d) pounds.

The allocation of these functions to local government is subject to the duty of provincial government to monitor and support local government in carrying out these functions. At that time, inquiries revealed that there was not a single official in the legal department at the Provincial Department of Agriculture who had knowledge and understanding of the fact that the constitutional mandate for ‘animal control and diseases’ fell under that provincial department. Enquiries also revealed that there was no existing programme to vaccinate against rabies within the jurisdiction of the eThekweni Municipality. The function had merely ceased to be performed. Somewhere between the legislative divide of the constitutional allocation of powers, the existing national and provincial legislative framework, the by-laws, and the administrative practices of the province, the key preventative measure – the immunisation of animals – had simply stopped being performed. The municipality, for its part, due in part to an increase in jurisdictional area and functions, and in part due to an apparent internal dispute between the Metro Police and health departments regarding who was responsible for performing the function, had ceased to perform the function of licensing animals.

The relevant senior manager at the city’s health department, disturbed by the death of a young child due to rabies infection, contacted the city’s legal department in an attempt to resolve the matter. Attempting to situate the problem in legal terms, the legal department set out the relevant national laws as follows:

- (a) Animals Protection Act and the regulations made in terms of the Act;⁵⁰⁰
- (b) Animal Diseases Act;⁵⁰¹ and
- (c) Animal Health Act.⁵⁰²

⁵⁰⁰ Animal Protection Act 71 of 1962.

⁵⁰¹ Animal Diseases Act 35 of 1984.

⁵⁰² Animal Health Act 7 of 2002.

(b) *Animals Protection Act*

(i) Introduction

The main purpose of this Act is the prevention of cruelty to animals. It contains a number of provisions which may be useful in the present context:

(ii) Offences

Any animal owner who fails to procure veterinary, medical, or other treatment or any animal in need of such treatment, whether through disease, injury, or any cause, or who fails to destroy any seriously injured or diseased animal in circumstances where it would be cruel to prolong the animal's life, commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding twelve months, or to such imprisonment without the option of a fine.⁵⁰³ This section is extended by section 2(3) to cover cases of negligence.⁵⁰⁴

(iii) When a police officer may destroy an animal⁵⁰⁵

⁵⁰³ Ibid s 2(1)(e).

⁵⁰⁴ Ibid. Section 2(3) provides: 'For the purposes of subsection (1) the owner of any animal shall be deemed to have permitted or procured the commission or omission of any act in relation to that animal if by the exercise of reasonable care and supervision in respect of that animal he could have prevented the commission or omission of such act.'

⁵⁰⁵ Section 5 provides:

(1) Whenever a police officer is of the opinion that any animal is so diseased or severely injured or in such a physical condition that it ought to be destroyed, he shall, if the owner be absent or refuses to consent to the destruction of the animal, at once summon a veterinarian or, if there is no veterinarian within a reasonable distance, two adult persons whom he considers to be reliable and of sound judgment, and if such veterinarian or adult person after having duly examined such an animal certify that the animal is so diseased or so severely injured or in such physical condition that it would be cruel to keep it alive, such police officer may without the consent of the owner destroy the animal or cause it to be destroyed with such instruments or appliances and with such precautions and in such manner as to inflict as little suffering as practicable.

(2) Any police officer who destroys any animal or causes it to be destroyed in the absence of the owner shall, if such owner's name and address are known, advise him of the destruction, and where the destruction of any animal takes place on any public place or public road shall, subject to the provisions of the Animal Diseases Act, 1984 (Act 35 of 1984), remove the carcass or cause it to be removed therefrom.

(3) A veterinarian may in respect of any animal exercise the powers conferred by subsection (1) upon a police officer without summoning another veterinarian, police officer or any other person, and in respect of such exercise of those powers the provisions of subsection (2) shall apply.

(4) Any expenses which may be reasonably incurred by any police officer or veterinarian in carrying out the provisions of this section may be recovered from the owner of the animal in question as a civil debt.

(5) It shall be a defence to an action brought against any person arising out of the destruction of an animal by him or with his authority, to prove that such animal was so severely injured or so diseased or in such a physical condition that it would have been cruel to have kept it alive, and that to summon a police officer or follow the

1. This section allows a police officer to destroy an animal which is obviously diseased, in the absence of the owner of that animal. Before destroying the animal a veterinarian or two adult persons must agree with the police officer's assessment of the animal's health.
2. A veterinarian may destroy an obviously diseased animal without summoning any other person.
3. Any expenses incurred in carrying out this section may be recovered from the owner of the animal as a civil debt.
4. Any police officer who destroys any animal in the absence of the owner must advise the owner of the destruction, if his or her address is known.
5. Where the destruction of an animal takes place in a public place or on a public road, the police officer must remove the carcass or cause it to be removed.

(iv) Powers of officers of the SPCA

The powers conferred on a police officer to destroy diseased animals in terms of section 5 may also be exercised by an officer of any SPCA.

(v) Regulations relating to the seizure of animals by an officer of a society for the prevention of cruelty to animals⁵⁰⁶

These regulations provide for seizure, reporting, notice, disposal and expenses related to the seizure of animals by an officer of a society for the prevention of cruelty to animals.

procedure prescribed in this section would have occasioned unreasonable delay and unnecessary suffering to such animal.

⁵⁰⁶ GN R468 of 14 March 1986.

(c) *Animal Diseases Act*

(i) Introduction

The whole of this Act has been repealed by the Animal Health Act, 2002.⁵⁰⁷ However, the latter Act had not yet come into operation at the time. In the interim, the provisions of the Animal Diseases Act continued to apply. The Act contains a number of provisions relating to animal control which may be utilised in the present case.

(ii) Designation of authorised persons

The Act (in s 3) makes provision for the Director of Animal Health within the Department of Agriculture to designate any applicant with the required knowledge, experience, qualifications, and means as an authorised person to carry out certain functions in the Act. This provision is significant because it could be used by eThekweni Municipality to apply for one or more of its officials to be designated an ‘authorised person’ for the purposes of the Act.

(iii) Control measures

Section 9 of the Act allows the Minister to prescribe control measures in respect of particular animal diseases for the whole Republic, or for a specific defined area.

(iv) Animal Health Schemes

In terms of section 10, the Minister may by notice in the *Gazette* establish a scheme in respect of any controlled purpose or for the improvement of animal health. The section is quite detailed and provides for the establishment of different schemes for the improvement of animal health in general, or of the health of different kinds of animals, animal disease, or parasites.

⁵⁰⁷ Animal Health Act 7 of 2002.

(v) Duties of owners

An obligation is placed on owners or managers of land where there are animals to take all reasonable steps to prevent the infection of the animals with any animal disease. Section 32 also creates a number of offences, including contravention of an animal health scheme or control measure.

(vi) Powers of entry and inspection

The powers of the director to enter property at any time, and without notice to exercise a power granted under the Act are detailed in section 16. This power may be delegated (on application) to a person authorised under section 3.

(vii) Seizures by Director

The powers granted under this section include the power to seize any animal or thing without notice, and the power to destroy or dispose of any animal or thing. This power may also be delegated under the application procedure in section 3.

(viii) Compensation

In terms of this section, the owner of any animal or thing which has been destroyed pursuant to any control measure may submit an application for compensation for the loss of the animal or thing to the director. This section is clearly intended to cover situations where large herds of animals are destroyed due to the outbreak of some or other disease.

(d) *Animal Health Act*

The main purpose of this Act is to provide measures to promote animal health and to control disease. The Act had not commenced operation (probably because it did not provide measures for disease control).

(e) *Provincial Legislation*

The following provincial Acts, Ordinances and regulations were identified as relevant:

- Licensing and Control of Dogs Ordinance;⁵⁰⁸
- KwaZulu Animal Protection Act;⁵⁰⁹
- KwaZulu Act on the Licensing and Control of Dogs;⁵¹⁰
- Regulations relating to Dog Licenses in Public Health Areas;⁵¹¹
- Regulations in terms of Ordinance, 1941;⁵¹²
- Regulations relating to the Licensing and Control of Dogs;⁵¹³ and
- Regulations relating to Dog Licenses in the areas of jurisdiction of Health Committees.⁵¹⁴

Perhaps the most significant of these Acts, Ordinances and regulations is the Licencing and Control of Dogs Ordinance. This Ordinance is incorporated by reference into the eThekweni Municipality Animal By-laws. The by-laws provide that ‘licensed’ in relation to dogs, means licensed in terms of the Licensing and Control of Dogs Ordinance (the Ordinance). The ordinance requires every owner of a dog which is six months of age or older to pay an annual prescribed licence fee. The licence fees are paid for the benefit of the provincial revenue fund. Upon payment of the fees, a dog licence is issued to the owner. The by-law regulates matters such as the production of a licence on demand, euthanising of dogs, etc. Authorised persons for the purpose of the Ordinance include a magistrate, a member of the SAPS, an officer of the Natal Provincial Administration, or any other person authorised by the Ordinance to issue licences. The difficulty with the Ordinance is that the licensing of dogs is a local government functional area in terms of the Constitution.

A perusal of the provincial legislation reveals that much of the legislation refers to the old order; as such, there are jurisdictional problems in applying it. (For example, some of the Acts refer to the old KwaZulu areas, while other regulations refer to the area of jurisdiction of the

⁵⁰⁸ Licensing and Control of Dogs Ordinance 10 of 1942.

⁵⁰⁹ KwaZulu Animal Protection Act 4 of 1987.

⁵¹⁰ KwaZulu Act on the Licensing and Control of Dogs Act 19 of 1988.

⁵¹¹ Provincial Notice 297 of 1969.

⁵¹² Ordinance 20 of 1941.

⁵¹³ Provincial Notice 475 of 1969.

⁵¹⁴ Provincial Notice 541 of 1946.

health committees, etc.). In addition, some of the legislation covers functional areas which have been allocated to local government under the new constitutional dispensation. In view of this the advice from the Legal Unit to the Health Unit at the eThekweni Metro was that solutions which involve minimal reliance on the fragmented provincial legislative framework should be preferred.

(f) *By-laws*

(i) Introduction

The Legal Unit attempted to analyse the existing provisions of the animal by-laws with reference to the relevant local government's constitutional functional areas.

(ii) Control of public nuisance

1. Limitation on number of dogs: The by-laws contain provisions limiting the number of dogs which may be kept on a property. This provision is enforceable by the municipality, but it also refers to the Ordinance in that provision is made for an application for permission to license more dogs in terms of section 11 of the Ordinance; and
2. General prohibitions: This section contains a number of useful and enforceable provisions such as that prohibiting owners from allowing diseased animals to be on a public street, or providing that any ownerless animal may be seized by a policeman or any officer of the Durban and Coast SPCA.

(iii) Licensing of dogs

The by-law provisions relating to licensing incorporate certain sections of the Licensing and Control of Dogs Ordinance. They are accordingly unenforceable in those parts of the municipality which fall under the R293 areas.

(iv) Facilities for the accommodation, care, and burial of animals

The by-laws do not address this issue.

(v) Pounds

The by-laws do not address this issue.

(vi) Section 27 of the by-laws: 'Emergency measures to prevent spread of disease'

Section 27 allows the Council's Medical Officer of Health to publish a notice prohibiting dogs and cats from being on any street or public place unless they are on a leash. Any dog or cat found in a public place may be seized, impounded, and destroyed if suspected of having rabies. The section further provides that during the period in which a prohibition is in force, the owner of an animal required to be immunised, may be required to produce a valid certificate of immunisation to any authorised officer.

(g) *Advice*

The legal unit presented the following advice to the health department as a possible way forward in addressing this issue. The analysis of applicable laws shows that the current legislative framework is wholly inadequate in both the provincial and local government spheres. Animal control and diseases is not a local government competence, and in terms of the existing framework, the lead in co-coordinating a response to a rabies outbreak should be taken by the National and Provincial Departments of Agriculture acting in conjunction.

The first version of the Environmental Implementation Plan (EIP) published by the National Department of Agriculture lists the development of an animal disease contingency plan as a programme of the Directorate of Veterinary Services.⁵¹⁵ The EIP states that the Veterinary Services Directorate works in close collaboration with the Veterinary Services of the PDA's (provincial departments), which are responsible for the implementation of policies and programmes.⁵¹⁶ The EIP further states that 'of particular importance are diseases transmissible to humans (such as rabies)'.⁵¹⁷

⁵¹⁵ GN 659 of 17 May 2002, 64.

⁵¹⁶ Ibid 57.

⁵¹⁷ Ibid 64.

The analysis of the national legislative framework reveals a framework at national sphere which is able to deal with the current problem. It is submitted that the animal diseases aspect of responses to the rabies outbreak should be dealt with at national and provincial levels. In so far as the animal by-laws address issues related to the functional area ‘animal control and diseases’, these sections of the by-laws are in all likelihood unconstitutional.

Option 1

As ‘animal and diseases control’ is a concurrent national and provincial function, the eThekweni Metro could call upon the relevant parties to assist by implementing their contingency plan as required by the EIP. Responses at the local government level would then be confined to matters falling within its functional domain (‘control of public nuisances’, ‘licensing of dogs’, ‘facilities for the accommodation, care, and burial of animals’, and ‘pounds’). Efforts would then be concentrated on sorting out the legislative framework relating to municipal functional domains.

This project would require the repeal of all conflicting provincial legislation. Licensing is an area of critical concern. Here extensive consultations would be required between the municipal departments tasked with administering Health, Legal, Licensing, Metro Police, Human Resources, and Treasury regarding provision for enforcement mechanisms, staff, and funding implications.

Option 2

A second suggested option was to seek authorisation from the Director of Animal Health within the Department of Agriculture to designate some of the municipality’s officials as authorised persons to carry out certain functions in the Act (in terms of s 3 of the Animals Diseases Act). The funding implications of this route would also need to be considered.

(h) Analysis

This case study illustrates a number of the issues outlined in this thesis, including:

- (i) concurrency and overlap between the applicable functional areas;
- (ii) misalignment between organisational capacity and the constitutional allocation of functions;
- (iii) differing understandings of the manner in which the Constitution allocates powers and functions to officials; and
- (iv) the non-alignment of the statute book with the Constitution (existence of old order legislation not aligned with the Constitution).

The exercise of trying to navigate the bewildering complexity of the legislative landscape governing local government is a matter of daily practice for officials in all three spheres of government. When officials are presented with a case such as the present one, the question they need answered is simply: ‘Who does what?’ This example shows that often the answer is not readily forthcoming. The difficulty in interpreting the potentially applicable Schedule 4 and Schedule 5 competencies is a problem which must be resolved before the matter can be addressed. Enter the next set of problems – first, many of the officials at the various levels of government do not understand the constitutional allocation of powers. They understand the previous system and nobody has brought them up to speed with what the new system requires. In the result, turf wars, inaction, opting out, and opting for lawlessness all manifest. In all of this, service delivery suffers. And in a case such as the present, the price is the life of a vulnerable rural child.

4.6 Conclusion

This chapter has reviewed the division of powers between local, provincial, and national government spheres by examining case studies drawn from the practice of government. The evidence from practice is that local government is the point of convergence for a large number of laws and policies formulated by national and provincial departments. Often these departments have differing understandings of local government’s functional and administrative arrangements, and very often local government is consulted only after the process of drafting has been completed. The presidency’s *Ten-Year Review of Intergovernmental Relations and Service Delivery*, highlighted the issue in the following terms:

Good governance requires that the national government and the provinces execute their regulatory function over municipalities in an integrated and coordinated manner. Several national departments exercise regulatory

responsibilities that impact on municipalities. If each of the departments works with an own understanding of the role of local government and its own regulatory powers, the risk is that there are as many concepts of local government as there are departments. The cumulative effect of these different concepts amounts to a burden on local government. If a province's own understanding of its regulatory powers over local government is added, the end result is even more burdensome and confusing to municipalities. The practice of regulation suggests that there is no consistency in approach to local government by line departments at both national and provincial level.⁵¹⁸

A detailed analysis of the impact this has had on the legislative framework local government must implement is beyond the scope of this study. Suffice it to say that practice offers many examples:

- (a) National and provincial laws which prescribe detailed, often cumbersome and costly processes for municipalities to follow and which are drafted in local government functional areas, eg the KZN Pounds Act.⁵¹⁹ To this category, it is submitted that large sections of the Municipal Systems Act⁵²⁰ and the regulations made in terms of the Act⁵²¹ and parts of the Municipal Finance Management Act (MFMA)⁵²² and its regulations,⁵²³ may be added. With respect to the regulations made in terms of the MFMA, it is submitted that the detailed legal prescriptions governing the Supply Chain Management process in government is an area which may benefit from further study.⁵²⁴ In particular the question of whether the detailed processes hamper service delivery should be examined together with the question of whether they have contributed to the prevention of corrupt practices.

⁵¹⁸ Layman T 'Intergovernmental Relations and Service Delivery in South Africa: A Ten-year review commissioned by the Presidency' (2003) at 24 available at <http://sarpn.org/documents/d000078751docs/Layman%20Tim.pdf> accessed on 23 September 2017.

⁵¹⁹ KwaZulu-Natal Pound Act 3 of 2006.

⁵²⁰ Local Government: Municipal Systems Act 32 of 2000: ss 27, 29, 37(b), (d)-(h); 54A, 56, 78, 80, 85, 86A, 86H-K, 88-90, 92, 93, 93A-H, 95, 97 and 104.

⁵²¹ Local Government: Municipal Planning and Performance Management Regulations, 2001; Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006; Local Government: Disciplinary Regulations for Senior Managers, 2010.

⁵²² Local Government: Municipal Finance Management Act 56 Of 2003: ss 21-24, 28, 33, 43, 46, 52-54, 60, 62 – 71, 75, 84, 87-90, 112, 120 and 168.

⁵²³ Municipal Investment Regulations GNR. 308 GG 27431 dated 1 April 2005; Municipal Public-Private Partnership Regulations GNR 309 GG 27431 dated 1 April 2005; Municipal Supply Chain Management Regulations GN 868 GG 27636 dated 30 May 2005; Municipal Regulations on Minimum Competency Levels GNR 493 GG 29967 dated 15 June 2007; Municipal Regulations on Debt Disclosure GNR 492 GG 29966 dated 5 June 2007; Municipal Asset Transfer Regulations GNR 878 GG 31346 dated 22 August 2008.

⁵²⁴ Local Government: Municipal Finance Management Act 56 Of 2003: ss 110-116, 119; Preferential Procurement Policy Framework Act 5 of 2000; Preferential Procurement Policy Framework Act, Regulations GNR 502 GG 34350 dated 8 June 2011; Municipal Supply Chain Management Regulations GN 868 GG 27636 dated 30 May 2005.

- (b) Provincial and national laws which add permitting processes at provincial level for functions that are administered at local level.⁵²⁵
- (c) New and old-order legislation which frustrates municipalities' ability to draft by-laws because they contain provisions which directly impact on municipalities in the functional area which the draft by-law seeks to regulate.⁵²⁶
- (d) Conflicting national and provincial laws and policies.⁵²⁷

This illustrates that the implementation of the constitutional allocation of powers has not been translated into consistent legislative practice which respects the constitutional status of local government. If government's own studies demonstrate that 'there are as many concepts of local government as there are departments', clearly this will be reflected in the legislation and policy emanating from those departments. It is hardly surprising, then, that government's review also found that 'national and provincial legislation and policies are also sometimes at odds'.⁵²⁸ The question which cannot be escaped is this – Is the difficulty which national and provincial departments experience in understanding the constitutional allocation of powers a challenge of capacity, implementation, or constitutional design? Or can it be laid at the door of some other factor or possibly a combination of factors? And how do all of these factors combine to impact on the functioning of local government and its ability to fulfil its constitutionally mandated functions? The crucial question is what can be done to address these challenges and to improve the efficacy and functioning of government.

The following recommendations are made to address the challenges outlined above:

- (a) The lack of coordination between national and provincial departments in the area of legislation within their mandates but impacting on local government must be addressed as a matter of urgency.
- (b) A more inclusive consultative process for the drafting of legislation and policy impacting on local government must be implemented. Local government should be included in the process of drafting and developing any laws which they are required to implement.

⁵²⁵ This is seen for instance in relation to permitting processes for the operation of taxis in KwaZulu-Natal.

⁵²⁶ An example of this phenomenon was discussed in the section on Management of Animal Punds in KZN above.

⁵²⁷ For example the conflicting legislation discussed in relation to the DPSA and the draft Public Administration Bill.

⁵²⁸ Layman T 'Intergovernmental Relations and Service Delivery in South Africa: A Ten-year review commissioned by the Presidency' (2003) at 24 available at <http://sarpm.org/documents/d000078751docs/Layman%20Tim.pdf> accessed on 23 September 2017.

- (c) A coordinating structure, with responsibility for coordinating legislation and clearing it for constitutionality and coherence with government policy and compatibility with existing policies and laws across government departments, must be developed. (This is distinct from the technical process or exercise of certifying a Bill for constitutionality performed by the Premier's Offices and the Office of the Chief State Law Advisor.)
- (d) The understanding by officials of the powers and functions of local government, the link between policies and laws and budgets, and the meaning of the constitutional value of cooperative governance need to be addressed.
- (e) All old-order legislation still on the statute books must be rationalised and either redrafted to bring it into line with the Constitution, or repealed.
- (f) Local government legislation must be reviewed and simplified. All laws which are in violation of the Constitution must be repealed.
- (g) The alignment of government departments with the functional allocation of responsibilities needs to be addressed via a comprehensive process that includes an assessment of capacity in local government and in provincial and national departments.

CHAPTER 5

JUDICIAL CONSIDERATION OF CONCURRENT FUNCTIONAL AREAS: THE PLANNING EXAMPLE

5.1 Introduction

5.1.1 General

In the previous chapter the constitutional allocation of powers to local government was examined. The effect of the concurrent allocation of responsibilities on efficient and effective government was also discussed. It was mentioned that one of the challenges which manifests in constitutions which incorporate concurrent powers is the difficulty of delimiting the functional areas of responsibility of the different spheres.⁵²⁹ One of the functional areas in which this difficulty has manifested is that of planning. The Constitution has divided legislative and executive authority over development planning between the three spheres in the following manner: ‘municipal planning’ and the related function of ‘building regulations’ are local government competencies.⁵³⁰ On the other hand, ‘regional planning and development’ and ‘urban and rural development’ fall within an area of concurrent national and provincial competence – they are Schedule 4 Part A functions. Finally, the functional area of ‘provincial planning’ is located in Schedule 5 Part A which lists functional areas of exclusive provincial competence.⁵³¹

The area of planning also overlaps somewhat with other functional areas such as the ‘environment’ – a Schedule 4 Part A competence – and with a number of other areas including mining.⁵³² In fact, Yacoob J observed in the *Wary Holdings* case that: ‘Planning 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

⁵²⁹ See the discussion in Section 4.4 above.

⁵³⁰ Constitution: Schedule 4B.

⁵³¹ Constitution.

⁵³² This overlap was explored in the case of *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 which is discussed in Chapter 6.

land.’⁵³³ It is not surprising, then, that contestation over the functional area of planning has generated a large body of case law dealing with the interpretation of Schedules 4 and 5 to the Constitution. In this section the judicial development of the law with regard to the precise meaning and ambit of the functional areas dealing with development planning is discussed.

5.1.2 Planning Terminology⁵³⁴

In South Africa there has been some confusion about which term best describes the law relating to land-use management and planning. The terms ‘planning law’; ‘land-use planning law’; ‘spatial planning law’; and ‘physical planning law’ have been used at various times. According to Van Wyk, the essentials of planning law are land-use planning and land-use management.⁵³⁵ Land-use planning (or forward planning) entails the compilation of plans to determine land use such as Integrated Development Plans (IDPs) and town planning schemes which includes the zoning of land. Land use management or development control comprises the management of the changes to the original plans such as rezoning and subdivision of land.⁵³⁶ The ‘*Wise Land Use: White Paper on Spatial Planning, Land Use Management and Land Development*’ suggested that the term ‘integrated development planning’ be used to denote plan creation (also known as forward planning), while the terms ‘land-use management’ and ‘land development’ be used to denote change in land use (also known as development control).⁵³⁷ As will be seen from the discussion which follows, the courts have provided some clarity on the issue of terminology.

5.1.3 Planning Legislation⁵³⁸

Municipalities administer planning decisions via a combination of new-order national and provincial legislation and old Ordinances which remain on the statute books of most provinces.⁵³⁹ The primary planning instruments of municipalities are the IDP and the Spatial

⁵³³ *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)* 2009 (1) SA 337 (CC) para 128.

⁵³⁴ Van Wyk (2011) 13 *PER/PELJ* 214 at 219.

⁵³⁵ Van Wyk (2009) 24(2) *SA Public Law* 545 at 559.

⁵³⁶ *Ibid.*

⁵³⁷ Van Wyk (2011) 13 *PER/PELJ* 220.

⁵³⁸ *Ibid* at 219–235.

⁵³⁹ *Ibid.*

Development Framework (SDF) they contain.⁵⁴⁰ The Municipal Systems Act compels municipalities to adopt an IDP containing an SDF setting out the desired spatial form of the municipality together with strategies to achieve it. The SDF must set out desired land-use patterns in the municipality, address spatial reconstruction, relate to the location and nature of development in the municipality, and set out the basic guidelines for a land-use management system for a municipality.⁵⁴¹

Before the commencement of the Spatial Land Use Management Act⁵⁴² on 1 July 2015, planning at municipal level was conducted via the town planning and township Ordinances of the erstwhile provinces. In addition to these Ordinances, the provinces applied separate legislation adopted to govern planning in the homelands and TBVC states.⁵⁴³

Together with all these laws, national environmental legislation also impacts on the municipal planning function by laying down procedures for the granting of environmental authorisation to undertake certain developments.⁵⁴⁴

Against this background, it is necessary to examine the jurisprudence which has emerged from judicial consideration of disputes concerning the exercise of planning powers by the three spheres in the area of development and planning. As discussed in the introduction to this chapter, the boundaries between the functional areas of ‘municipal planning’; ‘regional planning and development’; ‘urban and rural development’; and ‘provincial planning’ are not clear and the precise ambit of the functional areas is not defined. In the absence of definitions in the Constitution or any guidelines, the courts have provided useful guidance in interpreting and defining the precise ambit of the Constitution’s allocation of functional competences between the spheres.

⁵⁴⁰ Ibid at 223.

⁵⁴¹ Local Government Municipal Systems Act 32 of 2000: s 26.

⁵⁴² Spatial Planning and Land Use Management Act 16 of 2013.

⁵⁴³ These laws included the Black Administration Act 38 of 1927, legislation of the former homelands of KwaZulu-Natal, Gazankulu, KaNgwane, Lebowa, KwaNdebele, QwaQwa and laws governing the former TBVC states of Transkei, Bophuthatswana, Venda and Ciskei.

⁵⁴⁴ National Environmental Management Act 107 of 1998.

5.2 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another*⁵⁴⁵

5.2.1 Introduction

Wary Holdings was the first case to come before the Constitutional Court which considered the issue of the limits of local government's powers under the new constitutional order. The issue to be decided was whether the power granted by old-order legislation to the national Minister of Agriculture and Land Affairs to approve or reject subdivision, had survived in light of the new constitutional status of municipalities under the Constitution.⁵⁴⁶ The effect of the decision of the Court would be to either remove or confirm that power.⁵⁴⁷ The Court was accordingly called upon to determine the power of the national government to administer agricultural land falling within municipal boundaries in the context of local government's enhanced constitutional status.

The facts of the case involved the validity of an agreement for the sale of land concluded between the applicant and the first respondent. At the time of sale the land was zoned 'agricultural' but the applicant had lodged an application with the relevant local authority for the rezoning and subdivision of the land. Subdivision was, in fact, a suspensive condition of the sale. The subdivision was eventually approved subject to conditions which were costly to implement. The applicant then sought to increase the purchase price of the property in order to cover the attendant costs and the subsequent increase in the property's value. When the respondent refused to pay the increased price, the applicant claimed that the agreement of sale was invalid and unenforceable.⁵⁴⁸

⁵⁴⁵ *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)* 2009 (1) SA 337 (CC).

⁵⁴⁶ The Minister of Agriculture's power emanated from the Subdivision of Agricultural Land Act 70 of 1970.

⁵⁴⁷ *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)* 2009 (1) SA 337 (CC) para 45.

⁵⁴⁸ *Ibid* para 3.

The respondent approached the Port Elizabeth High Court for a declaratory order that the agreement was binding together with an order compelling the applicant to effect the transfer. The applicant sought to defend the application by arguing that the property sold was ‘agricultural land’ within the meaning of the Act. As such, the sale required the Minister to consent in writing to the subdivision in order for the sale agreement to be valid.⁵⁴⁹

Two parties, who were sellers in similar sale-of-land contracts, applied and were admitted as *amici curiae* in the proceedings. The Minister of Agriculture and Land Affairs (the Minister) was joined as an intervening party. The Minister aligned herself with the stance of the applicant.

The matter turned on whether the land in question was ‘agricultural land’ within the meaning of the Act. The definition of ‘agricultural land’ in section 1 of the Act is as follows:

‘agricultural land’ means any land, except—

- (a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee . . . but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the Gazette to be agricultural land for the purposes of this Act;
-
- (f) land which the Minister after consultation with the executive committee concerned and by notice in the Gazette excludes from the provisions of this Act;

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 (which immediately prior to the first election of the members of such transitional council was classified as agricultural land), shall remain classified as such.⁵⁵⁰

The majority judgment was delivered by Kroon J. The Constitutional Court reasoned that the Act aimed to prevent the division of farming land into smaller, less profitable plots. In order to achieve this, the Act gave the Minister of Agriculture and Land Affairs extensive powers to regulate and control agricultural land.⁵⁵¹

⁵⁴⁹ Ibid paras 4–5.

⁵⁵⁰ Agricultural Land Act 70 of 1970: s 1.

⁵⁵¹ These powers included the curtailment of owners’ common-law rights to subdivide their properties by the introduction of a requirement of ministerial consent prior to subdivision. See *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)* 2009 (1) SA 337 (CC) para 12.

The Constitutional Court noted that ‘agriculture’ is listed in Schedule 4 Part A as a functional area of concurrent national and provincial competence.⁵⁵² The decision of the Court *a quo* had turned on its interpretation of the proviso to the definition of ‘agricultural land.’ This proviso was added on the eve of the first local government elections to remedy the fact that following the elections all existing agricultural land would fall within the boundaries of a municipality.⁵⁵³

It held that the Minister’s written consent to the subdivision was a pre-requisite for a valid and enforceable agreement as, in the Constitutional Court’s view, the proviso provides a point in time with reference to which it must be decided if the land in question qualifies as agricultural land. If the land is agricultural land at that point in time, it remains so irrespective of any later changes to local government structures or boundaries.⁵⁵⁴

5.2.2 The Supreme Court of Appeal decision⁵⁵⁵

The Supreme Court of Appeal held that the proviso had been enacted as an interim measure in order it to preserve the status quo until the establishment of the new local government structures. Once the restructuring of local government was complete, the interim measure fell away. In the SCA’s view, the plain meaning of the words in the proviso was that it was intended to operate only so long as the land affected remained within the jurisdiction of a transitional council. If the legislature had intended the classification to survive after the transitional councils had ceased to exist, it would have said so expressly.⁵⁵⁶

The seminal part of the judgment as regards the interpretation of local government powers and functions, is the Supreme Court of Appeal’s finding that the High Court’s approach was incompatible with the ‘radically enhanced status and powers which the new constitutional order accorded local government structures.’⁵⁵⁷ This status necessarily includes the competence and capacity on the part of municipalities to administer land falling within their areas of jurisdiction

⁵⁵² Constitution: Schedule 4.

⁵⁵³ *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)* 2009 (1) SA 337 (CC) paras 28-30.

⁵⁵⁴ *Ibid* para 24.

⁵⁵⁵ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd & another* 2008 (1) SA 654 (SCA).

⁵⁵⁶ *Ibid* paras 21-28.

⁵⁵⁷ *Ibid* para 32.

without national and provincial executive oversight.⁵⁵⁸ The SCA reasoned further that in terms of the definition of ‘agricultural land’ in the Act, the Minister retained the power to declare any land ‘agricultural land’ for the purposes of the Act. This fact had been overlooked by the High Court. In view of this the SCA found that the objective of the Act would not be thwarted as section 3 of the Act still prohibits the subdivision of ‘agricultural land’ without the Minister’s consent.⁵⁵⁹

5.2.3 The Constitutional Court decision⁵⁶⁰

(a) *The majority judgment*

The Constitutional Court applied the ordinary-meaning rule to the interpretation of the definition of ‘agricultural land’.⁵⁶¹ Kroon J, writing for the majority, was of the view that the interpretation of the proviso was not tied to the life of the transitional councils.⁵⁶² He considered the finding of the SCA that the proviso was intended as an interim measure to be correct, but went on to reason that this does not mean that the proviso was intended to promote the contemplated restructuring of local government as there is no reference to the final local government structures to come into being in the future. He concluded: ‘In short, the proviso has to do with agriculture, not restructuring of local government.’⁵⁶³

In a split decision of seven to three the Constitutional Court set aside the judgment of the SCA and reinstated the order of the High Court. In the Court’s view, the powers of local and national government could co-exist as the role of each sphere was governed by important policy considerations. From a national viewpoint, land, agriculture, food production, and environmental considerations are important national policy matters. Accordingly, in the

⁵⁵⁸ *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)* 2009 (1) SA 337 (CC) para 26.

⁵⁵⁹ *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd & another* 2008 (1) SA 654 (SCA) para 27.

⁵⁶⁰ *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)* 2009 (1) SA 337 (CC).

⁵⁶¹ It is a canon of statutory interpretation that the ordinary meaning of words must be determined from the context of the statute (including its purpose) read in its entirety.

⁵⁶² *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)* 2009 (1) SA 337 (CC) para 62.

⁵⁶³ *Ibid* para 66.

Court's view, it was desirable to adopt an interpretation which preserved national government's authority over policy in order to ensure certainty.⁵⁶⁴

(b) *The minority judgment*

The minority judgment held that on the ordinary grammatical meaning of the words the land would remain agricultural land only for so long as it remained within the jurisdiction of a transitional council.⁵⁶⁵ Writing for the minority, Yacoob J did not agree with the view that dire consequences would result from the interpretation preferred by the SCA. In his view the consequences attendant upon such an interpretation accorded with the constitutional scheme for the devolution of powers between the spheres.⁵⁶⁶

The judge reasoned that the proviso was added to the law one day prior to the first municipal elections in respect of transitional councils. This was done in order to prevent the administration of agriculture being compromised if the newly established councils did not have the requisite capacity to administer the function. The purpose was to ensure that the Minister retained these powers until local government had been restructured and laws had been passed to divide powers and functions in relation to agriculture and land-use planning.⁵⁶⁷

The Constitution was passed and its provisions set out the division of powers between the three spheres. The minority noted that in terms of this division, 'agriculture' is a concurrent competence, however, in their view the way in which the Constitution devolved power for planning was crucial. In this regard, 'regional planning', like agriculture, is a concurrent functional area. However, regional planning is distinct from municipal planning, an expressly stated municipal function.⁵⁶⁸

In Yacoob J's view, the competence 'agriculture' does not exist in a 'hermetically sealed compartment': 'Planning entails land use and is connected to every decision concerning land.'⁵⁶⁹ Land use planning must take place in all three spheres of government. He concluded

⁵⁶⁴ Ibid para 80.

⁵⁶⁵ Ibid para 121.

⁵⁶⁶ Ibid para 124.

⁵⁶⁷ Ibid para 125.

⁵⁶⁸ Ibid paras 127-8.

⁵⁶⁹ Ibid paras 128.

that insofar as the Act was concerned with zoning, subdivision, and sale of land, it was engaged in the regulation of the functional area of planning and not agriculture.⁵⁷⁰

The minority judgment supports the view that there is an inevitable overlap between the functional areas in Schedules 4 and 5 to the Constitution as found by the Constitutional Court in the *Liquor Bill* case.⁵⁷¹ In the *Liquor Bill* case the Court stated that when interpreting concurrent powers, the main substance of the legislation must be determined in order to establish within which field of competence it falls.⁵⁷² Applying this approach to the present matter, Yacoob J concluded that issues of zoning of land and subdivision were essentially a planning function. In his view the Minister's role in the planning function applied only where local government structures were absent. The Constitution requires that planning be undertaken by municipalities; to continue to afford the Minister power over planning would be at odds with the Constitution by negating the 'municipal planning' function and possibly trespassing on the provincial competence of 'provincial planning.'⁵⁷³

The minority judgment goes on to point out that the Municipal Structures and Municipal Systems Acts⁵⁷⁴ confirm the status of land use planning as a municipal function.⁵⁷⁵ These Acts confirm the municipal council's authority to adopt IDPs and SDFs – instruments which regulate land use management in local government. National and provincial governments are afforded an oversight role via the power granted to the MEC for Local Government in the two Acts.

⁵⁷⁰ Ibid para 128.

⁵⁷¹ *Ex Parte President of the Republic of South Africa: In Re: Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC) para 47 where the Constitutional Court found that:

The list of exclusive competences in Schedule 5 must therefore be given meaning within the context of the constitutional scheme that accords Parliament extensive power encompassing 'any matter' excluding only the provincial exclusive competences. The wide ambit of the functional competences concurrently accorded the national Legislature by Schedule 4 creates the potential for overlap, not merely with the provinces' concurrent legislative powers in Schedule 4, but with their exclusive competences set out in Schedule 5. Examples of concurrent Schedule 4 competences which could overlap with Schedule 5 competences include 'trade' and 'liquor licences'; 'environment' and 'provincial planning'; 'cultural matters' and 'provincial cultural matters' as well as 'libraries other than national libraries'; and 'road traffic regulation' and 'provincial roads and traffic.'

⁵⁷² Ibid para 62.

⁵⁷³ Ibid para 131.

⁵⁷⁴ Local Government: Municipal Systems Act 32 of 2000; Local Government: Municipal Structures Act 117 of 1998.

⁵⁷⁵ *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)* 2009 (1) SA 337 (CC) para 128.

Similarly, the Acts give the national Minister for Local Government the power to make regulations concerning IDPs.⁵⁷⁶

Finally, Yacoob J concluded that the application for rezoning in this case had been made well after the Municipal Systems Act came into force, and the decision taken by the municipality was consistent with its approved IDP and SDF.⁵⁷⁷ The IDP would have been drafted in compliance with the national regulations and would have been approved by the MEC for local government. Yacoob J was of the view that in these circumstances the national Minister of Agriculture and Land Affairs could not expect to have a veto over this specific subdivision.⁵⁷⁸ Accordingly, the minority disagreed with High Court's interpretation. In its view a literal interpretation of the proviso was supported by the context and purpose of the Act.⁵⁷⁹

5.2.4 Analysis

Academic analysis of the judgment in *Wary Holdings* has been varied. Van Wyk approves the reasoning in the minority judgment to the effect that leaving responsibility for subdivision of agricultural land with the Department of Agriculture presents constitutional difficulties as it negates municipalities' planning function which, in terms of the Constitution, is allocated to the local government sphere. In Van Wyk's view it 'seems incomprehensible that municipalities have the power to subdivide urban land but not agricultural or rural land situated in the municipal area.'⁵⁸⁰ In Steytler's view, the majority judgment is lacking in that it offers no proper analysis of the functional division of powers between the three spheres of government. In his view, the proviso should have been interpreted so as to conform to the constitutional division of powers. This is what Yacoob J did in the minority judgment, but Steytler argues that he arrived at a wrong conclusion.⁵⁸¹ For Steytler, planning relates mainly to the built environment (zoning, building regulations, etc.) and this does not extend to decisions on subdivision of agricultural land as municipalities have no interest at stake in such

⁵⁷⁶ Yacoob J points out that the Minister has made these regulations in Local Government Municipal Planning and Performance Regulation GN R796 GG 22605 of 24 August 2001.

⁵⁷⁷ *Ex Parte President of the Republic of South Africa: In Re: Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC) para 140.

⁵⁷⁸ *Ibid* para 139.

⁵⁷⁹ *Ibid* para 141.

⁵⁸⁰ Van Wyk (2009) 24(2) *SA Public Law* 545, 562.

⁵⁸¹ Steytler (2009) 2 *Constitutional Court Review* 439.

decisions. ‘Agriculture’ is not a functional area of local government and municipalities do not have officials with the necessary skills to make such decisions. He points to the *Liquor Bill* case in which the Constitutional Court held that the provincial exclusive competence over ‘liquor licences’ is limited to licences that have no extra-provincial dimension.⁵⁸² Applying that principle to the present case, the ‘municipal planning’ function should be limited to land-use matters that have no extra-municipal application. The optimal use of agricultural land can only be judged on a provincial or national scale. According to Steytler, this dimension is not adequately covered in the IDP as IDPs are unlikely to speak to issues of viable farming units which are not municipal business. He also points to the possibility that there may be no alignment between IDPs and provincial and national plans. In his view, subdivision of agricultural land deals with agriculture and not planning.⁵⁸³

Olivier and Williams contend that the Constitutional Court was correct in finding that the proviso and the Act still apply. In their view the majority decision is correct and sound in law taking into account the background to the Subdivision of Agricultural Land Act, the history, content, and manner of assignment in the interim Constitution, and the constitutional arrangements in the Constitution.⁵⁸⁴

5.3 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others*⁵⁸⁵

5.3.1 Introduction

This decision dealt with a dispute between the City of Johannesburg (the city) and the Gauteng Development Tribunal. The dispute involved which sphere of government was entitled to exercise the powers relating to the establishment of townships and rezoning of land within the municipal area of the city in terms of the Constitution. Chapters V and VI of Development Facilitation Act (the Act), authorised provincial tribunals established in terms of the Act to determine applications for rezoning of land and for the establishment of townships.⁵⁸⁶

⁵⁸² *Ex Parte President of the Republic of South Africa: In Re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC).

⁵⁸³ Steytler (2009) 2 *Constitutional Court Review* 445.

⁵⁸⁴ Olivier & Williams (2010) 35(2) *Journal of Juridical Science* 99.

⁵⁸⁵ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC).

⁵⁸⁶ Development Facilitation Act 67 of 1995.

The facts were that the city delegated its powers to decide rezoning applications and to establish new townships to its planning committee. Difficulties began to emerge when the Gauteng Development Tribunal decided rezoning and township establishment applications within the city's area of jurisdiction. The city complained that the tribunal was overly lenient and that its decisions were often taken without regard to the city's development planning instruments. This undermined the authority of the city and resulted in 'forum shopping'. After meetings between officials from the city and the province failed to resolve the dispute, the parties agreed that the city should approach the High Court for a declaratory order in order to clarify the powers of the parties in terms of the Act.⁵⁸⁷ The city unsuccessfully challenged the constitutional validity of the Act in the High Court. On appeal, the SCA declared the Act to be invalid, but suspended the declaration of invalidity for eighteen months to allow Parliament to remedy the defects. In the Constitutional Court, the city sought confirmation of the SCA's order, leave to appeal against certain ancillary orders relating to the declaration of invalidity, and also leave to appeal against the dismissal of its appeal against two of the tribunal's decisions.⁵⁸⁸

The central issue before the Constitutional Court was whether the impugned Chapters of the Act were inconsistent with the constitutional division of powers between the three spheres. This issue turned on the interpretation of Chapters V and VI of the Act, section 156 of the Constitution, and the functional areas of 'regional planning and development', 'provincial planning', 'municipal planning', and 'urban and rural development'.⁵⁸⁹

5.3.2 The Constitutional Court decision

In its reasoning, the Constitutional Court discussed the constitutional scheme for the three distinct, interdependent, and interrelated spheres of government. It noted that each sphere is autonomous in the exercise of its powers, and that the spheres must respect the status, powers, and functions of government in other spheres. Sections 100 and 139 set out how the national and provincial spheres are permitted to intervene in municipalities. Section 156(1) affords municipalities original constitutional legislative and executive powers over Schedule 4 Part B

⁵⁸⁷ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) paras 9-10.

⁵⁸⁸ *Ibid* paras 14-18.

⁵⁸⁹ *Ibid* para 19.

and Schedule 5 Part B matters. The Court noted that section 155(7) obliges national and provincial governments to ‘see to the effective performance by municipalities of their functions listed in Schedules 4 and 5 by regulating the exercise by municipalities of their executive authority’.⁵⁹⁰

In the Constitutional Court’s view, the functional area of ‘planning’ was material to the determination of whether Chapters V and VI of the Act were inconsistent with the Constitution. The Court reiterated that a purposive approach to interpretation which will allow the spheres to exercise their powers ‘fully and effectively’ was required. Referring to the decision in the *Liquor Bill* case, it noted that the Constitution confers planning responsibilities on each of the three spheres; whilst the functional areas do not exist in hermetically sealed compartments – they are distinct from one another.⁵⁹¹ The Court found that:⁵⁹²

This distinctiveness lies in the level at which a particular power is exercised The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas of other spheres the functional area of ‘provincial roads’ does not include ‘municipal roads’. In the same vein, ‘provincial planning’ and ‘regional planning and development’ do not include ‘municipal planning.’

In the Constitutional Court’s view, (with the exception of concurrent powers) each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise. With regard to the meaning of ‘planning’, the Court held that the term has a particular, well established meaning in the context of municipal affairs which includes the zoning of land and the establishment of townships. There is nothing in the Constitution that indicates that the drafters intended to give the term ‘planning’ anything other than its common meaning. The Constitutional Court agreed with the SCA that the Constitution uses the term ‘planning’ in its commonly understood sense and accordingly held that the contested provisions of the Act concerned ‘municipal planning’.⁵⁹³

⁵⁹⁰ Ibid paras 44-49.

⁵⁹¹ *Ex Parte President of the Republic of South Africa: In Re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC); *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) paras 49-50.

⁵⁹² *City of Johannesburg Metropolitan Municipality* ibid para 47.

⁵⁹³ Ibid para 59.

The next question the Constitutional Court considered was whether the contested powers could be said to form part of the provincial power of ‘urban and rural development’ in Schedule 4 Part B. The Court held that to construe any of the national and provincial functional areas in a manner which includes areas of local government competence would be inconsistent with the constitutional scheme for the allocation of powers. This scheme requires the spheres to respect the functions of other spheres and not to encroach upon another sphere’s functional integrity. Accordingly, the Court held that the national government cannot enact legislation which transfers legislative and executive authority over municipal affairs granted in terms of the Constitution to another sphere of government. The mandate of the national and provincial spheres is limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities. The Court did not consider it necessary to define the functional area of ‘urban and rural development’ save to say that it is not broad enough to encompass ‘municipal planning.’⁵⁹⁴

The Constitutional Court distinguished its reasoning in this decision from that in *Wary Holdings* by stating that in the latter case the Court was not directly confronted with the question of interpreting the Schedules, but was instead concerned with the interpretation of the Subdivision of Agricultural Land Act (SALA).⁵⁹⁵ Accordingly, *Wary Holdings* cannot be read ‘as suggesting that the national sphere has executive powers in the municipal sphere that extend beyond its constitutionally prescribed roles of regulating the exercise of municipal powers by municipalities themselves and strengthening their capacity to manage their own affairs.’⁵⁹⁶

Delivering the judgment on behalf of the Constitutional Court, Jafta J held that in granting applications for rezoning or the establishment of townships, the development tribunals had encroached on the functional area of ‘municipal planning.’ Accordingly, the Court held that Chapters V and VI of the Act were inconsistent with section 156 of the Constitution read with Schedule 4 Part B. The Court confirmed the order of constitutional invalidity made by the SCA

⁵⁹⁴ Ibid paras 60-65.

⁵⁹⁵ *Minister of Public Works & others v Kyalami Ridge Environmental Association & another* 2001 (3) SA 1151 (CC); Subdivision of Agricultural Land Act 70 of 1970.

⁵⁹⁶ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) para 70.

but suspended the declaration of invalidity for 24 months to enable Parliament to remedy the defects in the legislation.⁵⁹⁷

5.4 *Swartland Municipality v Louw NO & others*⁵⁹⁸

5.4.1 Introduction

In *Swartland Municipality*, the Western Cape High Court was called upon to decide the validity and enforceability of the Cape Land Use Planning Ordinance (LUPO) and the scheme regulations promulgated in terms of the Ordinance.⁵⁹⁹ The applicant, Swartland Municipality, sought an interdict preventing the fifth respondent, Elsana Quarry (Pty) Ltd (Elsana), from conducting mining activities on a farm that had not been properly rezoned by the municipality from Agricultural I to Industrial III. Elsana had been granted a mining right effective for 30 years by the Minister of Minerals and Energy (the Minister). They then conducted and submitted an environmental impact assessment which was subsequently approved by the Department of Minerals and Energy (DME).⁶⁰⁰

In June 2000, Elsana submitted a rezoning application for the farm under the LUPO. However, the LUPO application was withdrawn after the respondents were advised by the DME that the granting of mining rights was the exclusive preserve of the national government. Elsana contended that it was entitled to continue mining activities by virtue of the mining right issued to it. However, the municipality argued that Elsana was not permitted to conduct mining activities on the property until the property had been zoned Industrial III.⁶⁰¹

⁵⁹⁷ This was due to information placed before the Constitutional Court which indicated that the Ordinances which empowered the tribunals applied only within the jurisdiction of old provinces but excluded the homelands and R293 areas. The suspension was subject to the condition that the development tribunals consider the applicable integrated development plans, spatial development frameworks, and urban development boundaries of municipalities when deciding applications. A further condition was that no development tribunal may consider an application for the grant or alteration of land use rights within eThekweni Municipality or the City of Johannesburg Metropolitan Municipality. The latter two conditions were added in order to accommodate the less resourced municipalities who lacked capacity to decide land applications and which relied on the tribunals to carry out this function. See *City of Johannesburg Metropolitan Municipality* ibid paras 70-101.

⁵⁹⁸ *Swartland Municipality v Louw NO & others* 2010 (5) SA 314 (WCC).

⁵⁹⁹ The Land Use Planning Ordinance 15 of 1985.

⁶⁰⁰ *Swartland Municipality v Louw NO & others* 2010 (5) SA 314 (WCC) para 7.

⁶⁰¹ Ibid para 8.

The parties' contentions were based on differing interpretations of the effect of provisions of the Mineral and Petroleum Resources Development Act (MPRDA), on the LUPO as subordinate legislation, as well as regarding the constitutionality of the LUPO.⁶⁰² The main objective of the MPRDA was to give effect to the state's custodianship of the country's mineral and petroleum resources. Section 23(6) of the MPRDA provides in this respect as follows:⁶⁰³

A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years.

And section 25(2)(d) goes on to provide that the 'holder of a mining right must comply with the relevant provisions of this Act, any other relevant law and the terms and conditions of the mining right...'.⁶⁰⁴

The respondents argued that the functional area of mining and minerals was an exclusive national legislative competence and reference to 'any relevant law' in the MPRDA did not include the LUPO to the extent that it purports to regulate the control and use of land for mining purposes. The respondents contended that the LUPO was pre-constitution legislation which was inconsistent with the MPRDA and the Constitution.⁶⁰⁵

5.4.2 The High Court decision

The High Court held that the legislature must have been aware that there was provincial and local legislation on land-use planning and zoning when it enacted the MPRDA. In the Court's view the meaning of 'any relevant law' in section 23(6) included the LUPO. Having concluded that the LUPO was relevant and binding, the Court turned to consider the issue of conflict between the LUPO and the MPRDA.⁶⁰⁵

The High Court noted the constitutional shift away from three 'tiers' of government toward three 'spheres' which was based on the fact 'that each of the spheres of government (and their

⁶⁰² Mineral and Petroleum Resources Development Act 28 of 2002; Land Use Planning Ordinance 15 of 1985.

⁶⁰³ *Swartland Municipality v Louw NO & others* 2010 (5) SA 314 (WCC) para 14.

⁶⁰⁴ *Ibid* para 16.

⁶⁰⁵ *Ibid* para 20.

legislatures) has equivalent status, is self-reliant and inviolable, and enjoys sufficient constitutional latitude to define and express its unique character.’⁶⁰⁶ ‘Mining and minerals’ is not listed in the allocation of powers in Schedules 4 and 5. ‘Agriculture’ and ‘regional planning and development’ are concurrent provincial and national competencies (Schedule 4 Part A). ‘Provincial planning’ is an area of provincial legislative authority while ‘municipal planning’ is a local government functional area (Schedule 4 Part B).⁶⁰⁷

Le Grange J noted that in *Wary Holdings*, the Constitutional Court held that planning entails land use and is therefore connected to every functional area that concerns land.⁶⁰⁸ In order to determine the meaning of ‘planning’, the judge considered the following *dictum* of Nugent JA in the SCA decision in *Johannesburg Municipality v Gauteng Development Tribunal & Others*:⁶⁰⁹

It is clear that the word ‘planning’ when used in the context of municipal affairs, is commonly understood to refer to the control and regulation of land use, and I have no doubt that it was used in the Constitution with that common usage in mind. The prefix ‘municipal’ does no more than to confine it to municipal affairs. That construction, which gives meaningful effect to the term, has the effect of leaving in the hands of national and provincial government the authority to legislate in the functional area of ‘urban development’, but reserving to municipalities the authority to micro manage the use of land for any such development. On that construction the functional area of urban development retains considerable scope for national and provincial legislation.

Accordingly, Le Grange J found that the LUPO provides a statutory framework for the regulation of land use and planning which is consistent with the Constitution. The High Court held further that the LUPO is not directed at the control of mining and falls within ‘the legislative competency scope provided for in both Schedules 4 and 5 of the Constitution’.⁶¹⁰ Given that the objects of the LUPO and the MPRDA differ, the High Court held that the MPRDA cannot be regarded as trumping the provisions of the LUPO.⁶¹¹

⁶⁰⁶ Ibid para 26.

⁶⁰⁷ Ibid para 29.

⁶⁰⁸ *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)* 2009 (1) SA 337 (CC).

⁶⁰⁹ *Johannesburg Municipality v Gauteng Development Tribunal & others* 2010 (2) SA 554 (SCA) para 4 cited at para 32 of *Swartland Municipality v Louw NO & others* 2010 (5) SA 314 (WCC).

⁶¹⁰ *Swartland Municipality v Louw NO & others* 2010 (5) SA 314 (WCC) para 34.

⁶¹¹ Ibid paras 34–40.

The High Court held that the zoning of land is essentially a planning function. In its view the legislator could not have intended to grant the Minister the power to make decisions which were outside the scope and purpose of the MPRDA. Such a wide ministerial power would ‘negate the municipal planning function conferred upon municipalities and may well trespass into the sphere of exclusive provincial competence’.⁶¹² Accordingly, the Court found that there was no conflict between the LUPO and the MPRDA as the two can be read as mutually supportive.⁶¹³

5.4.3 The Supreme Court of Appeal and Constitutional Court decisions⁶¹⁴

The Minister for Mineral Resources appealed to the Supreme Court of Appeals (SCA) against the order of the High Court. The SCA held that the MPRDA governs mining whereas the LUPO governs land use planning. In the Court’s view, the Ordinance and the Act operate alongside each other with the result that a party which has been granted a mining right in terms of the MPRDA, must seek rezoning of the land in terms of the LUPO before starting to mine.

In the Constitutional Court, the Minister’s appeal was heard together with the similar case, *Maccsand v City of Cape Town*.⁶¹⁵ The reasons for dismissing the appeal in that case apply equally to the present case, accordingly the reasons were not set out by the Constitutional Court in the present case. The Court dismissed the appeal and held that it agreed with the SCA that a party who is granted a mining right in terms of the MPRDA may start mining operations only if the zoning of land in terms of the LUPO permits it.

⁶¹² Ibid para 41.

⁶¹³ Ibid para 41.

⁶¹⁴ *Louw NO & others v Swartland Municipality* [2011] ZASCA 142 and *Minister for Mineral Resources v Swartland Municipality & others* 2012 (7) BCLR 712 (CC).

⁶¹⁵ *MaccSand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC).

5.5 *MaccSand (Pty) Ltd v City of Cape Town & others*⁶¹⁶

5.5.1 Introduction

Like the *Swartland Municipality* case, this case concerned the interplay between the MPRDA, the LUPO, and the National Environmental Management Act (NEMA).⁶¹⁷ The facts of the case and the decision in the matter turned on the Constitutional Court's interpretation of the constitutional allocation of powers in the Schedules to the Constitution.

The dispute arose when the Minister of Mineral Resources granted two mining permits to Maccsand which authorised it to carry out mining on the Rocklands and Westridge Dunes in Mitchells Plain. Both permits related to areas which were in close proximity to private homes. In addition to being close to homes, the Rocklands Dunes were between two schools. The land to which the permits related belonged to the city of Cape Town and was zoned as 'public open space' in terms of the LUPO.⁶¹⁸ The city of Cape Town (the city) objected to the mining operations and instituted proceedings for an interdict restraining Maccsand from mining sand until the dunes had been rezoned to allow for mining.⁶¹⁹

Section 23(1) of the MPRDA empowers the Minister to grant mineral rights subject to any terms and conditions she or he may wish to impose. A mining right granted in terms of the MPRDA comes into effect on the date on which the environmental management programme is approved. The MPRDA obliges the Minister of Mineral Resources to consult the Minister of Water and Environmental Affairs when she or he considers an environmental management plan or programme.⁶²⁰

The NEMA was passed in order to establish framework legislation to guide organs of state when they take decisions which may affect the environment. It also provides for cooperative environmental governance by establishing principles for decision-makers on matters affecting

⁶¹⁶ Ibid.

⁶¹⁷ Mineral and Petroleum Resources Development Act 28 of 2002; Land Use Planning Ordinance 15 of 1985; National Environmental Management Act 107 of 1998.

⁶¹⁸ The Land Use Planning Ordinance 15 of 1985.

⁶¹⁹ *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC) paras 20-22.

⁶²⁰ Ibid para 6.

the environment. In deciding applications for mining rights, the NEMA requires both the Minister of Water and Environmental Affairs or the Minister of Mineral Resources, as the case may be, to comply with the NEMA. The Ministers are also required to consult every state department which administers a law relating to the environment.⁶²¹

The LUPO is pre-Constitution legislation which came into force in July 1986. The operation of the LUPO was preserved by the interim Constitution and it was later assigned to the provincial government of the Western Cape. The LUPO governs spatial development by laying down procedures for municipalities to submit structure plans to the province. In terms of the LUPO, land may not be used for purposes other than those which are permitted by the relevant zoning scheme.⁶²²

5.5.2 The High Court decision

In the High Court, both Maccsand and the Minister of Mineral Resources argued that interpreting the LUPO so as to include ‘mining’ was inconsistent with the Constitution as ‘mining’ falls under the exclusive competence of national government. The constitutional scheme does not permit interference by one sphere in the exercise of powers assigned to another sphere. The High Court rejected this argument and found that the LUPO does not relate to ‘mining’ but to ‘planning’, which is an area of local government competence in terms of the Constitution. The LUPO does not purport to regulate mining. Similarly, the Minister of Mineral Resources contended that the NEMA does not apply to ‘mining’ activities as the MPRDA adequately protects the environment. This argument was rejected by the High Court which held that the MPRDA and the NEMA must be interpreted to give effect to the fact that both laws apply to mining activities. As a result the High Court interdicted Maccsand from commencing or continuing with mining activities until the land had been rezoned in terms of the LUPO and the relevant authorisations had been granted in terms of the NEMA.⁶²³

⁶²¹ National Environmental Management Act 107 of 1998 s 240(2); *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC) paras 8-10.

⁶²² Land Use Planning Ordinance 15 of 1985; *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC) paras 15-16.

⁶²³ *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC) paras 23-26.

5.5.3 The Supreme Court of Appeal decision

Maccsand and the Minister of Mineral Resources appealed to the Supreme Court of Appeal on grounds similar to those raised in the High Court. The SCA concluded that the LUPO and the MPRDA apply alongside each other. Accordingly, it held that a holder of a mining right cannot proceed to mine unless the LUPO permits mining on the land concerned. However, the interdicts based on the NEMA were set aside due to the repeal of the regulations underpinning the decision.⁶²⁴

Maccsand appealed to the Constitutional Court seeking to challenge the decision of the SCA. One of the main issues was whether a holder of a mining right or permit granted in terms of the MPRDA may exercise those rights only where the zoning scheme relating to the land in terms of the LUPO permits mining.⁶²⁵

5.5.4 The Constitutional Court decision

The Constitutional Court noted that the LUPO predated the enactment of the MPRDA and that the Westridge and Rockland Dunes were zoned for ‘public open space’ before Maccsand was granted the mining permit. The question was whether the application of the LUPO to the land ceased once the mining permits in terms of the MPRDA had been granted. The applicants argued that because the LUPO does not regulate ‘mining’, it does not apply to land in respect of which mining rights have been granted. They argued further that to hold that the LUPO applies would amount to an unjustified intrusion by the local sphere into the exclusive terrain of national government.⁶²⁶

The Constitutional Court stated that the MPRDA is concerned with ‘mining’ which is a national government competence. On the other hand, the LUPO regulates the use of land which falls into the local government competency of ‘municipal planning’. The two laws overlap because mining is carried out on land. In the Court’s view, this overlap was not an unjustified intrusion by one sphere into the area of competence of another sphere because spheres of government

⁶²⁴ Ibid paras 27-29.

⁶²⁵ Ibid para 30.

⁶²⁶ Ibid para 41.

do not exist in sealed compartments. If it is accepted that the LUPO applies to ‘municipal planning’, then it applies to the Westridge and Rockland Dunes. Consequently, the Court found that the mere granting of a mining right cannot cancel the LUPO’s application.⁶²⁷ The *ratio decidendi* is set out by Jafta J in the following extract from the judgment:⁶²⁸

The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere.⁶²⁹ But because these powers are not contained in hermetically sealed compartments, 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. It is in this context that the Constitution obliges these spheres of government to co-operate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.⁶³⁰

The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed.⁶³¹ If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through co-operation between the two organs of state, failing which, the refusal may be challenged on review.⁶³²

5.5.5 Analysis

Humby contends that national government’s insistence that the MPRDA trumps the LUPO must be seen in the context of the historically privileged position which the mining industry has enjoyed in South Africa. Both the common law and legislation were geared towards the protection of the mining industry – understandably, given the importance of mining to the economy. Added to this is the historically submissive status of local government in relation to provincial and national government. Under the parliamentary system local government bodies

⁶²⁷ Ibid paras 42-51.

⁶²⁸ Ibid paras 47-48.

⁶²⁹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) para 53.

⁶³⁰ Constitution: s 41.

⁶³¹ *Minister of Public Works & others v Kyalami Ridge Environmental Association & another* 2001 (3) SA 1151 (CC) para 59 and *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)* 2009 (1) SA 337 (CC) para 80.

⁶³² *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC) paras 47-48.

were ‘creatures of statute’. This is in distinct contrast to the constitutionally enhanced status of local government as a fully-fledged sphere of government in its own right that prevails today.⁶³³

Woolman and Roux argue that the constitutional notion of spheres of government sets the stage for two competing models of federalism with two differing concepts of intergovernmental relations – coercive intergovernmental relations versus cooperative intergovernmental relations. In the cooperative model there is relative parity between the spheres.⁶³⁴ It is submitted that this is the model set out in section 41(1) of the Constitution which enjoins all spheres to respect the constitutional status and functions of government in all spheres. By contrast, the coercive model harks back to the hierarchical system where national government is dominant. Woolman and Roux assert that intergovernmental relations legislation and other laws enacted after the Constitution, taken together with the dominance of the ANC in political structures, have led to the development of a system which more closely supports the coercive model.⁶³⁵ This, it is submitted, is unfortunate.

The reasoning of the Constitutional Court in the line of cases discussed above (*Wary Holdings*, *Gauteng Development Tribunal*, and *Maccsand*) appears to be developing in the opposite direction.⁶³⁶ In the context of national / local intergovernmental relations, Humby discerns the development of a line of reasoning which culminates in a ‘doctrine of usurpation’ in the *Maccsand* case.⁶³⁷ This doctrine applies in relation to concurrency and overlap of powers between the spheres. Beginning with Kroon J in *Wary Holdings*, there is a clear statement that overlap is to be expected in the constitutional scheme for the allocation of powers. The mere existence of an overlap does not necessarily imply a conflict. In *Wary Holdings* the Court accepted that the Subdivision of Land Act (SALA) dealt with subdivision in terms of national government’s competence over agriculture, whilst the municipality dealt with it from the perspective of its competence to oversee municipal planning.⁶³⁸ This finding was confirmed in

⁶³³ Humby (2012) 27(2) *SA Public Law* 628, 634-635.

⁶³⁴ Woolman S & Roux T ‘Co-operative government and intergovernmental relations’ in Woolman et al *Constitutional Law of South Africa* 2nd ed RS 4 at 14-6.

⁶³⁵ *Ibid.*

⁶³⁶ *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)* 2009 (1) SA 337 (CC); *City of Johannesburg Metropolitan Municipality*; and *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC).

⁶³⁷ Humby (2012) 27(2) *SA Public Law* 635.

⁶³⁸ Subdivision of Agricultural Land Act 70 of 1970.

Swartland v Louw and *Maccsand*.⁶³⁹ In the latter case the Constitutional Court confirmed that constitutional powers do not exist in ‘hermetically sealed’ compartments but may overlap. The mere existence of overlap does not mean that there is an intrusion by one sphere in the functional area of another. Functions can overlap, and it is in this situation that the principles of intergovernmental relations come into play.⁶⁴⁰ Furthermore, it is not only possible for different spheres to exercise powers in relation to the same object, but it is in fact possible that in exercising their powers in a matter one sphere can have what effectively amounts to a veto over a power constitutionally assigned to another sphere (as occurred as a result of the decision in *Wary Holdings*).⁶⁴¹

A conflict will only occur where one sphere seeks to exercise powers in the exact functional area in which another sphere is assigned competence in terms of the Constitution. This is what distinguishes the decisions in *Maccsand* and *Wary Holdings* from the decision in *Gauteng Development Tribunal*.⁶⁴² In the latter case, the provincial department’s exercise of powers granted under the Development Facilitation Act were found to be an unconstitutional usurpation of local government’s powers to administer the planning function. From this it is submitted that a ‘doctrine of usurpation’ can be discerned. Humby postulates that usurpation occurs when ‘one sphere of government takes on the executive power of another and attempts to *operate from the same functional perspective* as the encroached sphere in relation to the object of the power’.⁶⁴³

As Humby correctly points out, there is ‘play’ in the doctrine of usurpation. This relates to the interpretation of legislation and its characterisation as dealing with one as opposed to another functional area in the Constitution.⁶⁴⁴ This can be seen in the difference between the reasoning of the majority and minority judgments in *Wary Holdings*. Whilst Kroon J characterised the SALA as dealing with the functional area of ‘agriculture’, Yacoob J characterised it as essentially dealing with the functional area of ‘municipal planning’ with vastly differing

⁶³⁹ *Swartland Municipality; MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (WCC).

⁶⁴⁰ *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC) paras 47-8.

⁶⁴¹ Humby (2012) 27(2) *SA Public Law* 637.

⁶⁴² *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)* 2009 (1) SA 337 (CC).

⁶⁴³ Humby (2012) 27(2) *SA Public Law* 637.

⁶⁴⁴ *Ibid* at 638.

results.⁶⁴⁵ In *Gauteng Development Tribunal* the functional area of ‘municipal planning’ as opposed to ‘urban and rural development’⁶⁴⁶ was interpreted.

The line of judgments has also resulted in clarification of the meaning of the functional area of ‘municipal planning’ which the Constitutional Court found has a particular, well established meaning in the context of municipal affairs which includes the zoning of land and the establishment of townships.⁶⁴⁷ The contribution by the reasoning of the Constitutional Court to the interpretation of the constitutional allocation of powers and the practice of intergovernmental relations in the above line of cases has been remarkable. The doctrine of usurpation can be applied to the interpretation of various conflicts which may arise in the interpretation of the Schedules. In addition, given the observation by Yacoob J in *Wary Holdings* that there are very few functional areas in the Constitution which can be exercised without land, it is submitted that the Court’s definition of ‘municipal planning’ may apply to disputes involving various functional areas.⁶⁴⁸

5.6 *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd*⁶⁴⁹

5.6.1 Introduction

In this case, Lagoonbay, a property developer in the Southern Cape, challenged the validity of a decision by the Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape (the Minister) to refuse Lagoonbay’s application for rezoning and subdivision of land related to a proposed development. Lagoonbay required a number of approvals in order to proceed with the development – including an amendment of the applicable regional structure plan and certain changes to land use. The applications for these two approvals were governed by the LUPO.

⁶⁴⁵ *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)* 2009 (1) SA 337 (CC).

⁶⁴⁶ Humby (2012) 27(2) *SA Public Law* 638.

⁶⁴⁷ Olivier & Williams (2010) 35(2) *Journal of Juridical Science* 99.

⁶⁴⁸ *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)* 2009 (1) SA 337 (CC).

⁶⁴⁹ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC).

5.6.2 The High Court decision

Lagoonbay submitted its application to amend the Structure Plan to both the municipality and the Western Cape Department of Environmental Affairs and Development Planning. The municipality recommended that the application be approved. The previous provincial Minister approved the application in 2007 subject to certain conditions, including condition 1.3 that ‘the associated future zoning application in respect of the land concerned shall be subject to the approval by the Provincial Government as the location and impact of the proposed development constitutes ‘Regional Planning and Development’.⁶⁵⁰

On 4 August 2009 Lagoonbay submitted applications for rezoning and subdivision in respect of the land sought to be developed. The municipality approved the applications and referred them to the provincial Minister for further attention. On 28 April 2011 the provincial Minister refused the applications for subdivision and rezoning in terms of sections 16 and 25 of the LUPO. Lagoonbay applied to the High Court to set aside the provincial Minister’s decisions on the basis that the provincial Minister lacked the functional competence to decide rezoning applications. Lagoonbay’s alternative challenge attacked the rationality of the Minister’s decision in terms of the Promotion of Administrative Justice Act (PAJA).⁶⁵¹ The challenge based on the PAJA was dismissed in the SCA and failed in the Constitutional Court. Lagoonbay requested a declaratory order to the effect that the municipality was the final decision-maker in relation to rezoning and subdivision approvals and, accordingly, that the approvals granted by the municipality comprised the final land-use approvals.⁶⁵²

The High Court dismissed the application with costs holding that the provincial Minister was authorised by the LUPO to act as she or he had. The High Court accepted that zoning is a municipal competence but contended that there were certain categories of decision which exceeded the bounds of municipal planning because of the scope of interests affected. In the Court’s view, the present development was such a case as it required provincial oversight and fell within the bounds of the provincial competence over planning. The Court decided that

⁶⁵⁰ Ibid para 5.

⁶⁵¹ Promotion of Administrative Justice Act 3 of 2000.

⁶⁵² *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 8.

sections 16 and 25 of the LUPO which granted the provincial Minister the authority to decide rezoning and subdivision applications, were not unconstitutional and accordingly that the provincial Minister was entitled to rely on these provisions.⁶⁵³

5.6.2 The Supreme Court of Appeal decision

The Supreme Court of Appeal did not deal with the provisions of the LUPO but relied on the constitutional allocation of ‘municipal planning’ to local government in deciding that rezoning and subdivision applications fall to be dealt with by municipalities. Consequently, the Court found that the provincial Minister lacked the authority to refuse Lagoonbay’s applications. The SCA relied on its interpretation of the provisions allocating powers in the Constitution spelt out in the *Gauteng Development Tribunal (SCA)* case as authority for its conclusion.⁶⁵⁴

5.6.3 The Constitutional Court decision

The provincial Minister appealed against the SCA decision to the Constitutional Court. In broad outline, the Minister argued that Lagoonbay had not challenged condition 1.3. This condition lawfully empowered the provincial Minister to refuse Lagoonbay’s applications. Secondly, Lagoonbay had not challenged the constitutional validity of sections 16 and 25 of the LUPO and thus could not challenge the decisions resulting from the exercise of powers granted the provincial Minister in those provisions. Finally, if the first two arguments failed, the provincial Minister contended that the rezoning and subdivision applications fell within the province’s competence over provincial planning matters.⁶⁵⁵

Lagoonbay argued that the provisions of the LUPO had been repealed by implication by the Constitution. With respect to the constitutional allocation of powers and relying on *Gauteng Development Tribunal*, Lagoonbay submitted that the competence over ‘provincial planning’ does not include rezoning and subdivision applications.⁶⁵⁶

⁶⁵³ Ibid paras 11-14.

⁶⁵⁴ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC).

⁶⁵⁵ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 18.

⁶⁵⁶ Ibid para 19.

The Constitutional Court dealt first with the implied repeal argument. In support of its argument that the LUPO had been impliedly repealed, Lagoonbay relied on the decision of the SCA in the *CDA Boerdery* case.⁶⁵⁷ In that case the SCA had to decide on the validity of a section in the Cape Municipal Ordinance which allowed the Premier to approve the imposition of rates.⁶⁵⁸ The SCA had struck down the provision, holding that it contravened the right of local government to impose rates and taxes in terms of section 229 of the Constitution read with certain sections of the Local Government Transition Act.⁶⁵⁹

The Constitutional Court held that as a matter of general principle, old-order legislation remains in force until the necessary steps have been taken to set it aside. It distinguished the present case from the decision in *CDA Boerdery* on the basis that the latter case dealt with a provision which could be excised from the Ordinance.⁶⁶⁰ In the present case the provisions of the LUPO were part of a complex scheme and there was nothing before the Court regarding the impact of striking down the provisions. Given the importance of the LUPO to planning processes, any mode of addressing unconstitutionality should be taken by the appropriate legislative authority. Accordingly, the Court found that the implied repeal argument must fail.⁶⁶¹

On the issue of the constitutional validity of the LUPO, the Constitutional Court was of the view that Lagoonbay had not specifically attacked the validity of sections 16 and 25. The effect of this omission was fatal to Lagoonbay's case. The Court cited the view that appellate courts are hesitant to pronounce on the constitutional validity of a statute in circumstances where the matter has not been properly ventilated before them. The Court held that where a party wished to raise the constitutionality of a statute it should do so in the court of first instance.⁶⁶²

The decision in *DPP v Minister of Justice* laid down the following principles:⁶⁶³

⁶⁵⁷ *CDA Boerdery (Edms) Bpk & others v Nelson Mandela Metropolitan Municipality & others* 2007 (4) 276 (SCA).

⁶⁵⁸ Cape Municipal Ordinance 20 of 1974.

⁶⁵⁹ Local Government Transition Act 209 of 1993.

⁶⁶⁰ *CDA Boerdery (Edms) Bpk & others v Nelson Mandela Metropolitan Municipality & others* 2007 (4) SA 276 (SCA).

⁶⁶¹ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) paras 24-29.

⁶⁶² *Ex Parte President of the Republic of South Africa: In Re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) para 38.

⁶⁶³ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC).

- (a) A court may raise the unconstitutionality of a law it is called upon to enforce of its own accord.
- (b) In an instance where a point of law is clear on the papers, but the common approach of the parties proceeds on an incorrect perception of what the law actually is, a court should, raise the point of law of its own accord for the parties to deal with.
- (b) Courts should observe the limits of their powers and should not constitute themselves as overseers of laws made by the legislature. Ordinarily the courts should raise and consider the constitutionality of laws that are properly engaged before them where this is necessary for the proper resolution of the dispute before them.
- (d) A court may, of its own accord decide a constitutional issue if it is in the interests of justice to do so. Determining the interests of justice entails considerations of the public interest and whether the matter has already been fully aired.⁶⁶⁴

Applying these principles, the Constitutional Court decided that it was inappropriate to consider the constitutional validity of the LUPO. This was because a declaration of invalidity was not before the Court. The SCA did not consider the validity of sections 16 and 25 at all with the result that the Constitutional Court did not have the benefit of the SCA's insight into the matter. Secondly, Lagoonbay had not challenged the validity of the LUPO in its pleadings. Thirdly, the LUPO regulates many interconnected aspects of land-use planning apart from rezoning (including structure plans, zoning maps, town planning schemes, and departure applications). However, the Court had received no submissions on the implications which a declaration of invalidity regarding sections 16 and 25 would have for these other aspects. In the Court's view such a declaration of invalidity would have far reaching implications and it was reluctant to make such a finding without a proper understanding of those implications.⁶⁶⁵

In considering the approach of the SCA to the matter, the Constitutional Court conceded that 'at the very least there is...a strong case for concluding that, under the Constitution, the provincial Minister was not competent to refuse the rezoning and subdivision applications'.⁶⁶⁶ However, the Court was of the view that for the reasons expressed above, the SCA should not have ignored the provisions of the LUPO in deciding the matter.

⁶⁶⁴ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 39.

⁶⁶⁵ *Ibid* para 40.

⁶⁶⁶ *Ibid* para 46.

Having dismissed the constitutional invalidity argument, the Constitutional Court proceeded to decide the matter by applying the provisions of the LUPO. It held that the provincial Minister was competent to refuse the rezoning approval in terms of the LUPO, adding that – ‘this in no way implies that the provincial Minister was competent under the Constitution to exercise zoning functions.’⁶⁶⁷ Regarding the subdivision decision, the Court held that the local authority’s power to decide subdivision applications was not limited in terms of the Scheme Regulations made in terms of the LUPO. Accordingly, under the LUPO the provincial Minister was not the competent authority to grant or refuse the subdivision application. Because some of the subdivision applications were dependent on the rezoning approvals, the Court remitted Lagoonbay’s subdivision application to the municipality for reconsideration in light of the Court’s judgment.⁶⁶⁸

As pointed out, the remaining challenge based on the PAJA was rejected, with the Constitutional Court holding that the provincial Minister’s decision was based on his consideration of information provided by Lagoonbay, the municipality, and the relevant provincial planning policies. Accordingly, the Court upheld the High Court decision and found that: ‘Lagoonbay has failed to set out a proper basis upon which this Court may interfere with the provincial Minister’s policy-laden decision’.⁶⁶⁹

The order of the SCA was set aside and replaced by an order dismissing the application challenging the provincial Minister’s power to decide Lagoonbay’s rezoning application. The decision of the provincial Minister to refuse the subdivision application was declared unlawful and set aside. The Constitutional Court declared that the George Municipality was the competent authority to decide the subdivision application and the subdivision application was remitted to the municipality for consideration.⁶⁷⁰

⁶⁶⁷ Ibid para 52.

⁶⁶⁸ Ibid para 59.

⁶⁶⁹ Ibid para 71.

⁶⁷⁰ Ibid para 73.

5.7 *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council & others*⁶⁷¹

5.7.1 Introduction

In this matter the Constitutional Court was faced with an application for confirmation of an order of the High Court which declared section 44 of the LUPO unconstitutional and invalid. Section 44 gave the province the power to decide appeals against municipalities' planning decisions. The Court was directly faced with the question raised in *Lagoonbay* regarding whether direct provincial involvement in municipal planning and land-use decisions, is compatible with the constitutional division of powers between the spheres.⁶⁷²

The facts related to two planning decisions in which the province granted approvals which the City of Cape Town (the city) opposed. The first concerned an application by Gordonia Mount Properties (Pty) Ltd to the city to develop a residential housing estate on the hills above Gordon's Bay. The developer appealed to the province following a delay in deciding the application by the city. The provincial MEC upheld the appeal and granted planning approval, rezoning, and subdivision in terms of the relevant sections of the LUPO.⁶⁷³

The second matter concerned an application by Gera Investment Trust to redevelop a building of historical significance in the Cape Town City Centre. The redevelopment required the special consent of the city. The Habitat Council objected to the redevelopment which resulted in the refusal of the special consent application by the city. Gera appealed to the provincial Minister who overturned the city's decision, but granted the city an opportunity to impose conditions on the approval. The city was slow to add conditions, and the provincial Minister intervened to impose conditions of his own under section 42(1) of the LUPO.⁶⁷⁴

⁶⁷¹ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC).

⁶⁷² *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 1.

⁶⁷³ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) para 2.

⁶⁷⁴ *Ibid* para 3.

The city was unhappy with the provincial Minister's intervention in the *Gordonia* matter and instituted proceedings in the High Court for an order declaring section 44 of the LUPO unconstitutional and invalid. The Habitat Council, aggrieved by the decision in relation to the Gera Investment Trust application, instituted proceedings in the same Court seeking the same relief. The matters were consolidated.⁶⁷⁵

5.7.2 The High Court decision

In the High Court the provincial Minister conceded that section 44 of the LUPO was unconstitutional. The High Court agreed, finding that section 44 '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 [the provincial Minister] to replace every decision with his own decision.'⁶⁷⁶ However, the High Court was of the view that this did not mean that the provincial Minister was not permitted to exercise any appellate powers over municipal decisions in terms of the Constitution. This was based on the potential for overlap between the competence of 'municipal planning' and the provincial competences of 'regional planning and development', 'urban and rural development', and 'provincial planning'; and also because in terms of the Constitution, provinces enjoyed an oversight responsibility in relation to local government. The High Court found that where there is an overlap between the competences, the province may rightfully intervene and substitute its decision for that of a municipality. This did not apply in cases where the province was merely exercising its constitutional oversight responsibility. The High Court's interim order was crafted in accordance with this approach. It also limited the retrospective effect of the declaration of invalidity and suspended the declaration for 24 months to allow the province an opportunity to enact new legislation.⁶⁷⁷

5.7.3 The Constitutional Court decision

In the Constitutional Court, the provincial Minister sought the confirmation of the High Court's order in its entirety. None of the respondents appeared, but the City of Johannesburg was

⁶⁷⁵ Ibid para 4.

⁶⁷⁶ Ibid para 5.

⁶⁷⁷ Ibid paras 5–7.

admitted as an *amicus curia*. The city argued that neither the provinces' planning powers, nor its responsibility to oversee municipalities, entitled intervention in individual municipal decisions.⁶⁷⁸

Reviewing its jurisprudence on the constitutional allocation of powers, the Constitutional Court confirmed the *dicta* of Moseneke DCJ in *Robertson* to the effect that the Constitution had moved away from a hierarchical conception of tiers of government to a new vision of local government as a sphere which is interdependent, inviolable, and possesses 'the constitutional latitude within which to define and express its unique character ... A municipality enjoys original and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent that the Constitution permits.'⁶⁷⁹

The Constitutional Court in *Lagoonbay* declined to decide the issue of the constitutional validity of sections 16 and 25 of the LUPO, but during the course of her judgment Mhlantla AJ remarked that:

This Court's jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are *different* planning responsibilities, based on 'what is appropriate to each sphere'; (d) 'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning *which includes the zoning of land and the establishment of townships* (d); and (e) the provincial competence for 'urban and rural development' is not wide enough to include powers that form part of 'municipal planning'. At the very least there is therefore a strong case for concluding that, under the Constitution, the provincial Minister was not competent to refuse the rezoning and subdivision applications.⁶⁸⁰

This *dictum* was quoted and approved by the Constitutional Court in *Habitat Council*. For all the reasons set out in *Lagoonbay*, the Court concluded that section 44 of the LUPO does not withstand constitutional scrutiny. '*The provincial appellate capability impermissibly usurps the powers of local authorities to manage "municipal planning", intrudes on the autonomous sphere of authority the Constitution affords municipalities, and fails to recognise the*

⁶⁷⁸ Ibid paras 9.

⁶⁷⁹ *City of Cape Town & another v Robertson & another* 2005 (2) SA 323 (CC) para 60.

⁶⁸⁰ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 46 cited at para 12 of *Habitat Council*.

*distinctiveness of the municipal sphere*⁶⁸¹ (emphasis supplied). The Court based its reasoning on the decision in the *Gauteng Development Tribunal* case that ‘municipal planning’ includes the zoning of land and the establishment of townships.⁶⁸² It concluded that: ‘Municipalities are responsible for zoning and subdivision decisions, and provinces are not.’⁶⁸³ These decisions are better suited to municipalities who face citizens daily and must base their decisions on information available locally, such as whether services will be available for new developments.⁶⁸⁴

Having decided that section 44 of the LUPO was invalid, the Constitutional Court turned to consider whether there were any circumstances in which provinces are permitted to hear appeals against land-use decisions. It held that all municipal planning decisions lie within the competence of municipalities. This follows from the analysis of the judgment in *Gauteng Development Tribunal*.⁶⁸⁵ The power of provinces does not lie in a veto or appeal right over subdivisions and zoning decisions but in the coordinate powers to withhold or grant approval of their own. (Here the footnotes in the judgment indicate that the Court had in mind provincial powers over structure plan approvals as well as certain authorisations in terms of the NEMA.⁶⁸⁶)

Dealing with the content of the ‘oversight’ powers of provinces, the *dicta* in the *First Certification Judgment* was approved. In that case the Constitutional Court stated that the monitoring power does not bestow ‘additional or residual powers of provincial intrusion on the domain of [local government] beyond perhaps the power to measure or test at intervals [local government] compliance with national and provincial legislative directives or with the

⁶⁸¹ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) para 13.

⁶⁸² *Ibid* para 57; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC).

⁶⁸³ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) para 13.

⁶⁸⁴ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 14.

⁶⁸⁵ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC).

⁶⁸⁶ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 24.

Constitution itself'.⁶⁸⁷ This system 'prescribes a hands off relationship between local government and other levels of government' on the one hand, but on the other hand, 'acknowledges the requirement that higher levels of government monitor [local government] functioning and intervene where such functioning is deficient or defective ... This is the hands-on component of the relationship'.⁶⁸⁸

The Constitutional Court made the important observation that:

[R]egulating' in section 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial government in order 'to see to the effective performance by municipalities of their functions'.⁶⁸⁹

Both the provincial government and the city urged the Constitutional Court to use the opportunity to provide content to the functional power of 'provincial planning' in order to guide and assist local and provincial government with review and reform in the planning area. The Court declined to do so, preferring to exercise judicial economy. It pointed to the constitutional mechanism to refer legislation (both Bills and statutes) to the Constitutional Court for a declaration of constitutional validity.⁶⁹⁰

Some final points bear mentioning as they are important in the context of the debate on constitutional allocation of powers and the practical difficulties faced by provincial and local government in the country. The provincial Minister urged the Constitutional Court to suspend the declaration of invalidity for practical reasons because historically provincial departments had large and well-resourced planning departments whilst many municipalities lacked the capacity to deal with planning matters. The Court agreed that the lack of planning capacity in municipalities deserves serious consideration but held that this does not justify the suspension of the declaration of invalidity. In its view, 'the province must, as the Constitution envisages,

⁶⁸⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) paras 372-3.

⁶⁸⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) paras 372-3 (emphasis added).

⁶⁸⁹ *Ibid* para 22.

⁶⁹⁰ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) para 24.

promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.’⁶⁹¹

In the result, the Constitutional Court confirmed paragraph 1 of the order of the Western Cape High Court which declared section 44 of the LUPO unconstitutional and invalid. The Court declined to suspend the declaration of invalidity but limited the retrospective effect of the declaration.⁶⁹²

5.7.4 Analysis

Humby argues that the approach of the Constitutional Court in *Habitat* is ‘partial and faulty’ and ‘supports...concentration of power in the municipal sphere’.⁶⁹³ She contends that the approach of the Western Cape High Court was more in keeping with the constitutional allocations of powers between the spheres and the system of intergovernmental relations set out in the Constitution and the legislation, as it recognised and preserved a role for provincial government in zoning and subdivision matters. She states that the Constitutional Court judgment fails to locate local government powers within the spectrum of concepts and mechanisms intended to temper municipal powers. On the far end of the scale is the extreme power of intervention in section 139, but she argues that there is a whole spectrum of powers including ‘supporting’, ‘strengthening’, ‘promoting’ local government capacity, ‘regulating’, and ‘monitoring’. Although the right of appeal in section 44 of the LUPO is problematic, she contends that the appellate power in section 44 could have been ‘tailored to suit the provinces middle-ground powers of support, promotion and regulation.’⁶⁹⁴

On the issue of the definition of ‘municipal planning’, Humby asserts that the Constitutional Court has taken a leap in logic when it states that all municipal planning and subdivision applications fall within the powers of local government. She also criticises the Court’s refusal to consider the meaning of ‘provincial planning’ in the course of its judgment, saying that the

⁶⁹¹ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 27.

⁶⁹² *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) paras 24–31.

⁶⁹³ Humby (2015) 1 TSAR 178, 188.

⁶⁹⁴ *Ibid* at 183.

practical effect of the Court's judgment is that it has in fact hollowed out the concepts of 'provincial planning', 'urban and rural development' and 'regional planning'.⁶⁹⁵

Finally, Humby points to a number of practical difficulties resulting from the decision in *Habitat*. The first of these relates to the absence of any mechanism which the province can use to enforce provincial strategic plans and spatial development frameworks. For example, the Spatial Land Use and Management Act (SPLUMA) merely provides that where there is an inconsistency between a provincial and a municipal spatial-development framework, the Premier must take the necessary steps to support the revision of the SDF in accordance with the procedures laid down in the intergovernmental-relations legislation.⁶⁹⁶ She argues that a further difficulty relates to the lack of capacity in planning departments in local and district municipalities, a factor which favours a role for provincial oversight outside of the well-resourced metropolitan municipalities.⁶⁹⁷

5.8 *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others*⁶⁹⁸

5.8.1 Introduction

In this matter Tronox Sands approached the High Court for an order declaring section 45 and chapter 10 of the KwaZulu-Natal Planning and Development Act (PDA) unconstitutional on the ground that these sections, by providing for an appeal from municipal planning decisions to a provincial body, constitute interference by provincial government in municipal planning decisions.⁶⁹⁹ Tronox had applied to the Umlalazi Municipality under Chapter 4 of the PDA for prospective land-use rights for areas situated outside a scheme for its Fairbreeze mine. The application was granted by the municipality on 19 February 2014. The Mtunzini Conservancy and the Mtunzini Fish Farm were aggrieved by the municipality's decision and lodged appeals with the appeal tribunal against the decision.⁷⁰⁰

⁶⁹⁵ Ibid at 184.

⁶⁹⁶ Spatial Land Use Management Act 16 of 2013.

⁶⁹⁷ Humby (2015) 1 TSAR 187.

⁶⁹⁸ *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others* 2016 (3) SA 160 (CC).

⁶⁹⁹ KwaZulu-Natal Planning and Development Act 6 of 2008.

⁷⁰⁰ *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others* 2016 (3) SA 160 (CC) para 6-7.

Section 45 of the PDA provides a right of appeal to the appeal tribunal for persons who have applied for the development of land situated outside the area of a scheme or who have submitted written comments with respect to a proposal to develop land. Tronox argued that the establishment of the appeal tribunal was unconstitutional because its functions constitute provincial intervention in municipal land-use decisions contrary to the constitutional allocation of powers between local and provincial government. In support of its challenge, Tronox relied on the decisions of the Constitutional Court in the *Gauteng Development Tribunal* and *Habitat Council* cases.⁷⁰¹

The MEC argued that provincial department officials were precluded from sitting on the tribunal which was composed entirely of independent persons. It argued that the tribunal provided a useful internal appeal mechanism about which none of the municipalities in KwaZulu-Natal had complained.⁷⁰²

5.8.2 The High Court decision

Lopes J found that when Cameron J stated in *Habitat* that provincial governments may not have a veto power over a municipality's zoning application, he had precisely this situation in mind. The fact that provincial officials are precluded from membership of the tribunal is irrelevant. Lopes J set out the applicable principles pointed out in *Lagoonbay*:

[T]he jurisprudence of the Constitutional Court clearly establishes that:

- (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government;
- (b) the constitutional vision of autonomous spheres of government must be preserved; and
- (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities based on 'what is appropriate to each sphere'.⁷⁰³

⁷⁰¹ Ibid para 16.

⁷⁰² Ibid para 17.

⁷⁰³ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 46, cited in *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others* (9645/14) [2015] ZAKZPHC 42 para 25.

Applying these principles, Lopes J held that the present matter was indistinguishable from *Habitat* and accordingly that the operation of section 45 and Chapter 10 usurps the functions of a municipality and constitutes provincial interference in the municipality's constitutional power over municipal planning. However, the High Court limited the declaration of invalidity to section 45 and declined to extend the declaration to chapter 10 as, in its view, this did not form part of the relief sought by Tronox.⁷⁰⁴

A declaration of invalidity has no force and effect unless it is confirmed by the Constitutional Court. The High Court, therefore, extended the interdict it had granted preventing the appeal tribunal from hearing the Mtunzini Conservancy and Mtunzini Fish Farm appeals. Applying a similar approach to that of Cameron J in *Habitat*, Lopes J declined to suspend the declaration of invalidity but limited the retrospective application of the order to allow pending appeals to be finalised.⁷⁰⁵

5.8.3 The Constitutional Court decision⁷⁰⁶

In the Constitutional Court, the main question to be decided was whether section 45 of the PDA was constitutionally valid. In addition to an order confirming the invalidity of section 45, Tronox sought an order declaring the two pending appeals unlawful and void *ab initio*. Its arguments were similar to those in the High Court. The MEC for Cooperative Governance and Traditional Affairs in KwaZulu-Natal opposed the confirmation application and appealed against the High Court decision, based on the reasons advanced in the High Court. The eThekweni Municipality intervened, arguing for the invalidity of all the other appeal provisions in the PDA together with section 45.⁷⁰⁷

Applying its decisions in *Gauteng Development Tribunal*, *Habitat Council*, and *Lagoonbay*, the Constitutional Court held that section 45 impermissibly interferes in municipalities' exclusive constitutional powers. Accordingly, section 45 was held to be inconsistent with the Constitution and invalid. The retrospective application of the order was suspended by the Court

⁷⁰⁴ Ibid paras 62-63.

⁷⁰⁵ Ibid para 11.

⁷⁰⁶ *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others* 2016 (3) SA 160 (CC).

⁷⁰⁷ *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others* 2016 (3) SA 160 (CC) paras 14-17.

which ordered that all pending appeals be finalised but directed that the appeal tribunal must uphold the municipalities' IDPs in considering all pending applications.⁷⁰⁸

5.9 Conclusion

To recapitulate, this chapter began by noting that the Constitution has located various aspects of the planning function in the local, provincial, and national spheres of government. Thus 'municipal planning' and the related functions of 'building regulations' are local government competencies; whilst 'regional planning and development' and 'urban and rural development' fall within the area of concurrent national and provincial competence. Finally, the functional area of 'provincial planning' is located in Schedule 5 Part A which lists functional areas of exclusive provincial competence.⁷⁰⁹

What emerges most clearly from the jurisprudence is the confirmation of the status of local government as an autonomous sphere of government in its own right. The preceding discussion of the jurisprudence relating to the planning functional area has shown that the courts have reasoned from the premise that local government is an autonomous sphere of government possessing original legislative and executive powers under the Constitution.⁷¹⁰ In relation to planning, the courts have tended to define the functional areas of planning with reference to the meaning of 'municipal planning'.

Beginning with the minority judgment of Yacoob J in *Wary Holdings*, a line of reasoning has developed which defines 'municipal planning' as being concerned with rezoning and subdivision.⁷¹¹ In the *Gauteng Development Tribunal* decision, the Constitutional Court confirmed this approach and held that the constitutional drafters intended to use the term

⁷⁰⁸ *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others* 2016 (3) SA 160 (CC) paras 61-2.

⁷⁰⁹ Constitution.

⁷¹⁰ See, e.g., *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) paras 44-49 and *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) para 46 cited at para 12 of *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC).

⁷¹¹ *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)* 2009 (1) SA 337 (CC) para 131.

‘planning’ in its commonly understood sense.⁷¹² The next question which the Court considered in *Gauteng Development Tribunal* was whether the contested powers could be said to form part of ‘urban and rural development’ in Schedule 4 Part B. The Court held that to construe any of the provincial functional areas in a manner which encompasses areas of local government competence would be inconsistent with the constitutional scheme for the allocation of powers as set out in the Schedules read with section 41 of the Constitution which requires the spheres to respect the functions of other spheres and not to encroach upon another sphere’s functional integrity.⁷¹³

In *Gauteng Development Tribunal* and subsequent cases, the approach has been to define the ambit of the functional areas of ‘urban and rural development’, ‘provincial planning’, and ‘regional planning and development’ by reference to the meaning of ‘municipal planning’. So, in essence, the question of the content of the provincial and national planning related functional areas is determined by first eliminating what they are not. ‘Municipal planning’ entails land use, rezoning, and subdivision. Consequently, by definition ‘provincial planning’, ‘regional planning’, and ‘urban and rural development’ cannot be concerned with these matters.⁷¹⁴

This advances the matter somewhat, but greater clarity is needed. This much is clear from the *Habitat* case where both the provincial government and the City of Johannesburg urged the Constitutional Court to use the opportunity to provide content to the functional power of ‘provincial planning’ in order to guide and assist local and provincial government with review and reform in the planning area. Unfortunately, the Court felt compelled to decline this request as it was constrained by the principle of judicial restraint.⁷¹⁵ In the *Gauteng Development Tribunal* case Nugent JA did give some indication of what the functional area of ‘urban and rural development’ could entail when he held that it could include ‘the establishment of financing schemes for development, the creation of bodies to undertake housing schemes or to build urban infrastructure, the setting of development standards to be applied by municipalities and so on’.⁷¹⁶

⁷¹² *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) para 59.

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid* paras 44-49.

⁷¹⁵ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) para 24.

⁷¹⁶ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC).

What has emerged clearly from the jurisprudence is that the Constitutional Court will interpret the powers of provincial and national government to intervene in local government functional areas by locating those powers within the wider context of the constitutional scheme for the allocation of powers between the spheres. In this regard, in *Habitat* the Court remarked that provinces' powers must be interpreted in the context of the constitutional duty to monitor and support municipalities. The monitoring power does not bestow additional or residual powers of provincial intrusion on the domain of municipalities, beyond the power to measure or test at intervals compliance with national and provincial legislative directives or with the Constitution itself. This system 'prescribes a hands off relationship between local government and other levels of government', on the one hand; but 'acknowledges the requirement that higher levels of government monitor [local government] functioning and intervene where such functioning is deficient or defective', on the other hand.⁷¹⁷ Clearly, the interpretation of provincial and national government powers will take place within the parameters set by the Constitutional Court in the line of judgments discussed above. This reasoning has an application wider than the planning-related competences and can be applied to all areas where there is overlap or concurrency of powers.

A further interesting observation which emerges from the case law is the manner in which the Constitutional Court locates division-of-power disputes within the framework of cooperative governance in its reasoning. It appears that the Court's jurisprudence accords with the cooperative model of intergovernmental relations. Earlier, it was argued that section 41(1) of the Constitution reflects the cooperative model.⁷¹⁸ It is further submitted that the line of cases discussed in this chapter show that the courts have generally affirmed the status of local government as an autonomous sphere as set out in the Constitution.

In the next chapter, the interrelationship between the planning and environment functions is discussed with reference to the interesting case of *Le Sueur & others v eThekweni Municipality & others*.⁷¹⁹

⁷¹⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) paras 372-3.

⁷¹⁸ See section 5.7 above.

⁷¹⁹ *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6.

CHAPTER 6

EXPANDING THE LOCAL GOVERNMENT MANDATE: THE 'MUNICIPAL PLANNING' AND 'ENVIRONMENT' EXAMPLE AND THE IMPACT OF HUMAN RIGHTS

6.1 Introduction

In this chapter, some of the challenges surrounding the manner in which the Constitution has allocated responsibilities between the spheres is examined. In the first part, the recent case of *Le Sueur & another v eThekweni Municipality & others*⁷²⁰ is investigated. The evolution of the Constitutional Court's jurisprudence with regard to the local government competence of 'municipal planning' is underpinned by the thinking that decentralisation of powers acts as a countervailing force to centralisation. This thinking, which is supported by a vast amount of literature, holds that there are theoretical advantages to local management – for example, local governments are more aware of local factors and thus able to make decisions which best suit the local environment. Certainly, this thinking is evident in the interesting case of *Le Sueur*.⁷²¹ What is significant about this case is that the High Court interpreted a local government functional area ('municipal planning') as wide enough to encompass a competence which the Constitution has allocated exclusively to national and provincial government ('environment'). The case has generated a vast amount of academic commentary on the interpretation due to its importance.

In the latter part of this chapter the interaction between the obligations in the Bill of Rights and the constitutional allocation of powers and functions between the spheres is discussed. The adoption of the Bill of Rights in the Constitution demonstrates the commitment of the drafters to establishing a new order based on democracy, human rights, and the rule of law. The inclusion of a justiciable Bill of Rights is a centre-piece of the new order ushered in with the adoption of the new Constitution. In order further to demonstrate its commitment to human rights, the South African government has signed and ratified a number of international human rights treaties. It is trite that the delivery of services to citizens is underscored and informed by

⁷²⁰ *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6.

⁷²¹ *Ibid.*

the commitment of the state to the inherent dignity and worth of its citizens. The Constitution has ushered in an era where citizens have recourse to the courts in instances where the state fails to live up to its obligations set out in the Constitution. These court challenges are often founded in the Bill of Rights. A study of the division-of-powers provisions of the Constitution would not be complete without an examination of their relationship to and interaction with the Bill of Rights. Accordingly, the latter part of this chapter examines the interaction between human rights, service delivery and the allocation of powers in terms of the Constitution.

6.2 Expanding the Local Government Mandate: The ‘municipal planning’ and ‘environment’ example: *Le Sueur & another v eThekweni Municipality & others*⁷²²

6.2.1 Introduction

The eThekweni Municipality established the eThekweni Environmental Services Management Plan as a policy directive of council in order to protect the biodiversity of an interconnected system of open spaces of land and water which were considered to have a high value. As a policy directive, the eThekweni Environmental Services Management Plan did not have the force of law – a factor which presented challenges from an enforcement viewpoint. In response to these difficulties, the municipality passed a resolution to integrate the plan into its town planning scheme as a layer known as the Durban Municipality Open Space System (D-MOSS). This decision meant that property owners were required to obtain an environmental authorisation from the municipality before developing properties within D-MOSS areas.

The applicants owned properties within the jurisdictional area of eThekweni Municipality which were affected by the D-MOSS amendments to the eThekweni Town Planning Schemes. Aggrieved by the actions of the municipality, the applicants approached the High Court for an order declaring the council resolutions to adopt split zonings and a further resolution to introduce the D-MOSS, unconstitutional and requesting the Court to set them aside.

The Minister of Environmental Affairs, the MEC: Agriculture and Environmental Affairs KwaZulu-Natal, and the MEC: Cooperative Governance and Traditional Affairs KwaZulu-

⁷²² *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6.

Natal, were cited as co-respondents with eThekweni Municipality. The City of Cape Town was admitted as *amicus curiae*. It made common cause with eThekweni Municipality because of its ‘overlay zones’ which were similar in operation to the D-MOSS system. The MEC: Cooperative Governance and Traditional Affairs opposed the application, while the Minister of Environmental Affairs and the MEC: Agriculture and Environmental Affairs KwaZulu-Natal filed notices indicating that they intended to abide the Court’s decision.

The applicants based their application on the ground that the resolutions had been adopted under a repealed Ordinance and were accordingly invalid. The alternative argument on behalf of the applicants related to the constitutionality of the proposed D-MOSS schemes. The applicants contended that in so far as the D-MOSS amendments related to environmental matters, these amendments were unconstitutional as the eThekweni Municipality lacked the authority to legislate on environmental matters.

6.2.2 The constitutional challenge to the D-MOSS scheme

The applicants contended that ‘environment’ is listed in Schedule 4, Part A of the Constitution as a functional area of concurrent national and provincial competence. The amendment to the town planning scheme, which is a legislative instrument, is accordingly unconstitutional and invalid because municipalities lack legislative authority in terms of the Constitution to legislate on matters related to the ‘environment’ functional area. Further, the NEMA, which was enacted to give effect to section 24 of the Constitution, dealing with the environment, makes no reference to environmental impact procedures being carried out by municipalities nor does it empower municipalities to create their own processes to protect the environment. The applicants argued that the functions of national and provincial government, as the constitutionally mandated spheres in matters relating to the environment, were distinct and different from the powers allocated to municipalities in terms of section 156(2) of the Constitution read with Schedules 4 Part B and 5 Part B.

The applicants referred to the *Gauteng Development Tribunal* case as authority for the proposition that ‘municipal planning’ is defined as ‘the control and regulation of land use at a

municipal level, the zoning of land and establishment of townships'.⁷²³ They argued that none of the constitutionally-mandated local government functional areas involve the areas of 'environment', 'nature conservation', or 'biodiversity'. Further, any possible overlap between the regulation of land use and other functional areas cannot be interpreted as conferring powers on local government to legislate in the functional area 'overlap'.

The High Court disagreed as, in its view, the applicant's approach was unduly narrow. Beginning with an examination of the Bill of Rights, the judge noted that the obligation to uphold the Bill of Rights is binding on all spheres of government and all organs of state. Section 24(b) of the Bill of Rights provides that everyone has the right to have the environment protected through legislative and other measures that prevent pollution and ecological degradation and promote conservation. In addition, section 152(1)(d) of the Constitution requires that local government 'promote a healthy and safe environment.' These duties are binding on local government when it exercises its powers set out in Schedules 4 Part B and 5 Part B to the Constitution.

It is within the context of the constitutional provisions outlined above that the functional area of 'municipal planning' falls to be examined and assessed. It must also be noted that the Constitution envisages the possibility that local government may exercise powers other than those conferred by Schedule 4 Part B and Schedule 5 Part B in that section 156(4) provides for the possibility of the transfer of provincial and national government functions to local government if those functions relate to local government and would be most effectively managed at that level (provided that the municipality has the capacity to do so).

The High Court noted further that section 156(5) of 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' (emphasis supplied). The judge remarked that although the Constitution allocates the environmental function to both national and provincial government, it is apparent that: 'Local Governments in the form of municipalities are in the best position to know, understand and deal with issues involving the environment at local level.'⁷²⁴

⁷²³ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) quoted in *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6.

⁷²⁴ *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 para 19.

At this point, the judge approved the submission by eThekweni Municipality that ‘*the environment is an ideal example of an area of legislative and executive authority or power which had to reside in all three levels of Government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4*’ (emphasis supplied).⁷²⁵ Quoting with approval the *dicta* in *Wary Holdings* that two spheres of control can co-exist even if they overlap, ‘and even if, in respect of the approval of sub-division of “agricultural land” the one may in effect veto the decision of the other. It should be borne in mind that the one sphere operates from a municipal perspective and the other from a national perspective-each having its “own constitutional and policy considerations”’.⁷²⁶

The High Court then quoted *Maccsand* with approval. In particular, the statement in that case that the functional vision in the Constitution is not one in which the functions can be said to exist in ‘hermetically sealed compartments’.⁷²⁷ The Constitution envisages overlap, and it is in this context that cooperative governance is relevant. This view was confirmed in the *Gauteng Development Tribunal* case referred to above.⁷²⁸ The Court in that case explained the meaning of ‘municipal planning’ as control and regulation of land use which includes the zoning of land and the establishment of townships.⁷²⁹

The High Court went on to point out that municipalities have historically always exercised legislative authority over environmental affairs under the banner of ‘municipal planning’. The drafters of the Constitution were aware of this when the Constitution was drafted. The Local Government Transition Act provided for ‘a right to an environment which is not detrimental to his or her wellbeing’.⁷³⁰ The powers of the transitional metropolitan councils in Schedule 2 to the Act included the ‘co-ordination of environmental affairs’ and ‘the management and control

⁷²⁵ Ibid.

⁷²⁶ *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)* 2009 (1) SA 337 (CC) quoted in *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 para 47.

⁷²⁷ *MaccSand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC) quoted in *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 para 54.

⁷²⁸ See 5.3 above.

⁷²⁹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) quoted in *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 para 57.

⁷³⁰ *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 para 22.

of environmental affairs.⁷³¹ The judge also pointed to the fact that the amendments to the Local Government Transition Act required the drafting of an IDP in compliance with Chapter 1 of the Development Facilitation Act which requires policy, administrative practice, and laws to promote integrated land development with respect to a number of features including ‘environmentally sustainable land development practices and processes.’⁷³² All of this, the judge reasoned, points to the fact that ‘when the functional areas were allocated in Schedules 4 and 5, the framers of the Constitution knew what “municipal planning” encompassed’. Although these arrangements were intended to be transitional, section 245 of the interim Constitution provided that ‘local government shall not be restructured otherwise than in terms of the Local Government Transition Act 1993’. The High Court pointed out further that the Municipal Systems Act⁷³³ deals with integrated development planning and recognises in section 23(1)(c) that there is an obligation on local government ‘together with other organs of State to contribute to the progressive realisation of the fundamental rights contained in section 24 ... of the Constitution.’ This, according to the judge ‘is a clearly legislative mandate from national legislature in regard to environmental matters’.⁷³⁴

The High Court found further support for this position in section 2(4)(f) of the Local Government: Municipal Planning and Performance Management Regulations which require SDFs to ‘contain a strategic assessment of the environmental impact of the SDF’.⁷³⁵ Referring to the central role of the IDP, the Court quoted with approval the statement by the SCA in *Maccsand* that the location of zoning schemes within the context of IDPs and SDFs reflects the central role that municipalities play in land-use planning in their areas of jurisdiction. He reasoned that it is no doubt appropriate for them to do so given their knowledge of local conditions.⁷³⁶

The High Court pointed out that the D-MOSS amendments were effected in accordance with the municipality’s IDP. There was no suggestion that these amendments conflict with any provincial or national policy. Furthermore, the Minister of Environmental Affairs, and the

⁷³¹ Local Government Transition Act 209 of 1993.

⁷³² *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 para 22.

⁷³³ Act 32 of 2000.

⁷³⁴ *Ibid* para 24.

⁷³⁵ Local Government Municipal Planning and Performance Management Regulations GNR 796 dated 2 August 2001 s 4(f).

⁷³⁶ *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 para 27.

MEC: Cooperative Governance, KwaZulu-Natal, had not contradicted the standpoint of eThekweni Municipality nor complained that the municipality has traversed into an area of exclusive provincial and national competence. In the Court's view this was a clear indication 'that it is impossible as a matter of accepted town planning practice to divorce environmental and conservation concerns from town planning principles'.⁷³⁷ Accordingly, the Court held that the eThekweni Metro had succeeded in proving that before the advent of the Constitution, 'municipal planning' involved the power to regulate land-use whilst taking into account the need to protect the natural environment (amongst other things). The Court held further that 'it is impossible to separate environmental and conservation concerns in town planning practice from a "*municipal planning*" perspective'.⁷³⁸

Turning to a consideration of more recently enacted legislation, the High Court pointed out that the NEMA principles apply to all organs of state. In the provincial context, section 2.2 of the KwaZulu-Natal Environmental Implementation Plan published in terms of the NEMA lists '*functional areas of competence with environmental relevance*' for municipalities, and includes '*municipal planning*' (emphasis supplied).⁷³⁹ It also recognises that implementation of environmental governance will occur through the IDP. This indicates that provincial policy recognises the importance of environmental matters within 'municipal planning'. Going further, the NEMA recognises the power of municipalities to legislate – section 33 allows a person to institute a private prosecution in respect of any duty laid down in a law or municipal by-law '*where that duty is concerned with the protection of the environment and the breach of that duty is an offence*' (emphasis supplied).⁷⁴⁰ The High Court also pointed to the role of municipalities in the Environmental Management Framework Regulations⁷⁴¹ which lay down requirements for SDFs, including the requirement that SDFs must guide and inform the municipality on conservation of both the built and natural environment. The Court concluded that:

NEMA therefore recognises the role of municipalities and municipal duties with regard to the environment in its municipal planning function. It is clear therefore, that municipalities are entitled to regulate environmental matters from micro level for the protection of the environment.⁷⁴²

⁷³⁷ Ibid para 29.

⁷³⁸ Ibid para 33.

⁷³⁹ Ibid para 35.

⁷⁴⁰ Ibid para 36.

⁷⁴¹ GG No 35769 published 10 October 2012.

⁷⁴² Ibid para 37.

Accordingly, the High Court held as follows:

It is clear from the foregoing ... that ... municipalities have traditionally been involved in regulating environmental matters at the local level and that their functions at this level has been recognised by the drafters of the Constitution. Hence, although environmental matters stood as the apparently exclusive area for national and provincial governance at those levels, it is clear that the authority of the municipalities at local government level to manage the environment at that level has always been and is still being recognised. It is inconceivable that the drafters of the Constitution intended by the manner in which the Constitution was framed to exclude municipalities altogether from legislating in respect of environmental matters at the local level. In any event, it is clear that national and provincial legislation in respect of environmental issues recognises the part to be played by municipalities at the Local Government level in managing and controlling the environment.⁷⁴³

The High Court was satisfied that municipalities are in fact authorised to legislate in respect of environmental matters to protect the environment at local level, and that the D-MOSS amendments in no way transgress or intrude upon the exclusive purview of the national and provincial governance in respect of environmental legislation.⁷⁴⁴

6.2.3 Analysis

In simple outline, The High Court's reasoning in *Le Sueur* can be summarised as follows:

- (a) Municipalities have always had the power to deal with environmental matters as a consequence of their competence to deal with municipal planning matters.
- (b) The Local Government Transition Act and the transitional arrangements recognised local government's power over environmental matters.
- (c) Therefore, the drafters of the Constitution understood that municipalities historically had the competence to deal with environmental matters.
- (d) It is impossible to separate 'municipal planning' from environmental considerations.
- (e) Provincial policy and national legislation (in the form of the NEMA and the regulations made in terms of NEMA) recognise the role of local government in environmental matters.
- (f) Therefore, local government has the power to legislate in environmental matters.

⁷⁴³ Ibid para 39.

⁷⁴⁴ Ibid paras 39-40.

It is submitted that both the reasoning and the conclusion reached by the High Court in *Le Sueur* are problematic. In the course of his reasoning, it is submitted that the judge makes a number of errors and leaps of logic in order to support his conclusion – a conclusion which cannot be supported on a proper interpretation of the Constitution and the jurisprudence which has developed in this area.

The first and most obvious error relates to the finding that ‘*the environment is an ideal example of an area of legislative and executive authority or power which had to reside in all three levels of Government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4*’ (emphasis supplied).⁷⁴⁵

The location of a matter within Schedule 4 Part A to the Constitution does not indicate that the legislature intended it to be regulated by all three spheres. With respect, had that been the intention of the drafters of the Constitution, they would have located it in Part B of either Schedule 4 or 5. It is further submitted that the statement indicates a fundamental lack of understanding of the manner in which the Constitution allocates powers between the spheres.

In terms of the constitutional scheme, the location of a matter in a sphere over which local government has competence means that provincial and national government will likewise have legislative authority over that matter within the confines of the scheme set out in the Constitution. The limits of national and provincial governments’ powers to ‘regulate’ local government’s exercise of authority in these circumstances, have been covered extensively in previous chapters. Suffice to say here that this power is limited and, broadly speaking, those limitations (on the legislative front) require national and provincial government to limit any Part 4 B or Part 5 B legislation to norms and standards or to framework legislation.

The conclusion of the Constitutional Court in the *Gauteng Development* case that the ‘constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise’ applies equally in this case.⁷⁴⁶ As a result, it is also

⁷⁴⁵ Ibid para 20.

⁷⁴⁶ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) para 56.

submitted that the reasoning of the High Court in *Le Sueur* blurs the lines between the functional areas in a manner which creates confusion rather than clarity.

The fact that municipalities may historically have had the power to deal with environmental matters does not support the conclusion that the drafters of the Constitution intended to confer that power on municipalities. The plain text of the Schedules contradicts this finding. It is submitted that the drafters of the Constitution intended the national and provincial government to legislate over environmental matters. Had they intended otherwise, they would have stated this expressly. The argument that a function was previously exercised at a particular level has been held to be irrelevant to the interpretation of the Schedules. Going further, the Constitutional Court in *Habitat* in fact refused to suspend the declaration of invalidity for practical reasons because historically provincial departments had large and well-resourced planning department whilst many municipalities lacked the capacity to deal with planning matters.⁷⁴⁷ This consideration was correctly considered to be irrelevant. It is equally irrelevant to the matter at hand in the *Le Sueur* case.

The next premise on which the High Court based its decision – that it is impossible to separate the functional areas of environment and planning – does not support the conclusion the Court reached. The fact is that the Constitution did not intend the functional areas to be entirely separate, hence the elaborate scheme for the allocation of powers and the numerous provisions spelling out the manner of interaction between the spheres. The leap of logic from the premise that it is impossible to separate the two functional areas from one another, to the conclusion that this means that the one functional area contains the other, it is submitted, is a leap too far. It is submitted that the Court displayed a fundamental flaw in its understanding of the constitutional design in its initial premise where it held that the drafters placed ‘environment’ in Schedule 4A because they intended it to be regulated by all the spheres. This flawed understanding is again reflected in this finding.

The final factor which the High Court found persuasive was the fact that provincial policy and national legislation – in the form of the NEMA and the regulations made in terms of it – recognises the role of local government in environmental matters. Here again, it is submitted

⁷⁴⁷*Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC).

that the Court erred. Absent a finding that there has been an express delegation of authority to legislate over environmental matters, it was not competent for the Court to infer that national government had given implied authority to local government to legislate over a matter which the Constitution has clearly allocated to another sphere. This interpretation undermines the supremacy of the Constitution. It is far more likely that the policy and legislation relied upon reflect the flawed understanding of the constitutional allocation of powers on the part of drafters, than the assumption which the Court appears to make that they reflect some sort of intention on the part of the drafters of the legislation to confer authority on local government.

6.2.4 Academic commentary

Du Plessis and Van der Berg characterise *Le Sueur* as the moment when the judiciary was called upon to assess the implications of the location of ‘environment’ in Schedule 4 Part A of the Constitution with reference to the functional area of ‘municipal planning.’⁷⁴⁸ The authors welcome the decision contending that it:

- (a) confirms that municipalities have a significant role to play in environmental matters;
- (b) indicates that the role of municipalities in environmental matters is not limited to the provision of water, sanitation, electricity, storm water and air quality management; and
- (c) confirms that a municipality may use its planning instruments for the purposes of local environmental governance.

Accordingly, in their view, the development of the law is significant and welcome from an environmental law point of view. The authors’ only concern is that the High Court did not spell out whether the extent of original and assigned municipal authority over the ‘environment’ functional area is limited to being an incidence of ‘municipal planning’. They contend that the ‘loose and haphazard’ way in which the applicants and the Court referred to constitutional authority to legislate, leaves the environmental and planning law fraternity in some doubt as to the ambit of local government’s planning and ‘original and assigned environmental “authority” and “duties”’.⁷⁴⁹

Freedman sets out three categories of municipal legislative authority:

⁷⁴⁸ Du Plessis & Van Der Berg (2014) 25(3) *Stell LR* 580.

⁷⁴⁹ *Ibid* at 590.

- (a) Original powers (powers derived directly from the Constitution).
- (b) Assigned powers (powers assigned to municipalities in terms of national or provincial legislation).
- (c) Those powers reasonably necessary for, or incidental to, the effective performance of a municipality's functions (incidental powers in terms of s 156(5) of the Constitution).⁷⁵⁰

Having set out the constitutional categories, he agrees that the decision in *Le Sueur* was based on the first two categories – the original legislative and the assigned legislative powers categories. Freedman contends that the High Court relied primarily on the first ground ‘that the functional area of “municipal planning” encompasses “environmental matters”.’ The decision rests on the second category of assignment only as an alternative ground.⁷⁵¹

In his view, the judgment correctly finds that national and provincial government have by implication assigned legislative authority over environmental matters as part of municipal planning to local government. The argument in support of this contention is as follows: In *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government*⁷⁵² the Constitutional Court had to decide (amongst other issues) whether the NA could assign a matter that fell outside of Schedules 4 and 5 to provinces by implication. The Constitutional Court decided that any assignment by the NA to the provincial sphere must be express. Its decision was based on the ground that section 104(1)(b)(iii) of the Constitution states that a provincial legislature has the authority to pass legislation on any matter outside Schedules 4 and 5 that has been ‘expressly’ assigned to it by national legislation. The word ‘expressly’ cannot be interpreted to include the word ‘impliedly.’⁷⁵³ Third, the law provides that when Parliament assigns powers to the provinces it must do so in a manner that creates certainty as to the nature and extent of the powers assigned. Fourth, all ‘spheres of government and all organs of state within each sphere must not assume any power or function except those conferred on them in terms of the Constitution’.⁷⁵⁴

⁷⁵⁰ Freedman (2013) 17 *PER/PELJ* 556, 612.

⁷⁵¹ *Ibid.*

⁷⁵² *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* (CCT 94/10) [2012] ZACC 3, 2012 (4) SA 58 (CC).

⁷⁵³ Freedman (2013) 17 *PER/PELJ* 556, 579.

⁷⁵⁴ *Ibid.*

Freedman also indicates that the Constitutional Court pointed out that the qualifier ‘expressly’ in section 104(1)(b) stands in stark contrast to the absence of such a qualifier in section 156(1)(b) of the Constitution which deals with the assignment of matters over which municipalities have executive and administrative and, therefore, legislative authority. He contends further that ‘the implication is that 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.’⁷⁵⁵

Freedman also has difficulty with the High Court’s first ground dealing with original legislative powers. In his view it is not clear whether ‘municipal planning’ can be interpreted to include ‘environment’ – such a finding would potentially upset the division of powers in the Constitution’s Schedules. The second difficulty with the original ground, Freedman argues, is that the overlap between ‘environment’ and ‘planning’ cannot be used as the basis for a finding that ‘planning’ includes legislative authority over the ‘environment.’ He correctly points out that this would contradict the finding of the Constitutional Court in *Gauteng Development Tribunal* that the functional areas are ‘distinct’.⁷⁵⁶ In the third place, he notes that there could be unintended practical consequences to including ‘environment’ within ‘municipal planning’.

Freedman argues that while ‘municipal planning’ cannot encompass ‘environment’, this does not mean that the functional area of ‘municipal planning’ does not include aspects of environmental matters. Unfortunately, the judgment did not examine this matter more closely because the High Court did not examine the subject matter of D-MOSS in detail. He concludes that while *Le Sueur* is correct in finding that ‘municipal councils have the authority to pass legislation dealing with environmental matters as part of their power to pass legislation dealing with municipal planning, it has not set out the scope and ambit of this power as clearly as it could have.’⁷⁵⁷

In Freedman’s analysis the judgment rests on section 156(1)(b) of the Constitution. As support for this conclusion he points to the judgment in the *Premier of Limpopo* case where the Constitutional Court drew attention to the qualifier ‘expressly’ in section 104(1)(b)(ii) and the

⁷⁵⁵ Ibid at 581.

⁷⁵⁶ Ibid at 589.

⁷⁵⁷ Ibid at 592.

absence of such a qualifier in the corresponding section dealing with assignments to local government – section 156(1)(b).⁷⁵⁸ It has been argued in the discussion above that the applicable section is 156(4) and not section 156(1)(b). This contention rests on three premises. First, there is a distinction between section 156(1)(b) and section 156(4) – the former deals with assignment of executive matters not listed in the Schedules; while section 156(4) refers to the assignment of matters listed in Part A of Schedule 4 or Part A of Schedule 5. Since ‘environment’ is a Part A matter, any assignment of this power would need to satisfy the requirements of section 156(4). Second, interpreting section 156(1)(b) to allow implied assignment of Schedule 4 Part and Schedule 5 Part A matters, undermines legal certainty. As the Court in the *Limpopo Premier* case pointed out:

It is a requirement of the rule of law, one of the foundational values of our constitutional democracy, that when Parliament assigns its legislative powers to the provinces it must do so in a manner that creates certainty about the nature and extent of the powers assigned. This will enable the provinces to exercise those powers in accordance with, and within the limits of, the terms of assignment ... The public should be left with no doubt about which sphere of government has legislative competence with regard to the matter concerned.⁷⁵⁹

This reasoning applies equally to the present case. The rule of law and legal certainty are undermined if a provision in a statute can be interpreted so as to override the express allocation of a power to national and/or provincial government by virtue of its placement in Schedule 4 Part A or Schedule 5 Part A. Finally, the interpretation of national and provincial legislation in a manner which permits implied assignment undermines the supremacy of the Constitution and introduces the possibility that the constitutional scheme for the allocation of powers can be circumvented merely by passing legislation or adopting policy.

It is submitted that any interpretation which introduces the possibility of implied amendment of the Constitution’s Schedules introduces the likelihood that the public will be unsure of the legislative roles of the various spheres. The decision in *Le Sueur*, it is submitted, has in fact introduced further uncertainty into this complex area of law.

⁷⁵⁸ *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature & others* 2012 (4) SA 58 (CC).

⁷⁵⁹ *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* (CCT 94/10) [2012] ZACC 3, 2012 (4) SA 58 (CC) paras 36-37.

Bronstein begins her review of the decision in *Le Sueur* by placing the allocation of powers to local government in its constitutional context.⁷⁶⁰ She supports a restricted view of the ambit of local government legislative authority. Citing Yacoob J in *Swartbooi & others v Brink*, she argues for a restricted interpretation of section 156(2) which sees the power to make by-laws as being expressly granted for the sole purpose of the effective administration of those matters that a municipality has the right to administer.⁷⁶¹ De Visser disagrees with this interpretation which views ‘municipal law making ...as subservient and instrumental to its administrative role’.⁷⁶² Steytler and De Visser conceive of local government’s legislative power as wider than that which prevailed under parliamentary sovereignty. The argument put forward in earlier chapters, supports the interpretation by Steytler and De Visser. This view sees national and provincial government as having only supervisory power over matters in Part B of both Schedules. This affords municipalities a realm of legislative authority which cannot be usurped by other spheres.⁷⁶³

Bronstein contends that the comments of the Constitutional Court in *Gauteng Development Tribunal* show a clear regard for the autonomy of local government, but this ‘cannot be read to infer that there is a realm of legislative autonomy that is inherently in the domain of local government and cannot be usurped’.⁷⁶⁴ Her argument proceeds from this assumption. On this view, the legislative assignment of powers to local government to legislate in areas related to municipal planning assumes central importance.

Bronstein argues that the D-MOSS amendments were legislative acts and that the failure to acknowledge this is a flaw in the analysis presented in *Le Sueur*.⁷⁶⁵ Since the acts were legislative and not executive in character, section 156(1) cannot be the source of the municipality’s power in this instance. In her view, the amendment can also not fit under the incidental power in section 156(5). She explains that:

⁷⁶⁰ Bronstein (2015) 3 *SALJ* 639, 643.

⁷⁶¹ *Swartbooi & others v Brink* 2006 (1) SA 203 (CC) para 15.

⁷⁶² De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) cited in Bronstein (2015) 3 *SALJ* 639.

⁷⁶³ Steytler N, De Visser J & Bennet TW ‘Part III: The State and its Subdivisions’ in Murray C & Kirkby C (eds) *South Africa: International Encyclopedia of Laws - Constitution* (2014) 175.

⁷⁶⁴ Bronstein (2015) 3 *SALJ* 639, 645.

⁷⁶⁵ *Ibid* 659.

This is because the incidental power to ‘exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions’ cannot randomly be used to imbue the city with an entire undefined area of legislative authority over planning. In order to determine whether the incidental power applies, one first has to establish what powers the city actually has over planning. One then has to establish how the legislative power to enact D-MOSS can be considered incidental to those powers. If the power to make D-MOSS is correctly characterised as legislative, it would be circular to say that the right to exercise legislative authority in the area of municipal planning is simply incidental to the city’s acknowledged executive and administrative powers. If that were the case, why does the Constitution not say so?⁷⁶⁶

Taking the argument further, it becomes necessary to locate the power for the D-MOSS amendments not in the Constitution, but in the assignment of legislative power from the legislature. For this to work, the source of the legislative assignment needs to be clearly identified. Therefore, in Bronstein’s view, the main weakness in the reasoning in *Le Sueur* is that it does not show that the amendment was validly passed either in terms of a constitutional power or in terms of a legislative assignment to the city. It is problematic that there is no clear indication of the origin of the power to make the contested amendment.⁷⁶⁷

Bronstein’s argument against implied assignment is compelling. She correctly asserts that assignment must be express. However, her argument is based on a restricted interpretation of the powers of local government – an interpretation which is at odds with the basis of this thesis. It is submitted that whilst she is correct that an express assignment is necessary, the need for this assignment is based on the wording of section 156(4) of the Constitution and not on the reasons she advances. This is because the drafters of the Constitution inserted section 156(4) which requires a municipality’s consent to the assignment of a Schedule 4 or 5 Part A matter as a measure to protect local government from ‘functional creep’. The section is intended to cater for functional areas which ‘necessarily relate to local government’ and ‘would most effectively be administered locally’. This section is also on all fours with the facts of the present case. It is within this context that the support of the MEC: Agriculture and Environmental Affairs KwaZulu-Natal and the MEC: Cooperative Governance and Traditional Affairs is relevant. If this interpretation is correct then the application of section 156(4) to the matter by national, provincial and local government could easily have resolved the matter without the necessity for judicial intervention.

⁷⁶⁶ Bronstein (2015) 3 *SALJ* 645.

⁷⁶⁷ *Ibid* at 661–663.

Presenting yet another interpretation of the High Court's judgment in *Le Sueur*, Humby points out that the Court situated the contested power within the ambit of section 156(1)(b) when he noted that 'although matters relating to the environment may be said ... to be the primary concern or sphere of National and Provincial responsibility ... Local governments are in the best position to know, understand and deal with issues involving the environment at local level.'⁷⁶⁸ She points to the fact that Gyanda J highlighted section 156(5) of the Constitution which 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.⁷⁶⁹

After reviewing Bronstein's argument (which is outlined above), Humby argues that 'the precedent established by Gyanda J's reasoning is not so much that municipalities are authorised to legislate on environmental matters, but that they are authorised to do so as an incident of municipal planning, an original constitutional power.'⁷⁷⁰ As an original power is not the same as an assigned power, in Humby's view the assignment procedures find no application to the functional area of municipal planning.

Humby contends further that the enactment of town planning schemes is a 'hybrid form of legislation' that is neither legislative nor executive in character.⁷⁷¹ This makes section 156(5) of the Constitution the best choice for the source of municipal legislative authority in this case. In *Ex Parte, Western Cape Provincial Government: In re: DVB Behuising (Pty) Ltd v North West Provincial Government*, the Constitutional Court held that the exercise of incidental powers is constitutional if the powers are inextricably linked and foundational to powers allocated in terms of the Constitution.⁷⁷² She points to Steytler and De Visser who contend that a purposive approach must be applied to the interpretation of section 156(5) which links to local government's developmental mandate and increases efficacy in an existing functional area. But, this must not result in an increase in the functional ambit of local government.⁷⁷³ Humby argues that, given the now settled meaning of 'municipal planning' as including land-

⁷⁶⁸ Humby (2014) 17(4) *PER/PELJ* 1659, 1666–7.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid* 1677.

⁷⁷¹ *Ibid* 1679.

⁷⁷² *Ex Parte, Western Cape Provincial Government: In re: DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC).

⁷⁷³ Steytler & De Visser J 'Local Government' in Woolman S, Bishop M and Brickhill J (eds) *Constitutional Law of South Africa* 48.

use control – it is difficult to see how the power to legislate on environment could not be seen as ‘necessary for’ or ‘incidental to’ municipal planning.⁷⁷⁴

Humby’s conclusion is that Gyanda J was wrong to locate the source of municipal legislative authority in respect of environmental matters in section 156(1)(b) and 156(4) of the Constitution in that these provisions relate to assignment of powers not original constitutional powers. She nevertheless welcomes the judgment which she characterises partly as an extension of local environmental governance on the basis of the principle of subsidiarity.⁷⁷⁵

The difficulty with Humby’s reliance on section 156(5) is quite simply this – Gyanda J did not rely on this section for his conclusion but rather on sections 156(1)(b) and 156(4). In the final analysis Freedman, Bronstein, and Humby agree that section 156(1) of the Constitution cannot support the reasoning in *Le Sueur*. Further, there is a broad agreement, which includes even Du Plessis and Van der Berg, that the *Le Sueur* judgment has done little to introduce clarity into the law relating to the constitutional allocation of functions between the spheres.

6.2.5 Conclusion

It is submitted that the judgment in *Le Sueur* has precipitated some of the difficulties in interpreting the allocation-of-powers provision in the Schedules. A review of the academic commentary on the judgment reflects the difficulty in reaching agreement on the correct interpretation. It can be argued that what *Le Sueur* indicates most clearly is how difficult the interpretation of the constitutional Schedules becomes in practice. The practical complexities of delineating the boundaries of the overlapping powers of ‘municipal planning’ and ‘environment’ led the High Court in *Le Sueur* to the illogical conclusion that the functional area of planning includes the separate and distinct functional area of environment. The decision throws into stark relief the fact that there is a practical misalignment between the developmental mandate of local government in the Constitution, and the allocation of powers to local government in terms of the Constitution. What is also clear from the decision is that the plethora of legislation that has been enacted over the last twenty years adds a further layer of complexity, as does the old-order legislation which remains on the statute books. The

⁷⁷⁴ Humby (2014) 17(4) *PER/PELJ* 1659, 1680.

⁷⁷⁵ *Ibid* 1681.

existence of old-order laws which are aligned to the previous constitutional scheme, alongside new-order legislation is a recipe for confusion. The task of discerning the ambit of the legislative mandates of the three spheres in this environment is daunting.

In relation to the ‘municipal planning’ function, a final point bears mention. The long-awaited Spatial Land Use Management Act (SPLUMA)⁷⁷⁶ has been enacted. It is hoped that this legislation will create certainty in relation to the ambit and meaning of the interrelated functions of ‘municipal planning’, ‘building regulations’, ‘regional planning and development’, and ‘urban and rural development’. A detailed study of the provisions of the SPLUMA is beyond the scope of this thesis. However, it is worth noting that earlier versions of the Bill and its regulations were revised following submissions from eThekweni Municipality (and possibly other municipalities) to the effect that many of its provisions were unconstitutional.

Undoubtedly, the long wait for planning legislation was partly due to the legislative complexities created by the constitutional allocation of powers in relation to this functional area. The legislature must have taken great care to ensure that the constitutional scheme for the allocation of powers has been given effect within the SPLUMA. Nevertheless, the possibility that the SPLUMA in its current form may contain constitutionally impermissible sections cannot be dismissed. Some areas of concern include the following:

- (a) The inclusion of detailed procedures governing municipal processes, e.g., Chapter 6 prescribes the manner in which municipalities must consider land use and development applications in detail. In this respect the SPLUMA reads more like primary legislation than legislation setting norms and standards.
- (b) The prescriptive nature of the Schedules – e.g., Schedule 1 apparently confers authority on the provinces to determine procedures for the approval of a vast array of municipal planning decisions including township establishment, land-use scheme amendments, subdivision of land applications, etc.

The question of alignment between the SPLUMA, the NEMA, and existing provincial legislation is also an area of concern and a source of possible conflict. In relation to the enactment of the SPLUMA, Bronstein points to the existence of provincial legislation on

⁷⁷⁶ Spatial Planning and Land Use Management Act 16 of 2013.

planning in a number of provinces and remarks that the SPLUMA's enactment 'is a recipe for intense and disruptive legislative conflict between national and provincial legislation.'⁷⁷⁷ The SPLUMA does provide for municipalities to pass their own by-laws to regulate their planning processes, adding a further layer of complexity. The enactment of the SPLUMA places an obligation on municipalities to apply existing national legislation impacting on planning such as the NEMA and the Municipal Systems Act provisions which govern the formulation of IDPs together with existing provincial legislation and existing by-laws and policies. This complex legislative environment does little to promote certainty.

The possibility of a constitutional challenge to the SPLUMA was mentioned *obiter* by the Constitutional Court in the *Tronox* case.⁷⁷⁸ In this matter the Constitutional Court declined the MEC for Local Government and Co-operative Affairs' request to 'read in' to the the PDA in order to save it. The 'reading in' contended for by the MEC was based on section 51(1) of the SPLUMA which provides that a municipality 'may...authorise that a body or institution outside of the municipality or in a manner regulated in terms of provincial legislation, assume the obligations of an appeal authority in terms of this section.' The Court declined to effect the reading in, remarking that '...section 51(6) of SPLUMA, which allows municipalities to delegate their final say in planning and land use matters to an external body, could itself face a constitutional challenge one day'.⁷⁷⁹

These practical difficulties which arise from the constitutional scheme for the allocation of responsibilities with respect to the planning function, work themselves out in everyday life in a manner which impacts profoundly on the administration of government at all levels. The expense of moving from processes created in terms of the Planning Ordinance to the PDA processes and now to the SPLUMA and SPLUMA by-law processes in the eThekweni Municipality, for example, has been substantial. What is more difficult to quantify, but is perhaps even more significant, is the impact of all of this uncertainty on the citizenry and on service delivery. It is submitted that greater certainty needs to be introduced into the constitutional allocation of powers between the three spheres of government and that this certainty can only be introduced, it is submitted, by way of an amendment to the Constitution.

⁷⁷⁷ Bronstein (2015) 3 SALJ 649.

⁷⁷⁸ *Tronox KwaZulu-Natal Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & others* 2016 (3) SA 160 (CC) para 48.

⁷⁷⁹ *Ibid.*

6.3 The Impact of Human Rights

6.3.1 The Constitutional Allocation of Powers with regard to ‘housing’

(a) Introduction

Section 7 of the Constitution affirms that the Bill of Rights is a cornerstone of democracy in South Africa. The state is placed under an obligation to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. What is the impact of this obligation on the constitutional allocation of powers? Where a right has been infringed, are the three spheres jointly responsible or can a distinction be made between them based on the spheres’ functional responsibilities in terms of the Constitution?

‘Housing’ is listed in the Schedules as an area of concurrent national and provincial legislative competence. Other functional areas with an impact on the ‘housing’ function which are local government competencies include ‘building regulations’, ‘water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems’, ‘electricity’, and ‘refuse removal’. In terms of the Constitution, the primary responsibility for the fulfilment of the right of access to housing lies with national and provincial governments.

Section 26 of the Constitution provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Both section 7 and section 26 place an obligation on the state to realise the rights contained in the Bill of Rights, and the right of access to housing respectively. In *Grootboom*, the Constitutional Court held that the national government bears the overall responsibility for

ensuring that the state complies with its constitutional obligation to provide access to housing.⁷⁸⁰ In relation to the roles of the three spheres with respect to housing, the Court stated:

... the Constitution creates different spheres of government: national government, provincial government and local government ... The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.⁷⁸¹

Consequently, a coordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated in Chapter 3 of the Constitution. It may also require framework legislation at national level, a matter that need not be considered further in this study as there is national framework legislation in place. Each sphere must accept responsibility for the implementation of particular parts of the programme, but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes, and strategies are adequate to meet the state's section 26 obligations. In particular, the national framework must be designed so that these obligations are met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national government must ensure that executive obligations imposed by the housing legislation are met.⁷⁸²

De Visser argues that a qualification must be made to local government's responsibilities in terms of the Bill of Rights to the effect that local government 'is responsible for the *fulfilment* of a socio-economic right by taking legislative, administrative, or budgetary measures *only if the subject matter first, falls within the competencies set out in Schedules 4B and 5B of the Constitution, or, has been assigned to local government by national or provincial legislation*' (emphasis supplied).⁷⁸³

⁷⁸⁰ *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) para 66 (*Grootboom*).

⁷⁸¹ *Ibid* para 39.

⁷⁸² *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) paras 39–40.

⁷⁸³ De Visser (2003) 7(1) *Law, Democracy and Development* 201.

This means that the nature of the obligations imposed on the three spheres by the Bill of Rights varies greatly. Some rights fall within the competence of local government, while others intersect with local government competences in a more indirect way. For example, the right of access to sufficient water intersects squarely with the local government competence of ‘water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems’. An indirect intersection between a municipal functional area and a constitutional right occurs where the functional area does not cover the right directly, but the municipality plays an important contributory role in the realisation of the right – e.g., in the right to housing.⁷⁸⁴

(b) *Housing legislation*

National and provincial governments have enacted legislation and adopted policy in order to regulate the provision of housing. The primary legislation regulating the provision of housing is the National Housing Act.⁷⁸⁵ The Act outlines the government framework for housing and sets out the responsibilities of the three spheres with respect to housing.

In terms of the duties of national government, the Act provides that the national government, acting through the Minister of Housing, must establish and facilitate a sustainable housing-development process in consultation with MECs and the national organisations representing municipalities. The Minister has the overall responsibility to determine policy, set broad national housing delivery goals, and facilitate the setting of provincial housing delivery goals (and local government housing goals where this is appropriate). He or she must also set norms and standards in respect of housing and establish the institutional framework necessary for funding and the negotiation of funding allocations. As regards provincial government, national government must assist provinces to develop the administrative capacity required for the effective performance of their housing-development duties. National government is required to support and strengthen the capacity of local government to manage its own affairs and to exercise its powers and perform its duties in respect of housing development.⁷⁸⁶ The Minister

⁷⁸⁴ Steytler N & De Visser J *Local Government Law of South Africa* (2007) 9-14.

⁷⁸⁵ Housing Act 107 of 1997.

⁷⁸⁶ *Ibid* s 3.

is also given the power to publish a National Housing Code – a comprehensive policy to guide the three spheres of government in the provision of housing.⁷⁸⁷

In terms of the Act, provinces must promote and facilitate the provision of adequate housing within the framework of national housing policy. Provinces must consult with organised provincial local government organisations, develop provincial policy, and support and strengthen the capacity of municipalities to perform their duties in respect of housing.⁷⁸⁸

Section 9 of the National Housing Act sets out the functions of municipalities with regard to housing development. It requires that municipalities situate their duties in respect of housing within the context of the IDP and places an obligation on municipalities to take all reasonable and necessary steps within the framework of national and provincial policy to ensure that:

- (a) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- (b) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed; and
- (c) services in respect of water, sanitation, electricity, roads, storm water drainage, and transport are provided in a manner which is economical and efficient.

Municipalities are required to set housing goals, to identify and designate land for housing development, and to initiate, plan, coordinate, facilitate, and enable appropriate housing development within their areas of jurisdiction. Municipalities must also provide bulk engineering services and plan and manage land-use development.

In terms of section 10, municipalities may apply for accreditation for the purposes of administering one or more national housing programmes. An accredited municipality may administer the programme and exercise the powers and duties of the provincial housing development board for the accredited programme/s, subject to the direction of the MEC. The question which arises is whether the National Housing Act assigns responsibility for the housing function to municipalities. De Visser argues that it does not for the following reasons:

⁷⁸⁷ Ibid s 4.

⁷⁸⁸ Ibid s 7.

- (a) The duties which the Housing Act imposes on municipalities relate to the functions which are ancillary to housing such as water, sanitation, electricity, storm water drainage, etc.
- (b) The other functions relate to the position of local government at the point of delivery – for instance municipal planning, setting of housing delivery goals, and creating and maintaining an environment conducive to the provision of housing.
- (c) Where municipalities act as administrators through the accreditation process, they are funded through the province and are under the direction of the MEC. Therefore, this arrangement is one of agency and not of assignment.

He concludes that the scheme for allocating functions laid down in the Housing Act does not amount to assignment in terms of section 156(1)(b) of the Constitution but is on an agency basis.⁷⁸⁹

The authorities surveyed do not appear to support the opposite view – that the National Housing Act has assigned powers over housing to the local government sphere. However, it can be argued that certain provisions of the Housing Act point toward the conclusion that national government intended to shift responsibility for housing downwards. What is not clear is whether the mechanism of assignment or delegation or agency or some other hybrid means was the vehicle used to effect the downward shifting of the function. This is due to the apparent conflation of these concepts in the Act.

As the Constitutional Court affirmed in *Grootboom*, the primary obligation to provide housing falls on national government and provincial government, whilst local governments must ensure that services are provided to communities.⁷⁹⁰ Reading the obligation on the state to provide access to housing with the National Housing Act and the constitutional allocation of powers between the spheres, it is submitted that the minimum obligations of local government in relation to housing can be interpreted to include:

- (a) making land available;
- (b) providing basic water services;
- (c) providing basic sanitation; and

⁷⁸⁹ De Visser (2003) 7(1) *Law, Democracy and Development* 209.

⁷⁹⁰ *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) para 39.

- (d) facilitating the realisation of the right to shelter, by:
- (e) facilitating communication between the residents and the provincial housing department, including the resolution of conflicts; and
- (f) assisting the provincial housing department on any relevant matter, this may include playing a co-ordinating role in the implementation of the realisation of the right to shelter.⁷⁹¹

The Constitutional Court made it clear in *Grootboom* that the national government bears overall responsibility for housing provision but each sphere of government must accept responsibility for the implementation of particular parts of the housing function.⁷⁹² This does not mean that functions and powers may be strictly divided but that the various state actors must cooperate to ensure the fulfilment of the constitutional obligation to provide access to housing as they are equally responsible for the realisation of those rights.⁷⁹³ Whilst national government bears responsibility to ensure the adequate provision of funding for housing development, this does not affect the application of the right between the individual and the state. The courts are unlikely to entertain a defence based on the division of powers and responsibilities between the spheres. As De Visser points out, ‘a municipality cannot absolve itself of the responsibility it has to provide basic services to its residents by claiming that adequate budgetary support is not forthcoming from national government. The courts are not likely to entertain such a defence since it would mean that the most vulnerable in society become victims of failing intergovernmental relations.’⁷⁹⁴ The Constitutional Court was called upon to decide on this matter first in *Joseph & others v City of Johannesburg & others* and later in the case of *City of Johannesburg Municipality v Blue Moonlight Properties*.⁷⁹⁵

6.3.2 *Joseph & others v City of Johannesburg*⁷⁹⁶

In this case the Constitutional Court had to decide a matter involving the relationship between a public body (City Power, an entity of the City of Johannesburg), and residents of a building within the city with whom the city had no direct contractual relationship. The facts were briefly that the applicants resided in a building in Johannesburg which they rented from a landlord,

⁷⁹¹ Ibid at 210.

⁷⁹² Ibid para 40.

⁷⁹³ Ibid at 214.

⁷⁹⁴ Ibid.

⁷⁹⁵ *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC).

⁷⁹⁶ *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC).

Nel. Nel, in turn, contracted with City Power for the supply of electricity to the buildings. Nel fell into arrears with the city which terminated the electricity supply to the building without giving notice to the residents. The residents were without electricity for one year by the time the Constitutional Court heard the matter. The city's by-laws provided only for notice to 'customers'. In this case, Nel, the landlord, was the customer and so the city argued that they were under no obligation to give notice to the applicants. The High Court accepted this argument, but in the Constitutional Court it was held that whether the applicants were customers or not was not decisive of the matter.

The Constitutional Court framed the issue as one concerning the relationship between a public service provider and users of its service. Accordingly, this case concerned the special cluster of relationships that exist between a municipality and its citizens which is fundamentally cemented by the public responsibilities a municipality bears in terms of the Constitution and legislation in respect of persons living within its jurisdiction. At this point, administrative law principles operate to govern the relationship beyond the law of contract.

The city argued that administrative paralysis may result if it is required to give notice to non-customers in the manner contended by the applicants. This argument was rejected by the Constitutional Court which held that:

The spectre of administrative paralysis is a legitimate concern. Administrative efficiency is an important goal of democracy, and Courts must remain vigilant not to impose unduly onerous administrative burdens on the state bureaucracy. In my view, however, the issue of administrative efficiency primarily concerns the content of the duties imposed under administrative law. The latter is fundamentally determined by the relationship that exists between the administrative state and its citizens and should not be delimited. Practical concerns should not be decisive in determining the scope of administrative action, but must inform the content of procedural fairness.⁷⁹⁷

The Constitutional Court did not consider the impact of the right to housing, but instead held that the real issue was whether the contractual relationship that exists between a public service and members of the public gives rise to rights that require the application of section 3 of the PAJA.⁷⁹⁸

⁷⁹⁷ Ibid para 29.

⁷⁹⁸ Promotion of Administrative Justice Act 3 of 2000.

The Constitutional Court's reasoning in this matter is important as it indicates the manner in which similar matters will be approached by the courts in future. The Court adopted a purposive approach, giving effect to the spirit of the Constitution and the duty incumbent upon state institutions to provide services in an efficient, impartial, and effective manner. It emphasised the objects of local government in the Constitution, the developmental duties of municipalities in terms of the Constitution and the Municipal System Act, and the specific obligation to provide electricity placed upon municipalities by the Housing Act. It held that taken together, all of these duties imposed a public law obligation on the municipality to provide electricity and a concomitant right on residents of the municipal areas to receive it.⁷⁹⁹ Next the Court turned to consider whether this public law right was sufficient to entitle residents to procedural fairness in terms of the PAJA if the municipality intended to terminate a right which they already enjoyed.

The Constitutional Court stated that the notion of rights includes not only vested, private-law rights but also legal entitlements that have their basis in the constitutional and statutory obligations of government. The preamble to the PAJA states that the objectives of the Act include the promotion of an efficient administration and good governance. The Act aims to 'create a culture of accountability, openness and transparency in the public administration.'⁸⁰⁰ These objectives give expression to the founding values of our Constitution, which provides in section 1 that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The Constitutional Court stated that section 195 of the Constitution enumerates the basic values and principles governing public administration and affirms our constitutional commitment to a responsive and accountable administration. It further emphasised the following principles which are relevant to procedural fairness set out in section 195(1):

⁷⁹⁹ *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC) para 47.

⁸⁰⁰ Promotion of Administrative Justice Act 3 of 2000: Preamble.

- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to, and the public must be encouraged to participate in policy making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.

Taken together, the Constitutional Court held that the values and principles described above require government to act in a manner that is responsive, respectful, and fair when fulfilling its constitutional and statutory responsibilities. This responsibility is especially important for the delivery of public services, and more so for municipalities which are at the forefront of government interaction with citizens.

Applying this reasoning, the Constitutional Court held that when City Power supplied electricity to the applicants, it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living within its jurisdiction. In depriving them of a service they were entitled to and were receiving, City Power was obliged to afford them procedural fairness before taking a decision that would materially affect their rights. Accordingly, the Court found that the applicants were entitled to notice of the intended termination in terms of the PAJA.

The decision in *Joseph* has been criticized by human rights lawyers for being unduly focussed on proceduralism to the detriment of substantive human rights. It is argued that the case represents a missed opportunity to develop socio-economic rights (the right to housing) because the Constitutional Court focussed on administrative law and adopted a formalistic approach rather than consider the plight of the citizens impacted by the case.⁸⁰¹ The view, shared by Dugard and Langford amongst others, is that the preferable approach would have been for the Court to interpret the right to housing as encompassing a right to basic municipal services such as electricity.⁸⁰² This, however, ignores that fact that from the outset, the

⁸⁰¹ Bilchitz 'Substantive Reasoning in Administrative –Law Adjudication' (2010) *CCR* 111

⁸⁰² Dugard & Langford 'Art or science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 *SAJHR* 39,51

applicants characterised the matter as involving the infringement of their administrative law rights and not an infringement of the right to housing.⁸⁰³

It is submitted that the value of the case lies in its applicability to a wide range of situations where good governance and procedural fairness may find application. This case shows that the courts will take a purposive approach to the adjudication of similar cases brought before it. This is demonstrated by the Constitutional Court's rejection of the rigid, positivistic approach taken by the High Court when it characterised the matter in contractual terms. It is clear that the state's responsibility to provide accountable government weighed heavily with the Court. Of particular importance for future cases, is the manner in which the Court located the dispute within the developmental duties and objects of local government as set out in the Constitution. This lends support to the argument advanced in this thesis that the state must use planning and intergovernmental-relations processes which operate from the bottom-up. It is submitted that this approach to planning and intergovernmental relations will give effect to developmental local government and improve the effectiveness of the state administration. Service delivery and democratic governance will be best served by this approach which places communities at the centre of government planning and decision-making. Of course, for this to be effective, the operational inefficiency of the ward committees in local government will have to be addressed. It is submitted that attending to the functioning of ward committees must be a priority in the intergovernmental reform process which this thesis proposes.

6.3.3 *City of Johannesburg Municipality v Blue Moonlight Properties*⁸⁰⁴

The decision in this case presents a further development of the reasoning in *Joseph v City of Johannesburg*.⁸⁰⁵ In this case, the city raised the allocation of the housing responsibility in the Constitution to provincial government in order to deny that it was under an obligation to provide the applicants with housing. The argument was rejected by the Constitutional Court. The facts of the case were that in 2004 Blue Moonlight purchased a commercial property called 'Saratoga Avenue' in Berea, Johannesburg. At the time of purchase, the property was occupied

⁸⁰³ Hoexter *Administrative Law in South Africa* 2 ed (2012) 402-4; Murcott 'The Role of Administrative Law in enforcing Socio-economic rights: Revisiting Joseph' (2013) *SAJHR* 481

⁸⁰⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* (CC), 2012 (2) SA 104 (CC).

⁸⁰⁵ *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC).

by 86 people (referred to by the Court as ‘the occupiers’). After posting eviction notices on two occasions, Blue Moonlight began eviction proceedings in the High Court under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (the PIE Act).⁸⁰⁶ The occupiers opposed the application on the basis that they would be rendered homeless and applied to join the City of Johannesburg to the proceedings by reason of its constitutional and statutory duties in relation to housing. In the High Court, the city’s housing policy was found to be unconstitutional to the extent that it discriminated against people in desperate need of housing who are subject to eviction by private landowners. The SCA upheld the High Court’s order and ordered the city to provide the occupiers with ‘temporary emergency accommodation’. The city appealed against the SCA’s order to the Constitutional Court.

The occupiers’ case was based on section 26 of the Constitution and on the right to equality. The Constitutional Court was accordingly called upon to consider the obligations of the local government sphere in relation to the right of access to housing. The Court noted that the duty to provide housing in section 26 of the Constitution falls on all three spheres of government. The city’s application to join the provincial government had been refused in both the High Court and the SCA. In this regard, the Constitutional Court noted that in view of the intertwined responsibilities of the three spheres of government it would have been preferable for all to have been joined. However, the absence of provincial government was not fatal. The Court considered the obligations and conduct of the city as the ‘joinder of the city as the main point of contact with the community is essential.’⁸⁰⁷

The city argued that its role in relation to the provision of housing is secondary to that of the provincial government. It relied on the provisions of chapter 12 of the Housing Code to support its contention. Chapter 12 provides for assistance to people who find themselves in need of emergency housing for reasons beyond their control. The definition of an emergency situation includes where people are ‘evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences.’ The city contended that in terms of the constitutional allocation of powers, housing appears in Schedule 4 Part A. There is nothing in Parts B of Schedules 4 and 5 which places an obligation on local government to provide housing. The Housing Act requires local

⁸⁰⁶ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

⁸⁰⁷ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) para 45.

governments merely to act as a point of delivery. Local government is entirely dependent on national and provincial government and confined to acting within the parameters of national and provincial policy. The city argued that it was not obliged to fund emergency accommodation. It stated that chapter 12 was adopted pursuant to the decision in *Grootboom*, which clearly placed the obligation to fund housing on national government. Therefore, once the city's application for funding to provincial government was refused, its constitutional mandate in respect of emergency housing was exhausted.⁸⁰⁸

The Constitutional Court held that the city's reliance on *Grootboom* to support its contention that local government was not primarily responsible for the achievement of the right of access to adequate housing was misplaced.⁸⁰⁹ This was because while Yacoob J described the division of roles between the three spheres, he did not thereby 'delineate absolute and inflexible division of governmental responsibilities between the spheres'.⁸¹⁰ When *Grootboom* was decided there was no express provision requiring that emergency housing be provided. The essential question before the Court, therefore, was whether the nation-wide housing policy was able to cater for those in immediate need. National policy was required to fill in the gaps in the legislation and it was in this light that the Court held that for there to be effective implementation, it was necessary for national government to provide adequate budgetary support.⁸¹¹ Accordingly, the Court held that:

The City's submission that national or provincial government is the primary duty-bearer in relation to funding emergency housing is cogent only to the extent that, but for the existence of a national emergency housing policy and budget, the attempt of a local authority to fulfil the right of access to adequate housing would be empty. There is no basis in *Grootboom* for the assertion that local government is not entitled to self-fund, especially in the realm of emergency situations in which it is best situated to react to, engage with and prospectively plan around the needs of local communities.⁸¹²

In order to justify its reasoning, the Constitutional Court pointed to a section of Chapter 12 of the Housing Act which requires municipalities to 'initiate, plan and formulate applications for projects relating to emergency housing situations.'⁸¹³ Further, the Court noted that the Housing

⁸⁰⁸ Ibid para 49-50.

⁸⁰⁹ Ibid para 54.

⁸¹⁰ Ibid.

⁸¹¹ Ibid para 56.

⁸¹² Ibid para 57.

⁸¹³ Housing Act 107 of 1997: s 9(1) (f).

Code requires that ‘the provision for possible emergency housing needs must be identified through pro-active planning or in response or reaction to a request for assistance from other authorities of the public’.⁸¹⁴ In such a case, the municipality must investigate and assess whether the situation requires intervention and, if so, ‘whether the municipality can itself address the situation utilising its own means.’⁸¹⁵ The Court accordingly held that, apart from its entitlement to approach the province for assistance, ‘the City has both the power and the duty to finance its own emergency housing scheme’.⁸¹⁶

The implications of these two judgments for the constitutional division of powers are far reaching. The Constitutional Court has essentially taken the reasoning in *Joseph v City of Johannesburg* one step further. It is clear from this, that the Court will not entertain arguments based on administrative efficiency, neither will it allow government spheres to escape responsibility for providing public services by relying on the fact that the Constitution assigns responsibility for that function to another sphere. The Court intended to hold the public administration accountable for service delivery as required by section 195 of the Constitution. This means that it is imperative for government to address the inefficiencies in its administration in order to improve service delivery. Failure to do so in the face of increasing rights-based litigation will mean that more and more funds will be diverted from service delivery to the defence of costly litigation.

6.4 Human Rights Advocacy

In addition to increasing litigation in the domestic sphere, there is also the spectre of referrals to United Nations (UN) treaty bodies which must be faced. An increasingly active civil society is referring human rights matters to UN treaty bodies. A recent example occurred where the Centre for Applied Legal Studies (CALS) at the University of Witwatersrand submitted a shadow report to the Universal Periodic Review (UPR) Working Group on the South African state’s progress in giving effect to the right to housing. In this shadow report CALS points out

⁸¹⁴ Depart of Human Settlements: National Housing Code s 4.

⁸¹⁵ Ibid s 4.2.

⁸¹⁶ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) para 67.

that it has been five years since the decision in *Blue Moonlight* and ‘the City of Johannesburg has failed to adequately address the crisis in the inner city...’⁸¹⁷

The submission argues that whilst the South African state should be commended for ratifying a number of regional and global human rights instruments which recognise socio-economic rights, there is a gap between policy and implementation and the state is failing to meet its international obligations to provide an ‘adequate standard of living’ to its citizens. The CALS submission proposed the following recommendations to the UPR Working Group:⁸¹⁸

1. ...
2. The State and all three spheres of government must ensure that they comply with their constitutional obligation in the provision of housing, water and sanitation and in doing so, that they eradicate poverty and instil equality and dignity to previously disadvantaged communities.
3. The City of Johannesburg should be providing households with low income rental that is affordable and protective of people’s rights to dignity and privacy.
4. The City of Johannesburg must ensure that all accommodation protects the rights of women and children, in that there is a safe environment and enhances family life.
5. There must be political will applied to the cases and that Court orders are implemented.

The submission ends with the observation that ‘governmental stakeholders should inject political will and understand the plight of its people, this will accelerate service delivery and address the challenges that plague our country’.⁸¹⁹

South Africa has lost much of the status it once enjoyed in the international community. The elevation of service delivery failures to the global human rights community further calls the reputation of the country into question. It is submitted that human rights advocacy and litigation should galvanise the state into action. It is clear that there are inordinate failures in service delivery. Where these failures have their roots in administrative and systemic inefficiencies in government, there is an obligation on the government to act; this should not be left to the courts to attempt to resolve.

⁸¹⁷ Submission by Centre for Applied Legal Studies to the Working Group on the Universal Periodic Review regarding the Republic of South Africa, October 2016.

⁸¹⁸ Ibid 11.

⁸¹⁹ Ibid 12.

6.5 Conclusion

The result of the Constitutional Court's decisions discussed above is that it is now beyond doubt that the obligation to provide adequate housing in emergency situations rests on local government, even where the emergency situation is caused by an eviction initiated by a private property owner as happened in the *Blue Moonlight* case. It is clear also that the constitutional rights in the Bill of Rights are justiciable against the state as a whole and that the courts will not entertain defences based on the division of powers between the spheres. Of particular importance, too, is the characterisation of the disputes as involving the state's obligation to provide a responsive and accountable administration. The centrality of developmental local government to the provision of services emerges clearly from the Court's reasoning. As in *Blue Moonlight*, in *Le Sueur* the eThekweni Municipality relied on the argument that section 24 (environment) was also binding on local government as a consequence of the duty to provide developmental local government.⁸²⁰

The proximity of local government to the community means that it is increasingly likely that municipalities will be joined in litigation based on the constitutional obligations of the state. From these two cases it is reasonable to argue that litigation in respect of the rights in the Bill of Rights is likely to result in an extension of the powers and functions of local government. The impact of this must be taken into account in assessing the efficacy of the constitutional division of powers. Where the Constitutional Court extends local government's responsibilities as it did in the *Blue Moonlight* case by imposing an obligation on local government to fund emergency housing from its own resources, it impacts on government planning and budgeting processes. Ever more responsibilities are shifting downwards and resources ought to follow this downward trend. Failing this, municipalities will simply rob Peter to pay Paul, leaving other services under funded in order to deal with new areas of responsibility. In the long term, this will negatively impact on service delivery.

It is submitted that government should address the manifest shortcomings in the constitutional design which have been exposed by twenty years of practice. The failure to do so has had negative impacts on service delivery which cannot be ignored. The manner in which the courts are currently interpreting the constitutional division of powers in one direction, while the

⁸²⁰ *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6.

legislature interprets it in another, cannot be allowed to continue unchecked. It is incumbent upon the executive to initiate a process of reform aimed at improving the efficiency and effectiveness of the government. The final chapter sets out recommendations which may be beneficial in guiding such a process.

CHAPTER 7

PUBLIC ADMINISTRATIVE PRACTICE IN THE CONSTITUTIONAL ERA

7.1 Introduction

It is accepted that the transformation of the public service is a condition precedent to the transformation of South African society. The unitary nature of the apartheid administration resulted in a public service in which authority was highly centralised. Backed by the system of parliamentary sovereignty and a statute book which delegated extensive powers to the executive, the nature of the apartheid state was essentially authoritarian. In the result, 'apartheid state culture' required that public servants follow orders without question. This was particularly the case in the justice and security arms of the state which committed among the worst injustices in furtherance of the aim of maintaining white hegemony and control.

The drafters of the Constitution realised that in order for the vision of a democratic, constitutional state to be realised, the public service would need to be transformed to reflect a culture of constitutionalism. This would require a paradigmatic shift from the organisational culture which prevailed under the apartheid government. Accordingly, the drafters included provisions aimed at the regulation of the country's public service in the Constitution. These provisions require that government departments reflect an ethos which promotes the realisation of human rights.

It is consequently submitted that an examination of the public service is an important part of any investigation into the constitutional practice of the state since the adoption of the Constitution. This discussion is both significant and relevant to current developments in South African public discourse in that the extent to which the public service reflects these constitutional values is an important indicator of the extent to which the constitutional scheme is being successfully implemented. This chapter examines the state of the public service 23 years after the adoption of the Constitution.

7.2 The Constitution, the Public Administration, and the Public Service Commission

Section 197 of the Constitution establishes a public service for the Republic within the administration. The right of state employees to support any political party is protected by the Constitution which outlaws partisan behaviour towards officials based on political affiliation.⁸²¹ The regulation of the public service is governed by legislation. The national and provincial spheres which constitute the public service, are governed by the Public Service Act.⁸²² However, the local sphere of government has legislative and executive authority over personnel practices in its own sphere and so falls under different legislation.⁸²³ In this thesis, the term ‘public administration’ means the administrative arm of the state including national, provincial, and local governments. By contrast, ‘public service’ refers only to the national and provincial government departments.

In Chapter 1, the supremacy of the Constitution, the rule of law, and human rights were briefly discussed. In furtherance of these aims, the Constitution provides that ‘public administration must be governed by the democratic values and principles enshrined in the Constitution.’ The basic values and principles governing the public administration are laid down in the Constitution.⁸²⁴ These basic values and principles include:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably, and without bias.
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible, and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel-management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.⁸²⁵

⁸²¹ Constitution: s 197(3).

⁸²² Public Service Act 30 of 2007.

⁸²³ Local Government Municipal Systems Act 32 of 2000.

⁸²⁴ Constitution: s 195(1).

⁸²⁵ Ibid s 195(1)(a)-(i).

After setting out the constitutional values which govern the public administration, the Constitution establishes the PSC with the aim of maintaining an effective administration with a high standard of professional ethics.⁸²⁶ The PSC is required to perform its functions without fear, favour, or prejudice. These functions include:

- (a) to promote the values and principles set out in section 195, throughout the public service;
- (b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;
- (c) to propose measures to ensure effective and efficient performance within the public service;
- (d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions, and dismissals comply with the values and principles set out in section 195;
- (e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with;
- (f) either of its own accord or on receipt of a complaint –
 - (i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and the legislature;
 - (ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
 - (iii) to monitor and investigate adherence to applicable procedures in the public service; and
 - (iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge, and other aspects of the careers of employees in the public service; and
- (g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.⁸²⁷

It is interesting to note that the powers given to the PSC include the powers of monitoring, evaluation, and investigation. The PSC is empowered to propose measures, give advice, and make recommendations.⁸²⁸ In contrast to the Public Protector, the PSC does not have the power to recommend appropriate remedial action.⁸²⁹ In addition, its reports are not required to be made public.⁸³⁰ PSC commissioners may be removed from office by a simple majority vote as opposed to the Public Protector and Auditor-General who may only be removed by a resolution supported by a two thirds of the members of the NA.

⁸²⁶ Ibid s 196.

⁸²⁷ Ibid.

⁸²⁸ Ibid.

⁸²⁹ Ibid s 182(C) read with s 196(4).

⁸³⁰ Ibid s 182(5).

A further point which bears mentioning is the entrenchment of the right to fair labour practices enshrined in section 23 of the Constitution. As a consequence of this right, state employees are afforded the full protection of labour law and are no longer restricted to remedies based in administrative law.⁸³¹

7.3 Constitutional Principle XXIX and the PSC

Recognising the importance of the public administration to the new constitutional order, CP XXIX provides that:

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

It is significant that the wording of CP XXIX groups the PSC together with the Reserve Bank, the Auditor-General, and the Public Protector. Between the *First* and *Second Certification Judgments*, significant changes were made to the structure, powers, and functions of the PSC.⁸³² Many of these changes diminished the status of the PSC when compared to the earlier provisions in the NT. In this part, the reasoning of the Constitutional Court with regard to the provisions governing the PSC in both judgments is examined.

The interim Constitution provided for a national PSC to exist by side-by-side with provincial PSCs. However, the NT removed the power of the provinces to pass a law establishing individual provincial PSCs. In the *First Certification Judgment*, the Constitutional Court held that the basic powers and functions of the single PSC established by the NT had not been clearly set out, and that this made it difficult to assess the import of the changes made by the NT.⁸³³ In order to address this, the CA amended the constitutional text by the addition of procedures for

⁸³¹ However, members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service are excluded from the Labour Relations Act 66 of 1995 which was passed to give effect to s 23 of the Constitution.

⁸³² *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC); *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC).

⁸³³ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC) para 183.

the appointment and removal of commissioners, by defining the functions of the PSC, and by specifying its size and composition.

This point will be revisited later. It is significant that like the NT, the AT provided for a single PSC so removing the power to establish provincial PSCs which featured in the interim Constitution. In order to remedy this, the AT provided that each province could nominate one representative to the PSC. The remaining five commissioners were to be appointed by the NA, to which the PSC reports.

It is interesting to note that during argument it was raised that the role of the PSC is similar to that of the Public Protector and the Auditor-General, and that the procedures laid down for the protection of the independence of the PSC should be similar to those set for the Public Protector and Auditor-General. These procedures require a resolution of at least two thirds of the members of the NA to remove the Public Protector and the Auditor-General. By contrast, a commissioner of the PSC may be removed by a simple majority of the provincial legislature or the NA.⁸³⁴

This argument was rejected by the Constitutional Court which found that ‘the functions of the PSC are materially different to those of the Public Protector and the Auditor-General’ who ‘perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution.’⁸³⁵ In the Court’s view, the PSC’s main work was routine and supervisory. Although it did have ‘supervisory and watchdog functions’, the PSC’s ‘primary function was to promote a high standard of professional ethics in the public service’.⁸³⁶ The Court found that the functions of the PSC could not be equated with those of the Public Protector and the Auditor General.⁸³⁷ In the Court’s view the PSC’s functions were materially different from those of the Public Protector which include the ‘investigation of sensitive and potentially embarrassing affairs of government, whilst the Auditor-General (AG) has a crucial role to play in ensuring that there is openness, accountability and propriety in the use of public funds’.⁸³⁸ The Court reasoned

⁸³⁴ Ibid para 139.

⁸³⁵ Ibid para 142.

⁸³⁶ Ibid.

⁸³⁷ Ibid.

⁸³⁸ Ibid.

further that the removal of one of fourteen commissioners would not necessarily impact significantly on the work of the PSC. In its view the political ramifications of removing a commissioner would operate to constrain arbitrary action.⁸³⁹

As mentioned above, the powers of the PSC were significantly altered between the interim Constitution and the Constitution. The cumulative effect of these changes reduced the role of the PSC significantly. One of the most important changes involved the removal of the power to make peremptory directions and recommendations. Significantly, the NT removed the control of the public service from the PSC and gave it the provincial and national executives, subject to monitoring by the PSC.⁸⁴⁰

The Constitutional Court stated that the changes to the nature and functions of the single PSC under the AT, made comparison difficult particularly because it complicated the weighing process which had to be undertaken. In summary, the factors which the Court regarded as important were:⁸⁴¹

- (a) The provinces lost autonomous power to appoint their own commissions.
- (b) The collective powers of the provinces had been extended by the establishment of the single PSC. This extension had not fully compensated the provinces for the loss of power to create their own commissions.
- (c) Part of the power which previously vested in a provincial service commission now vested in the provincial executive.
- (d) The residue of the power would be transferred to the single PSC. A significant part of the residual power concerns directions in regard to practices, which under the interim Constitution were in any event subject to national norms and standards.

After weighing all these factors, the Constitutional Court concluded that ‘there had been a small diminution in the powers of the provinces arising out of the alteration in the functions of the PSC, the change in composition, and the disestablishment of the provincial service commissions.’⁸⁴² Accordingly, the Constitutional Court was satisfied that:

⁸³⁹ Ibid.

⁸⁴⁰ Ibid para 188.

⁸⁴¹ Ibid para 197.

⁸⁴² Ibid para 198.

- (a) the amendments to the NT contained in AT 146(2) and (4) effectively restored the balance referred to in the preceding paragraph;
- (b) the amendments to provincial police powers contained in AT 205-8 increased the powers in respect of police services compared with those accorded to the provinces in terms of the NT;
- (c) the provisions of the AT in regard to the PSC did not materially affect the balancing process;
- (d) the combined effect of the changes made in the AT was such as to produce a conclusion different to that at which it arrived in respect of the NT. In particular, those relating to provincial police powers and to the terms of the override in AT 146 played a material role in this change of assessment; and
- (e) in the result, the powers and functions of the provinces in terms of the AT remain less than or inferior to those accorded to the provinces in terms of the interim Constitution but not substantially so.⁸⁴³

As a result, the Constitutional Court certified that the amended constitutional text passed by the Constitutional Assembly on 11 October 1996 complied with the Constitutional Principles contained in the interim Constitution.

It is submitted that the reasoning of the Constitutional Court which underpins the decision in respect of the PSC matter may be flawed. In the first instance, it is submitted that the inclusion of the PSC in CP XXIX was not accorded sufficient weight by the Court.⁸⁴⁴ There is nothing in this wording to suggest that the PSC should be given lesser protection by limiting the procedures for its independence and impartiality in the way in which the AT does. Secondly, the Court's reasoning that the work of the PSC differs materially from that of the Public Protector and the Auditor-General is, with respect, flawed for a number of reasons. In the first instance, the PSC is tasked with maintaining ethics and professionalism in the public service. The importance of this assumes greater significance today with the large number of ethically compromised public officials being exposed daily in the media and in the parliamentary enquiries which are underway at the time of writing.

⁸⁴³ Ibid para 204.

⁸⁴⁴ CP XXIX provides that: 'The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.'

Thirdly, the Constitutional Court attached weight to the fact that in contrast to the NT, the AT afforded provinces the majority of places in the PSC. This, according to the Court, gave provinces a majority voice. With respect, this assessment does not sufficiently take account of a number of factors which impact on the provinces' ability to advance provincial interests in the PSC. It is not a foregone conclusion that the provinces would adopt a common position on matters under deliberation. There are significant differences between the provinces in terms of size, language, geographic location, distribution of resources, and the like. The distribution of financial resources and the extent to which provinces rely on funding from central government may also play a part – as may political factors. In this regard, at the time of writing there is only one province which is not controlled by the ruling party. This may mean that in practice, the strongest unifying factor across the majority of provinces in the PSC would be political affiliation. This external locus of influence may have a greater impact on proceedings within the PSC than any other common interest which may emerge amongst provinces.

7.4 Public Administrative Practice

7.4.1 Introduction

The culture in the public administration is important. It has been pointed out that in order for a Constitution to succeed in cementing democracy, it must be sustained by a democratic culture and an enabling social and economic environment.⁸⁴⁵ It goes without saying that the culture in the public service is an important indicator of the success of constitutionalism. Public servants are responsible for carrying out all of government's functions – from health care, through to the administration of social grants and the provision of education. The extent to which government departments exhibit a culture which reflects basic democratic values and principles impacts on the ability of the state to deliver services in a humane, honest and compassionate manner.

Recognising the importance of the public administration, the government has invested considerable effort in developing a legal and policy framework aimed at building a professional and ethical administration. These laws and policies include the:

⁸⁴⁵ Simeon (1998) 13 *SA Public Law* 42, 46.

- Constitution of the Republic of South Africa, 1996;
- Public Service Act;⁸⁴⁶
- Labour Relations Act;⁸⁴⁷
- White Paper on the Transformation of the Public Service;⁸⁴⁸
- White Paper on Transforming the Public Service;⁸⁴⁹
- White Paper on Public Service Training and Education;⁸⁵⁰
- Skills Development Act;⁸⁵¹
- Public Service Co-ordinating Bargaining Council Resolutions;⁸⁵²
- Senior Management Services Handbook;⁸⁵³
- Public Service Management Act;⁸⁵⁴
- Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices;⁸⁵⁵ and
- Public Service Regulations.⁸⁵⁶

The question addressed in this chapter is the extent to which the implementation of these laws and policies has resulted in a public service that reflects a commitment to constitutionalism? Unfortunately, the Constitution does not require the PSC to publish its investigations and reports.⁸⁵⁷ As a result, the PSC releases only certain of its reports. It is submitted that this lack of transparency impacts negatively on effective oversight and accountability in the public administration. In the result, it is necessary to draw on PSC reports (where available), parliamentary committee minutes, reports of NGOs, information from government department websites, news reports, and the like in order to address this important question.⁸⁵⁸

⁸⁴⁶ Public Service Act 103 of 1994.

⁸⁴⁷ Labour Relations Act 6 of 1995.

⁸⁴⁸ DPSA 'White Paper on the Transformation of the Public Service' (1995).

⁸⁴⁹ DPSA 'White Paper on Transforming the Public Service' (1997).

⁸⁵⁰ DPSA 'White Paper on Human Resource Management in the Public Service' (1997).

⁸⁵¹ Skills Development Act 97 of 1998.

⁸⁵² Resolution 13 of 1998.

⁸⁵³ DPSA 'Senior Management Services Handbook' (2003).

⁸⁵⁴ Public Service Management Act 1 of 1999.

⁸⁵⁵ DPSA 'Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices' (2005).

⁸⁵⁶ Public Service Regulations 2016 GNR 877 of 29 July 2016 *GG* 40167.

⁸⁵⁷ Constitution: ss 195 and 196.

⁸⁵⁸ See www.dpsa.gov.za, www.psc.gov.za accessed on 22 July 2019; Toxopeus M 'Understanding water issues and challenges 1 Department of Water and Sanitation' Research Project into Water available at <https://hsf.org.za/publications/hsfs-briefs/understanding-water-issues-and-challenges-i-department-of-water-and-sanitation> accessed on 22 July 2019. See also 'Fisheries Department rots from the top: Report of GroundUp'

7.4.2 The Role of the Department of Public Service and Administration

Earlier in this chapter, the oversight role of the PSC was introduced. Here the role and efficacy of the government department tasked with management of the public service is discussed. Within the public sector, the Department of Public Service and Administration (DPSA) bears the primary responsibility for ensuring that the country has an ethical, professional, and effective public service.⁸⁵⁹ This includes the authority to establish norms and standards to ensure the effective functioning of the public service. In this regard, the DPSA has overseen the development of an extensive network of inter-related laws and policy frameworks governing the public sector.⁸⁶⁰ However, the extent to which the regulatory framework has been successful is open to question.

In the first place, the human-resources environment within the DPSA itself appears to be dysfunctional. In the result, the ability of the department to implement public service policy in the rest of the administration is thrown into doubt. A startling indication of the state of affairs at the DPSA is contained in a recent report by the DPSA leadership in the Public Service and Administration, Performance Monitoring and Evaluation Parliamentary Oversight Committee.⁸⁶¹ The relevant committee meeting was also attended by the PSC and DPME who made various submissions.

The committee discussed the state of retention of Heads of Departments in the public sector, challenges at the politico-administrative interface, and challenges with implementation of government's performance monitoring system. The DPSA emphasised the importance of the performance management system in creating an accountable culture linked to a transparent reward system. The system in place requires that poor performance be effectively managed

available at <https://m.news24.com.SouthAfrica/News/fisheries-department-rotting-from-the-top-20181113> accessed on 22 July 2019. Public Service and Administration Performance Monitoring and Evaluation Committee Meeting of 25 October 2017 available at <https://pmg.org.za/committee-meeting/25324/> accessed on 22 July 2019. Public Accounts (SCOPA) Committee Meeting of 28 November 2018 available at <https://pmg.org.za/committee-meeting/27688> accessed on 22 July 2019.

⁸⁵⁹ See www.dpsa.gov.za accessed on 22 July 2019.

⁸⁶⁰ Public Service Act 103 of 1994; Public Service Regulations, 2016 GNR 877 of 29 July 2016; Public Administration Management Act 11 of 2014 available at www.dpsa.gov.za/legislation.php#7 accessed on 22 July 2019.

⁸⁶¹ Public Service and Administration, Performance Monitoring and Evaluation Committee 25 October 2017 available at <https://pmg.org.za/committee-meeting/25324/> accessed on 22 July 2019.

through personal development plans and training.⁸⁶² Unfortunately, the picture which emerged from the presentations was that government's performance management system was dysfunctional. The PSC chairperson registered the PSC's concern that the DPSA and the DPME had not implemented a 'legitimate and transparent process' to evaluate HoDs – some had not been evaluated for three years. He explained further that a process of deviation which had been allowed by the departments in order to assess HoDs for progression purposes only, had been applied in an uneven and chaotic manner.⁸⁶³

This led to a discussion on the topic of the tensions at the politico-administrative interface, the impact of the dysfunctional performance system on the career incidents of DGs, and the turnover rate for DGs and HoDs in the public sector. The PSC linked tensions at the politico-administrative interface with the high turnover rate in the senior management levels of government. The DPSA informed the public service parliamentary oversight committee that between 2004 and 2014, the average DG held his or her position for only 2,4 years of his or her five-year contract.⁸⁶⁴ This problem may be even more serious at the level of Deputy-Directors General.⁸⁶⁵

In her response, the Minister for Public Service and Administration highlighted the following:

⁸⁶² Ibid.

⁸⁶³ Advocate Sizani appearing before the Public Service and Administration, Performance Monitoring and Evaluation Committee *ibid.*

⁸⁶⁴ Ibid.

⁸⁶⁵ This study found that 59 per cent of DDG posts were vacant. A high replacement rate for DDGs was confirmed by the authors of the study by the DPSA. Thirty-five per cent of senior management posts were found to be vacant Development Network Africa 'Public Sector Constraints – A critical Review' June 2007 available at www.dnaeconomics.com/assets/Usematthew/Capacity_constraints_in_the_public_sector-20=1_06_2007.pdf accessed on 22 July 2019. When Dr Ndudane took up a DDG position at the Department of Forestry and Fisheries in 2016, she was the eleventh DDG to fill the role seven years. See <https://m.news24.com/SouthAfrica/News/fisheries-department-rotting-from-the-top-2018113> accessed on 22 July 2019. A string of resignations at senior management level in the Department of Water and Sanitation is reported at <https://m.news24.com/SouthAfrica/News/nomvula-axes-dg-after-just-six-months-20170715> accessed on 22 July 2019. The suspension of four DDGs at the Department of Water and Sanitation is reported at <https://www.iol.co.za/capetimes/news/fourth-water-department-deputy-suspended-as-director-general-snubs-mps-979414> accessed on 22 July 2019. The suspension of the DDG for Policy, Planning and Clean Energy at the Department of Energy is reported at: <https://www.moneyweb.co.za/news/south-africa/energy-minister-suspends-ddg/> accessed on 22 July 2019. The suspension of two DDGs at the DPSA is reported at <https://citizen.co.za/news/south-africa/1689865/muthambi-suspends-public-service-and-administration-dept-cfo-and-ddg> accessed on 22 July 2019. The suspension of the DG is reported on, together with the dismissal of two DDGs in the Department of Telecommunications and Postal Services at <https://mfjn24.com/Tech/News/Telecoms-DG-suspended-for-60-days-20150807> accessed on 22 July 2019. <https://techcentral.co.za/vilikazi-latest-ddg-out-at-telecoms/5860> accessed on 22 July 2019. <https://techcentral.co.za/another-ddg-bites-the-dust/56865/> accessed on 22 July 2019.

- (a) The matters raised by the PSC and DPME during discussions had arisen from an apparent lack of leadership in the DPSA.⁸⁶⁶
- (b) The Minister's impression was that the department had lost sight of its role in driving efficiency in the public sector.
- (c) Critical programmes affecting staff morale, such as the employee satisfaction survey and the client satisfaction survey, had been discontinued.
- (d) Surveys which had been conducted in recent years were not published because the results reflected poorly on the department.
- (e) The organisational development branch of the department had not completed the organograms of various departments. As a result, these departments could not fill vacancies, forfeiting money back to the *fiscus* as a result.
- (f) The department had a bloated, top-heavy structure.
- (g) It was not clear what work some of the chief directors were doing.
- (h) Decisions in the department were based on personal issues instead of objective considerations.
- (i) Powers were not appropriately delegated which led to slow work progress.
- (j) Key management controls such as the performance management system were not operational. Employees had not been assessed for some time which impacted on work morale.

The Minister's report painted a worrying picture of the DPSA. The apparent dysfunction extends to key management controls such as the performance management system which has broken down within the department. The DPSA bears responsibility for implementing the Performance Management and Development System for the Public Service (PMDS) throughout the administration, and yet the system was not implemented within the DPSA itself. The PSC has identified performance management in the public service as one of its key concerns.⁸⁶⁷ This concern is based on previous studies which showed that performance

⁸⁶⁶ This includes the breakdown of performance monitoring in the public service generally and amongst senior managers (DGs) in particular. Tensions at the politico-administrative interface, unwarranted suspensions and disciplinary actions against DGs by Ministers.

⁸⁶⁷ 'Evaluation of the Effectiveness of the Performance Management and Development System for the Public Service' Executive Summary at vi available at www.psc.gov.za/documents/reports/2018PMDS/%20Report%20_%20Final.pdf accessed on 22 July 2019. See the comments of the PSC Chairperson to the Public Service and Administration, Performance Monitoring and Evaluation Committee Meeting of 25 October 2017 available at <https://pmg.org.za/committee-meeting/25324/> accessed on 22 July 2019.

management in the public sector is poorly managed and implemented in most departments. The PSC found that this has resulted in poor performance and poor morale.⁸⁶⁸ In June 2018 the PSC published its report on the evaluation of the efficacy of the PMDS.⁸⁶⁹ The report studied implementation of the PMDS in six national departments.⁸⁷⁰ The aim of the research was to establish the underlying reasons for the ineffective implementation of the PMDS.⁸⁷¹

The study found that a variety of factors impacted negatively on the implementation of the PMDS. Some of the challenges were administrative, such as the under-staffing of units tasked with implementing the PMDS in the various departments.⁸⁷² The study identified a correlation between poor implementation of the PMDS and failure to achieve targets. This link was observed even where departments had received clean audits and had spent their entire budgets.⁸⁷³ Participants reported that the system was plagued by subjective and inconsistent application. In some instances the system was used to punish or reward. On the other hand, an over emphasis on financial reward was detrimental. Supervisors reported that staff expected to be rewarded even for meeting the minimum requirements of their jobs.⁸⁷⁴

While negative conduct, such as favouritism on the part of supervisors, was reported by participants, an interesting trend which emerged in a number of departments, was that employees' self-scores were seldom reduced by supervisors. Two departments reported no reduction in scoring. In the one department where supervisors did reduce scores, they claimed that their failure to provide reasons for the reduction was due to the fear of being bullied or sabotaged by their subordinates. One department reported that supervisors avoided performance management altogether as they wished to avoid conflict. Some supervisors did

⁸⁶⁸ 'Evaluation of the Effectiveness of the Performance Management' *ibid* at 1 and 'Development System for the Public Service' at 1 available at www.psc.gov.za/documents/reports/2018PMDS/%20Report%20_%20Final.pdf accessed on 22 July 2019.

⁸⁶⁹ 'Evaluation of the Effectiveness' accessed on 22 July 2019.

⁸⁷⁰ The Basic Education, Health, Human Settlements, Transport, Rural Development and Land Reform and the Water and Sanitation Departments were selected by the PSC because their mandates are important for service delivery. See 'Evaluation of the Effectiveness' *ibid* accessed on 22 July 2019.

⁸⁷¹ *Ibid* Executive Summary at vi accessed on 22 July 2019.

⁸⁷² The Department of Basic Education had ten practitioners responsible for 750 officials. The Department of Health had six officials for 1 834 employees, while the Department of Human Settlements had three staff members for 600. In the Department of Rural Development, the ratio was 6:5400, while the Department of Transport was 2:650, and the Department of Water and Sanitation 6:700. See 'Evaluation of the Effectiveness' *ibid* at 33 accessed on 22 July 2019.

⁸⁷³ *Ibid* at 41.

⁸⁷⁴ *Ibid* at 41.

not award any bonuses for fear of retaliation from staff. Two departments reported that staff who did not receive bonuses retaliated, for example, by engaging in a ‘go-slow’.⁸⁷⁵

The investigation presents a worrying picture of the public administration. Of particular concern is the apparent failure of the relevant organisational and institutional process effectively to regulate the public service. A failure in government’s performance management system means that one of the primary management controls driving service delivery is absent. The failure of the DPSA to complete and publish diagnostic surveys is equally worrying. This may be a major contributor to the apparent dysfunction in the public service environment emerging with increasing frequency from news reports into the various commissions of inquiry underway at the time of writing.⁸⁷⁶

7.4.3 The link between Discipline and Dysfunction

One department, which has been subjected to various investigations into allegations of maladministration since 2008, is the Department of Water and Sanitation (DWS).⁸⁷⁷ According to research, the department faces severe institutional and governance problems which compromise its ability to perform its duties.⁸⁷⁸ The department was restructured from the Department of Water Affairs and Forestry into the Department of Water and Environmental Affairs in 2009. In 2013, it was again reconfigured to include the sanitation function.⁸⁷⁹ In 2019, the department was again restructured, this time to combine the water and sanitation

⁸⁷⁵ Ibid at 41.

⁸⁷⁶ Commission of Inquiry into Tax Administration and Governance by the SARS (Nugent Commission of Inquiry); Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector (Zondo Commission of Inquiry); Commission of Inquiry into Allegation of Impropriety Regarding the Public Investment Corporation (Mpati Commission of Inquiry); and the Life Esidimeni Arbitration (Moseneke Arbitration).

⁸⁷⁷ Toxopeus M ‘Understanding water issues and challenges I: Department of Water and Sanitation’ Research Project into Water at 6 available at <https://hsf.org.za/publications/hsfs-briefs/understanding-water-issues-and-challenges-i-department-of-water-and-sanitation> accessed on 22 July 2019.

⁸⁷⁸ The Friederich Naumann Foundation has funded a research project into water in South Africa. See <https://hsf.org.za/publications/hsfs-briefs/understanding-water-issues-and-challenges-i-department-of-water-and-sanitation> accessed on 22 July 2019.

⁸⁷⁹ Toxopeus M ‘Understanding water issues and challenges I: Department of Water and Sanitation’ Research Project into Water at 1 available at <https://hsf.org.za/publications/hsfs-briefs/understanding-water-issues-and-challenges-i-department-of-water-and-sanitation> accessed on 22 July 2019.

functions with human settlements (housing).⁸⁸⁰ These constant changes may contribute towards instability with negative effects on governance.⁸⁸¹

Toxopeus highlights poor financial management in DWS and the water trading entity which both received qualified audit opinions from the Auditor-General. She points out that there appears to be an extremely high staff turnover combined with an ageing workforce and an inability to attract and retain skilled staff.⁸⁸² Top management is plagued by instability due to frequent changes in leadership. There have been eight DGs in nine years at DWS. This trend also applies to DDGs, with frequent suspensions in top management.⁸⁸³ At one stage during 2017, four DDGs were simultaneously placed on suspension.⁸⁸⁴ She argues that the instability at management level contributes to lack of accountability and an environment which disregards financial controls. The cumulative effect of these factors is compromised service delivery.⁸⁸⁵

The culture of disregard for financial controls apparently also extends to a disregard for accepted human-resource practices. In October 2018 it was reported that the DDG for national water resources infrastructure, Ms Makhatini had been suspended on the basis of various charges relating to projects in her branch. The branch in question is responsible for 80 per cent of the department's R15 billion budget. This same DDG had previously been suspended in 2017 for four months without charges being brought.⁸⁸⁶ According to reports Ms Makhatini was later summarily dismissed by the department without a disciplinary hearing.⁸⁸⁷

⁸⁸⁰ See <https://businesstech.co.za/news/government/319988/full-list-here-is-ramaphosa-new-cabinet/> accessed on 22 July 2019

⁸⁸¹ Toxopeus M 'Understanding water issues and challenges I: Department of Water and Sanitation' Research Project into Water available at <https://hsf.org.za/publications/hsfs-briefs/understanding-water-issues-and-challenges-i-department-of-water-and-sanitation> accessed on 22 July 2019.

⁸⁸² Ibid at 2 accessed on 22 July 2019.

⁸⁸³ Ibid. During the period from 2016 to 2018, the media exposed instability in the top management at the Department of Water and Sanitation (DWS). DG Margaret-Ann Diedericks resigned in June 201. She was replaced by Gorbachev Mashitso six months later. Mashitso, himself was suspended after only six months in the job, but not before he had suspended four DDGs. See <https://m.news24.com/SouthAfrica/News/nomvula-axes-dg-after-just-six-months-20170715> accessed on 22 July 2019. <https://www.iol.co.za/capetimes/news/fourth-water-department-deputy-suspended-as-director-general-snubs-mps-9794149> accessed on 22 July 2019.

⁸⁸⁴ See <https://www.iol.co.za/capetimes/news/fourth-water-department-deputy-suspended-as-director-general-snubs-mps-9794149> accessed on 22 July 2019.

⁸⁸⁵ Toxopeus M 'Understanding water issues and challenges I: Department of Water and Sanitation' Research Project into Water at 2 available at <https://hsf.org.za/publications/hsfs-briefs/understanding-water-issues-and-challenges-i-department-of-water-and-sanitation> accessed on 22 July 2019.

⁸⁸⁶ See <https://businesslive.co.za/bd/national/2018-10-15-water-official-suspended-for-refusing-to-let-unit-serve-as-honey-pot/> accessed on 22 July 2019.

⁸⁸⁷ See <https://www.businesslive.co.za/bd/national/2018-10-20-water-deputy-fired-because-of-lack-of-trust-and-confidence/> accessed on 22 July 2019.

On 28 November 2018, the top management and the executive of the DWS appeared before the Standing Committee on Public Accounts (SCOPA). The SCOPA had met with the Special Investigations Unit (SIU) and the Department of National Treasury on the previous day to discuss the financial problems at DWS which included unbudgeted projects, unauthorised expenditure, budget overruns, and the departmental overdraft. From discussions in the committee, it appeared that there were 40 unbudgeted projects costing R1, 3 billion. The water trading entity account was overdrawn to the tune of a further R3 billion. This overdraft had been incurred despite the law not allowing departments to incur overdrafts. In total DWS had made a R12 billion loss in the 2017/2018 financial year.⁸⁸⁸

The oversight committee met with officials and the then Minister until deep into the night with little progress. Eventually, the meeting ended with members of Parliament (MPs) expressing their frustration at and dissatisfaction with what they perceived as officials' unwillingness or refusal to answer questions. From discussions in the committee the following emerged:⁸⁸⁹

- (a) Officials claimed that they had incurred the irregular expenditure on the authority of a ministerial directive. The SCOPA MPs accused officials of trying to hide behind the ministerial directive when they were responsible for advising the Minister.
- (b) The officials present in the committee could not satisfactorily explain where large sums of money had gone. It was not clear whether the department's objectives for the unbudgeted projects had been achieved and whether value for money had been obtained. In addition, certain costs which were flagged as suspicious could not be explained. For instance, the figures revealed that furniture for a Technical and Vocational Training (TVET) College had been budgeted for, whereas the DWS had contracted with existing colleges for the project. Why was it necessary to buy furniture and equipment if the colleges already existed? In another case, boreholes cost R1,4 million each and plumbing students were provided with laptops costing R18 000 each.
- (c) There appeared to be a high turnover rate amongst top management and this negatively impacted on officials' ability to answer questions. For example, the Acting DG had

⁸⁸⁸ Minutes of the meeting of the Standing Committee on Public Accounts (SCOPA) on 28 November 2018 available at <https://pmg.org.za/committee-meeting/27688> accessed on 22 July 2019.

⁸⁸⁹ Ibid.

only been in the post for six months and the Acting Chief Financial Officer (CFO), for an even shorter period. As a result they could not account for decisions taken by the former officials.

- (d) Reporting lines appeared to be in disarray. The documents revealed that the DDG for Water Planning Information and Management was responsible for the ‘War on Leaks’ project. This project raised the DWS’s overdraft to R3 billion. The DDG explained to the committee that although the project appeared to be under her responsibility, in fact it was not. This was because she had been moved out of her branch for a period. While she was out of her post, the manager responsible for that project was instructed to report directly to the DG.
- (e) Questionable HR processes and apparent unfair treatment towards senior management were exposed during the course of proceedings. The Acting DG (who holds the substantive post of DDG for Water Planning Information and Management) explained that although she had been in the department for a long time, she could not explain what had happened because she had been moved out of her post for a period by the previous DG for a period of ten months. The previous DG announced the transfer (to another province) during an EXCO meeting, without informing her in advance. Litigation between the side-lined DDG and the former DG continued until that DG resigned. Thereafter, the affected DDG was returned to her post.
- (f) It appeared that no official had been held to account for the financial mismanagement. The former CFO was charged but resigned before the disciplinary hearing. The DG who was the accounting officer in terms of law, was never charged but had resigned from the department.

Discussions in the committee revealed a dysfunctional environment. It is interesting that the project which caused the largest expenditure was run by a manager who reported directly to the former DG. The responsible DDG was moved out of her post and could not provide the necessary oversight. The CFO and the DG who were responsible at that time had resigned. The SCOPA laid the blame for all this squarely at the door of the officials. The Acting DG came in for a particularly tough time. The irony of it all was that the Acting DG was the very DDG moved out of her post during the time that the questionable practices occurred. During this

time, the former DG (who resigned without facing charges) assumed her responsibilities.⁸⁹⁰ What emerges from the SCOPA investigation minutes is the link between a poor human-resources environment and deterioration in governance and management controls. The consequence is compromised service delivery.

Unfortunately, many of the characteristics of the dysfunctional administrative environment exposed at the parliamentary oversight committees discussed above, are prevalent throughout government departments and entities. At the Department of Agriculture, Forestry and Fisheries (DAFF), media reports have exposed what appears to be a power struggle involving the DG, one of the DDGs, and the Minister.⁸⁹¹ The war between the DG and DDG has involved a number of forensic investigations, suspensions of both officials at various times, and ongoing court cases which have cost the department millions to date.⁸⁹² The department is responsible for managing the R6 billion fishing industry, including a lucrative shadow industry. Poached abalone is reportedly the country's third largest fisheries export. The allegations, charges, and investigations in the ongoing saga revolve around lucrative tenders in the department.⁸⁹³

At local government level, a spate of suspensions and resignations amongst senior management were reported on during the period 2016-2018. In the eThekweni Metropolitan Municipality, the city manager left his position prior to the termination of his contract.⁸⁹⁴ Next, the deputy city manager for community and emergency services resigned, followed by the Metro Police head who took early retirement. At the same time, the municipality lost its head of legal services and head of electricity, whilst the head of health was again suspended.⁸⁹⁵ In August 2017, the head of the city's Parks, Recreation and Culture Department was suspended,⁸⁹⁶ and in November 2018, the municipality dismissed its new head of legal services following a disciplinary process.⁸⁹⁷ In May 2019 the municipality's mayor, the chair of the Human

⁸⁹⁰ Ibid.

⁸⁹¹ See <https://m.news24.com/SouthAfrica/News/fisheries-department-rotting-from-the-top-2018113> accessed on 22 July 2019.

⁸⁹² Ibid.

⁸⁹³ Ibid.

⁸⁹⁴ See <https://www.businesslive.co.za/bd/politics/2016-12-22-sibusiso-sithole-aded-to-leave-position-as-ethekweni-city-manager-immediately/> accessed on 22 July 2019.

⁸⁹⁵ See <https://www.iol.co.za/mercury/news/ethekweni-manager-hit-by-staff-exodus-10343238> accessed on 22 July 2019.

⁸⁹⁶ See <https://www.news24.com/SouthAfrica/News/ethekweni-official-cries-foul-over-cancelled-multi-million-conference-20170815> accessed on 22 July 2019.

⁸⁹⁷ See www.sahrc.org.za/index.php/sahrc-media/news/item/1652-head-of-legal-gets-his-marching-orders accessed on 22 July 2019.

Settlement's Committee, and two senior managers were charged with corruption involving a R201 million tender.⁸⁹⁸

7.4.5 Politicisation of the Public Administration

Recent revelations before the Zondo Commission of Inquiry appear to reveal an environment in which executive instructions trump legal provisions. The Commission recently heard evidence of how public officials were instructed by one Mr Kolane, then Chief of Protocol in the Department of Foreign Affairs and Cooperation, to ignore rules and regulations on the basis of the Cabinet and the President having authorised their doing so.⁸⁹⁹ The former DG in the Department of Justice and Constitutional Development, Ms Sindane testified that the government task team investigating the Gupta landing at Waterkloof had absolved the executive of any responsibility for the incident. This was because in the view of the task team the 'name-dropping' officials (including Mr Kolane) were to blame for abusing the positions of power of the Ministers by mentioning their names.⁹⁰⁰ Mr Kolane was the only person disciplined for this breach of procedure – he was promoted to the position of Ambassador to the Netherlands shortly after pleading guilty. Under cross-examination, Ms Sindane denied that the investigating task team had come up with a report which exonerated the executive in exchange for senior government positions.⁹⁰¹

It is submitted that the current public service appears to operate on much the same principles as its apartheid counterpart with its emphasis falling on executive powers. The new constitutional legal and policy framework appears to have done little to constrain abuses of power. Reports of instances of executive abuse of authority abound in the media. A recent

⁸⁹⁸ See <https://www.timeslive.co.za/news/south-africa/2019-05-14-ethekweni-mayor-zandile-gumede-to-appear-on-corruption-charges> accessed on 22 July 2019.

⁸⁹⁹ Former Director-General Sindane referred in her evidence to recorded conversations in which Koloane was heard referring to 'Number One' and telling other officials that the President and members of Cabinet gave permission for Gupta landing at Waterkloof Air Force Base in 2013. See www.timeslive.co.za/politics/2019-07-03-state-capture-bruce-koloane-ignored-rules-to-let-guptas-land-at-waterkloof accessed on 22 July 2019.

⁹⁰⁰ Ibid.

⁹⁰¹ The investigating task team members were: Tom Moyane who was promoted to the position of South African Revenue Service Commissioner; Thulani Dlomo who became Ambassador to Algeria; Clinton Swemmer who became a South African diplomat to the United Nations; and Nonkuleleko Sindane who became head of a private company which benefits from state contracts. See <https://citizen.co.za/news/south-africa/state-capture/2150374/probe-into-gupta-plane-landing-was-not-a-whitewash-of-zuma-sindane/amp/> accessed on 22 July 2019.

Treasury report found that Transnet provided security personnel for a former Minister without following any internal processes. No assessment was undertaken to determine whether the staff were necessary, and the board was neither informed of the appointments, nor did it authorise them. The two security staff were appointed without following recruitment processes and were provided with vehicles belonging to Transnet to perform their duties.⁹⁰²

The former Acting CEO of South African Airways (SAA), Ms Mpshe, testified at the State Capture Inquiry that the previous SAA chairperson, Ms Myeni, subjected the senior management team at the airline to constant, irregular interference. Most of this interference concerned irregular instructions on who to appoint, who to promote, and who to discipline. Procurement processes were also the subject of constant interference. Ms Mpshe testified that she was considered to be ‘obstructive’ as she was reluctant to carry out unlawful instructions.⁹⁰³ What happens to obstructive officials in an environment where senior managers are told who to appoint and who to discipline? And what happens to senior managers who refuse unlawful instructions?

According to the chairperson of the PSC, cases of unjustified disciplinary action against DGs and HoDs are not uncommon. He informed Parliament that ‘where HoDs were instructed to carry out unlawful actions and they refused their Executive Authority would discipline them’.⁹⁰⁴ This has led to a great deal of tension at the point of interaction between senior managers and political principals – often termed the ‘politico-administrative interface’.

7.4.6 Victimization and Harassment in the Public Administration

The severity and frequency of unwarranted disciplinary action against DGs has led the PSC to release a statement condemning this practice and calling on Ministers to exercise restraint. The statement expressed concern about the destabilising effect of the high turnover rate on departments which can negatively impact service delivery.⁹⁰⁵ In many cases senior managers

⁹⁰² See www.timelive.co.za/politics/2018/2018-11-16-transnet-funds-used-to-guard-public-enterprises-minister-gigaba-treasury/ accessed on 22 July 2019.

⁹⁰³ See <https://citizen.co.za/news/south-africa/state-capture/2149348/saa-ex-acting-ceo-tells-of-constant-irregular-interference-by-myeni-kwinana/> accessed on 22 July 2019.

⁹⁰⁴ PSA Performance Monitoring and Evaluation Committee 25 October 2017 available at <https://pmg.org.za/committee-meeting/25324/> accessed on 22 July 2019.

⁹⁰⁵ Public Service Commission statement on the increased turnover rate of Director-Generals and Heads of Department available at <http://www.psc.gov.za/pressstatements/2017/18072017.asp> accessed on 22 July 2019.

resign from employment rather than face the exorbitant costs of defending themselves. Departments tend to use senior counsel in the disciplinary process and many officials cannot bear the cost of legal representation in these circumstances. Unfortunately, this impacts on their career prospects as an impression of guilt is created by their resigning under a cloud of suspicion. It becomes difficult to distinguish between the innocent and the guilty. The PSC was not able to provide the portfolio committee with statistics on the number of cases involving litigation between HoDs and Ministers. However, it did register its concern that government lost seven out of ten cases.⁹⁰⁶

The treatment of senior managers in the public sector was recently highlighted by the ‘protest suicide’ of Mr Garane, a senior manager in Parliament. Mr Garane’s family told the media that he had committed suicide after enduring twenty months of bullying by his boss, a former ANC MP. After exhausting all his internal remedies, Mr Garane shot himself in his office in Parliament in order to ‘protest against (1) politicisation of administration, (2) gross abuse of power, (3) complete disregard of human rights and dignity.’⁹⁰⁷ His suicide note was posted on Facebook by a former colleague in order to draw attention to Parliament’s institutional culture. The National Education, Health and Allied Workers Union (NEHAWU) stated that it was not surprised by Mr Garane’s death because it regularly dealt with cases of victimisation, bullying, and abuse of power by senior management in the national legislature.⁹⁰⁸

It is submitted that the Garane incident exposes the failure of the institutional mechanisms designed to regulate human-resource matters in the public service. Mr Garane followed all the correct procedures to draw attention to the alleged bullying to which he was subjected. First, he lodged a grievance which was considered by his boss’s immediate superior. In his records, he stated that the response he received to his grievance was that ‘Parliament is a political environment’. Mr Garane interpreted this to mean that ‘political appointees...were free to do as they wished with the lives of those below them’.⁹⁰⁹ The complaint eventually ended up with the Speaker and Chairperson of the NA and NCOP respectively, who also failed to take appropriate action. In desperation, Mr Garane made a protected disclosure to the Public Service

⁹⁰⁶ Ibid.

⁹⁰⁷ See <https://www.dailymaverick.co.za/article/2018-10-01-death-in-peoples-house-the-family-needs-answers-from-parliament-about-lennox-garanes-working-conditions/> accessed on 22 July 2019.

⁹⁰⁸ See <https://www.dispatchlive.co.za/news/2018-09-24-parliamentary-manager-shot-himself-over-unrepentant-bully-of-a-boss/> accessed on 22 July 2019.

⁹⁰⁹ Ibid.

and Administration, Performance Monitoring and Evaluation Committee.⁹¹⁰ None of these avenues provided an appropriate remedy. Commentators have pointed to the underlying issue – Parliament’s bosses are accountable only to the political parties who appointed them. There is accordingly no effective oversight of employees’ career problems.⁹¹¹

Following Mr Garane’s suicide, the PSC was tasked with investigating the circumstances surrounding his death. His family unsuccessfully wrote to the PSC requesting it to extend its investigation to include organisational, administrative, and personnel practices affecting the organisational culture in Parliament. In this letter, the family also expressed concern about a potential conflict of interest in the PSC’s reporting structure. They registered concern about the PSC’s powers, the nature of its directives, and its remedial actions.⁹¹² The PSC did not respond to the family. Instead, the family later discovered through the media, that the PSC had completed a preliminary report and released it to Parliament’s presiding officers without informing the family. According to the PSC, the family were not regarded as ‘an affected party’ in terms of the relevant procedures.⁹¹³ It appears that the ‘affected persons’ in Parliament who were given access to the preliminary report included the very people who had dealt with Mr Garane’s various grievances and complaints in the first place. The facts in this matter illustrate many of the negative consequences of the NT’s transfer of oversight over the public service to the executive. It is submitted that the manner in which commissioners are appointed exacerbates the problem as it may have the effect of increasing executive control thereby diminishing the independence of commissioners.

In 2019, the PSC released a report on bullying in the public service. The report found that public servants faced victimisation, bullying, discrimination, intimidation, harassment, sexual harassment, and cyberbullying.⁹¹⁴ The report was not made public. However, from subsequent reports it appears that the findings of the report support the view expressed by the Garane family concerning the lack of effective remedies for public servants who are subject to

⁹¹⁰ Ibid.

⁹¹¹ See <https://www.dailymaverick.co.za/article/2018-10-01-death-in-peoples-house-the-family-needs-answers-from-parliament-about-lennox-garanes-working-conditions/> accessed on 22 July 2019.

⁹¹² See <https://www.news24.com/SouthAfrica/News/we-were-blindsided-by-release-of-preliminary-report-family-of-man-who-took-his-life-at-parliament-20190314> accessed on 22 July 2019.

⁹¹³ Ibid.

⁹¹⁴ See <https://www.iol.co.za/the-star/news/damning-report-exposes-bullying-in-the-public-service-19058290> accessed on 22 July 2019.

victimisation. The PSC found that employee-relations staff in government did not process grievances against senior managers to conclusion for fear of victimisation.⁹¹⁵ This effectively removes the primary institutional mechanism available to employees to address unfair treatment.

A recent PSC round table issued the following recommendations aimed at addressing unfair treatment in the workplace:⁹¹⁶

- (a) The PSC should visit departments in order to investigate the underlying causes of grievances. They should not rely solely on statistics from the grievance database.
- (b) Unions should conduct training to educate members.
- (c) The DPSA must report all cases where disciplinary measures against senior managers have not been implemented to the PSC and Parliament. Ministers and HoDs must account to Parliament for failure to implement disciplinary measures.
- (d) Employees must be brave enough to challenge unfair treatment in the workplace through the relevant organisational processes and the courts since this is the only way to end unfair treatment.

It is submitted that the nature and content of these recommendations reflect weaknesses in the organisational and institutional processes intended to regulate the public service. They merely reiterate existing processes. There is a disturbing failure to interrogate the underlying reasons for institutionalised unfair treatment. It is worrying that the onus for resolving the issue has been shifted to affected employees who may lack the psychological or financial resources to stand up against a system which appears to be failing.

7.4.7 Professionalism in the Administration

An area of key concern is the need to promote a culture of professionalism in the public sector. The values in the public sector have been highlighted by the Esidimeni tragedy, in which the actions of the Gauteng Department of Health and Social Development caused the death of an

⁹¹⁵ Ibid.

⁹¹⁶ Public Service Commission 'Report on the Roundtable Session on Understanding and Ending Unfair Treatment in the Workplace' (2019) available at psc.gov.za/documents/reports.asp accessed on 22 July 2019.

estimated 143 mentally ill patients.⁹¹⁷ The Health Ombud's 'Report into the circumstances surrounding the deaths of mentally ill patients: Gauteng Province' found that:⁹¹⁸

- (a) A 'high level' decision was taken to terminate the Life Esidimeni contract. Three key people were identified – the MEC, the HoD, and a director in the Gauteng Health Department;
- (b) Once the decision had been taken, it was implemented in a hurried and chaotic manner. Chronic mentally ill patients were transferred from Life Esidimeni Hospital to NGOs which were ill-prepared and ill-equipped to manage their care. At the time the report was released, 94 patients had died. The number subsequently rose to 143 patients;
- (c) The department ignored widespread professional expert warnings and advice against the transfer project;
- (d) There was *prima facie* evidence that the conduct of the officials and NGOs violated the National Health Act and the Mental Health Care Act; and⁹¹⁹
- (e) The actions of the officials involved in implementing the project showed a disregard for the rights of the patients and their families, including the right to dignity, the right to life, right to freedom and security of the person, right to privacy, right to protection from an environment that is not harmful to their health and well-being, right to access to quality health care services, sufficient food and water and right to administrative action that is reasonable, lawful and procedurally fair.

During the hearings into what had occurred, Dr Mkhathswa, former Life Healthcare managing director, testified that the culture in the health department was politicised to the extent that professional ethics and standards had been subverted. He recounted how he had begged Gauteng health department officials not to move mentally ill patients from his facility. He testified that it saddened him to see doctors violate their oath of office and succumb to political pressure.⁹²⁰

⁹¹⁷ See <http://m.news24.com/news24/SouthAfrica/News/life-esidimeni-death-toll-rises-to-143-20171110> 10 November 2017 accessed on 22 July 2019.

⁹¹⁸ Health Ombud: South Africa 'The Report into the Circumstances surrounding the deaths of mentally ill patients: Gauteng Province' available at <https://sahrc.org.za/home/21/files/Esidimeni%20full%20report.pdf> accessed on 22 July 2019.

⁹¹⁹ National Health Act 61 of 2003; Mental Health Care Act 17 of 2002.

⁹²⁰ See <http://m.news24.com/news24/SouthAfrica/News/life-esidimeni-death-toll-rises-to-143-20171110> 10 November 2017 accessed on 22 July 2019. <http://www.thenewage.co.za/ex-md-tried-to-stop-removals/> 19 October 2017 accessed on 22 July 2019.

This tragedy raises important questions about the prevailing culture in the public service. Why exactly, did officials not express their professional views to their bosses? Why were the views of professionals and NGOs who warned against the transfer of the patients not heeded? Were they too afraid to defy an instruction? Were they overwhelmed by the challenges inherent in the public health environment? Did the officials lack basic care and professional ethics? What is the prevailing culture in the department?

A recent PSC investigation into professional ethics in health care facilities in the KZN province is instructive. The study was undertaken in response to complaints from citizens and the media relating to service levels at hospitals and clinics in KZN.⁹²¹ The key finding was that the Department of Health is not responsive and professional in delivering on its mandate because the ‘cultivation of a professional ethics is not a deliverable against which the Department could measure performance.’⁹²²

The PSC found that the province adopted a mechanical, bureaucratic, and compliance-based approach to its role in respect of hospitals and clinics. The emphasis was on process compliance and the meeting of targets. Qualitative methods of monitoring and evaluation such as inspections were not used. Instead, districts acted as conduits for policy messages from the provincial and national spheres. The provinces saw their role as less management and more ‘rule by compliance enforcement’.⁹²³ This involved drafting plans, ensuring that structures met these plans, and measuring achievements according to generic targets unrelated to the real-life situation in the hospitals and clinics. Consequently, there was a lack of care, agency, professionalism, and responsiveness displayed by officials in the sector.⁹²⁴

It was further found that the provinces adopted a blanket approach to challenges – e.g., the implementation of a blanket ban on the filling of ‘non-critical’ posts. This had a severe impact on services which was exacerbated by local differences in capacity, resources, and geographic location of health facilities. Management at the coalface expressed frustration with the non-responsiveness of provincial offices when it came to equipment, recruitment, and financial

⁹²¹ ‘Investigation into Health Care Facilities in KwaZulu-Natal: A special focus on Professional Ethics’ March 2018 available at www.psc.gov.za/documents/reports/2018/SUMMARY%20Report%20on%KZN%20Health%20facilities accessed on 22 July 2019.

⁹²² Ibid.

⁹²³ Ibid.

⁹²⁴ Ibid.

delegation.⁹²⁵ Conditions in the hospitals as regards maintenance of infrastructure, and in some cases even cleanliness, were found to be below the level expected in the health sector. In addition, poor staff attitudes were highlighted by the study as an area of major concern.⁹²⁶ The PSC expressed the view that the lack of professionalism displayed implied a ‘professional prejudice’ against the ordinary citizen. The lack of regard for efficiency was attributed to the fact that indigent citizens are less assertive of their rights.⁹²⁷

The PSC study did not expressly deal with the constitutional division of powers with respect to the health function. However, the study did highlight certain areas of difficulty between the health care facilities at the coalface of service delivery, and the provincial and national governments. It did not unpack the relationship between concurrency, working conditions, and the issue of professional ethics.

‘Health Services’ is a Schedule 4 Part A competence – it is an area of concurrent national and provincial competence. But ‘municipal health services’ is an area of local government competence in terms of Part B of Schedule 4. The difficulty lies in defining where ‘municipal health services’ end and ‘health services’ begin. This is not merely a theoretical question; the implications for service delivery are serious for those who rely on the public sector for health care.

On the issue of division of powers between the spheres, the PSC study notes that:

A District model of decentralization is adopted in the Health sector in South Africa. This does not mean that health becomes a key mandate of local government. It simply means that the Provincial Department of Health makes its decentralised presence in line with District Municipal Boundaries.⁹²⁸

This comment alludes to the difficulty of concurrency in the management of health in South Africa.

⁹²⁵ Ibid at 17.

⁹²⁶ Ibid.

⁹²⁷ Ibid at 18.

⁹²⁸ Ibid at 19.

Health is regarded by the FFC as one of the four main unfunded mandates.⁹²⁹ The FFC found that there were major challenges with regard to funding for infrastructure and stock as a result of the ‘downward creep’ of health functions to the municipal level.⁹³⁰ The PSC report highlighted serious challenges regarding infrastructure and stock at certain hospitals. The inter-relationship between the health institution, the districts, national and especially provincial government, was highlighted by the PSC. The findings point to a high level of dissonance between the three spheres regarding their respective roles in the management of the health function. It is submitted that this has translated into an environment in which the work conditions of public servants in the health sector have deteriorated. This has impacted on morale and professional ethics. Unfortunately, the citizen suffers the consequence in the form of compromised service delivery.

7.5 Conclusion

This part of the thesis has considered the practice of the administration in the new constitutional order. It is argued that the culture and ethos in the public service falls short of the values envisaged by section 195 of the Constitution. The reasons for this are complex and varied. It appears that there has not been a successful transition from the centralised authoritarian culture of the apartheid public service, to a culture and practice which promotes constitutional values. This can be traced, in part, to an incomplete re-alignment of the institutions of state with the allocation of functions and powers in the Constitution, but also to political factors. The prevailing culture is impacted by tension at the politico-administrative interface, unclear reporting lines to ministries, and failures in human resource and management controls.

Earlier, it was submitted that the Constitutional Court had erred in certifying that the changes made to the NT satisfied the requirements of the NT. To recapitulate, CP XXIX requires that:

⁹²⁹ Financial and Fiscal Commission ‘The Impact of Unfunded Mandates on Intergovernmental Relations 2012/2013 Policy Brief’ 265 available at www.ufh.ac.za/journals/index.php/apsdpr/article/download/10/10 accessed on 22 July 2019.

⁹³⁰ The FFC Study found that Health care facilities were often inadequate, but their extension, upgrading and maintenance are for the account of local government. There is not enough money for stock, equipment and records required for primary health care (e.g. needles, syringes and dressings), which have to be funded by the local government budget. See also Financial and Fiscal Commission ‘The Impact of Unfunded Mandates on Intergovernmental Relations 2012/2013’ Policy Brief at 25 available at www.ufh.ac.za/journals/index.php/apsdpr/article/download/10/10 accessed on 22 July 2019.

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

It is submitted that the insulation of the public service from executive control may have been what was intended by CP XXIX, and if that was indeed the case, the Constitution has failed to achieve this goal. It can be argued that insofar as the Constitutional Court read into CP XXIX, a lesser protection for the PSC when compared to the protection offered to the Public Protector and Auditor-General, it erred both in its reasoning and in its conclusion. There are important policy reasons why the independence and impartiality of the public service must be protected and maintained. It is submitted that this is an area which could benefit from legislative reform.

It is further submitted, that the decision by the Constitutional Court to allow the changes which were effected to the provisions governing the PSC between the interim Constitution, NT and AT, has had a significant impact on the evolution of provincial government as a sphere of government. It is also submitted that the creation of a 'single public service' in the German tradition, has had the effect of cementing the power of central government over the provinces in the South African context. By centralising control over the administration in the executive, the ability of provinces to develop autonomously has been limited. Taken together with other factors such as the fiscal dependence of the provinces on national government, this aspect of the constitutional system has had a significant effect in reinforcing the unitary aspects of the constitutional design.⁹³¹

There is a case to be made for the revision of the provisions of the Constitution which establish the PSC. It is notable that the PSC had significant powers to issue binding directions under the interim Constitution. It is submitted that the weaker, investigative and reporting powers have done little to insulate the public service from executive abuse. It is further submitted that the manner in which the law gives the executive extensive control over personnel matters has contributed to the current state of affairs in the public administration. It has led to politicisation of matters which could be more readily resolved if they were dealt with administratively. Blurred and non-existent reporting lines between ministries and departments have become so

⁹³¹ This aspect is discussed in greater detail in Chapter 3.

commonplace that the PSC produced a report into the practice of Minister's advisors usurping the role of HoDs.⁹³²

Perhaps one of the most striking examples of political interference involves the former Minister of Social Development's creation of a parallel work stream to deal with the South African Social Security Agency (SASSA) matter. The former CEO of the SASSA gave evidence in the Constitutional Court that the former Minister created parallel decision-making and communication processes which bypassed the responsible officials at the SASSA.⁹³³

It is submitted that the issue of executive interference requires urgent attention. It is submitted that the Code of Conduct for councillors contained in the Local Government Municipal Systems Act is exemplary in how it draws a distinction between the political and administrative arms in the local government sphere. Clause 11 of the Code provides:⁹³⁴

A councillor may not except as provided by law –

- (a) interfere in the management or administration of any department of the municipal council unless mandated by council;
- (b) give or purport to give any instruction to any employee of the council except when authorised to do so;
- (c) obstruct or attempt to obstruct the implementation of any decision of the council or a committee by an employee of the council; or
- (d) encourage or participate in any conduct which would cause or contribute to maladministration in the council.

It is submitted that the public service, constituted at provincial and national levels of government, may benefit from similar protection. It is recommended that the Constitution and legislation governing the public service be amended to provide a check against possible abuse of authority.

7.6 Recommendations

1. It is recommended that consideration be given to amending the Constitution and Public Service legislation in order to provide the Public Service Commission with similar

⁹³² PSA 'Performance Monitoring and Evaluation Committee 25 October 2017' available at <https://pmg.org.za/committee-meeting/25324/> accessed on 22 July 2019.

⁹³³ See <https://groundup.org.za/article/former-social-grants-boss-accuses-minister-parallel-decision-making/> accessed on 22 July 2019.

⁹³⁴ Local Government Municipal Systems Act 32 of 2000 Schedule 1.

protections to those afforded the Reserve Bank, the Auditor-General and the Public Protector.

2. The procedure for the appointment and removal of PSC Commissioners should be revised so as to ensure greater independence for the commission.
3. The PSC administration should be entirely independent of the executive. The appointment of the DG of the PSC and all budget-related matters must be managed and controlled independently.
4. The powers of the PSC should be amended to include the power to make peremptory findings and recommendations on public service matters.
5. The reports of the PSC should be made public.
6. The PSC should be given the power to follow up on the implementation of its reports. Departments which fail to implement the finding in reports should be reported to Parliament.
7. The Executive Ethics Code should be amended in order to regulate the politico-administrative interface more effectively. This may require a proper delineation of matters falling within the executive versus those under administrative control.⁹³⁵
8. Matters concerning the appointment, career incidents, and management of discipline of public servants should be removed from executive control.
9. The culture of non-compliance with legal prescripts governing the public service should be addressed first within the DPSA before it is progressively implemented in the rest of the public administration.
10. The DPME should address challenges with its performance system and resolve these with input from all government departments. Attention should be given to the nature of performance targets and how effectively they measure departmental services. The emphasis needs to shift from rigid compliance to qualitative outputs.
11. The DPSA engagements in managing the public administration need to shift from being 'model' or 'programme' based to being people based in order to reflect the values of constitutionalism and human rights. The morale and working conditions of public servants requires urgent attention. A change in the way the DPSA approaches its mandate will result in similar changes throughout government and will positively impact the quality of service given by public servants to citizens. Programmes to affect

⁹³⁵ Executive Members Ethics Act 194 of 1998; Executive Ethics Code: Proclamation R 41 2000 *Government Gazette* 41 Regulation 8853.

a shift in the mind-set of managers at provincial and national government should be developed and implemented. Managers need to move away from formulaic, compliance-based models towards interaction, engagement and innovation. Management is not about ‘rule by compliance’.

12. Measures to address employee wellbeing and professional development should be developed. Perceptions of favouritism and bias on the part of management should be addressed. Greater emphasis needs to be placed on creating a fair, depoliticised environment.
13. Mechanisms to increase the security of tenure of DGs and DDGs should be put in place. In this regard, consideration should be given to appointing DGs on a permanent basis in order to increase stability in the administration. Mechanisms to constrain the abuse of disciplinary processes against DGs and DDGs should be developed. This may include removal of this power from individual ministries.
14. Programmes to address the authoritarian culture prevalent in the public service should be developed and implemented to transform government departments from within. An understanding of the Constitution and the rule of law should be fostered amongst public servants.
15. Measures to address professionalism in the public sphere should be improved. At the same time, measures to de-politicise the public administration should be prioritised. This could include workshops and training for DGs and Ministers as outlined in the NDP.
16. The conduct of members of the executive in government departments should be subjected to oversight to ensure compliance with the Constitution and the law.

CHAPTER 8

CONCLUSION

8.1 Introduction

This thesis has evaluated the constitutional division of powers in the South African Constitution in the light of intergovernmental relations practice, judicial interpretation, legislative and administrative practice, and the impact of political factors. In so doing, the primary object has been to consider whether the system works.

The argument advanced is that there are shortcomings in how the constitutional vision for the division of powers has been implemented by government in the 23 years that have passed since the 1996 Constitution was enacted. This can be seen by comparing the judicial interpretation of the constitutional division of powers, on the one hand, and legislative and administrative practice, on the other. This is partly due to institutional design elements in the Constitution which draw together federal and unitary elements resulting in a kind of institutional schizophrenia. This is compounded in some instances by a lack of understanding by national government and the provinces of their roles in relation to local government. Factors such as political will, the incomplete transition of the public service from one constitutional system to another, and political and administrative practice also play a part. It is argued that there is a need to intervene to reinforce the constitutional vision.

8.2 Summary of Observations and Findings

Chapter 2 examined the history of the drafting of the Constitution as well as the theoretical underpinnings of the system of constitutional administration adopted by the drafters of the Constitution. It was observed that the South African system is hybrid in nature, representing a compromise reached during the negotiation process. As a result it has both federal and unitary design elements. It embraces a form of decentralised government with three spheres all possessing constitutionally entrenched autonomy. An important feature of this model is the entrenchment of the principle of subsidiarity and the concept of developmental government. The inclusion of developmental local government underscores the importance of participatory

democracy and has a significant impact on the implementation of the division of powers and the law and practice of government between the spheres.

This chapter also looked at the reasoning of the Constitutional Court in the *Certification Judgments*.⁹³⁶ It was argued that the Constitutional Court was willing to accept the reduction of provincial powers when measured against the Constitutional Principles, which perhaps in retrospect has contributed towards the gradual centralisation of power in national government to the detriment of the provinces. In this regard, the removal of provincial PSCs between the interim Constitution and the Constitution and the creation of a single public service has contributed towards the reduction in provincial autonomy. Finally, it was observed that the decision to place many aspects of the administration and the PSC under executive control and to trust in the ability of political considerations to constrain abuses of power which may arise, may have been misguided. It is submitted that the large number of public officials who would have had to have been involved in the questionable practices currently being revealed by the various commissions of inquiry underway in South Africa, is cause for concern.⁹³⁷ The institutional failures which allowed this state of affairs to develop should be addressed in order to promote ethical conduct and good governance in public service institutions.

Chapter 3 examined the intergovernmental relations system. It noted that the system of intergovernmental relations contained in Chapter 3 of the Constitution is similar to the integrated system found in the German Basic Law of 1949. A distinct tendency towards centralisation in the practice of intergovernmental relations can be seen. The fiscal dependence of the provinces, and the existence of own revenue resources at the local government sphere, together with the impact of judicial decisions, have influenced intergovernmental relations between the spheres. This has resulted in a reduction in provincial autonomy. Local government, however, has resisted centralisation. The observation was made that the day-to-day practice of intergovernmental relations in the state is adversarial and competitive, and that government departments are not complying with the spirit of cooperative governance enshrined

⁹³⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC); *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 1997 (2) SA 97 (CC).

⁹³⁷ Commission of Inquiry into Tax Administration and Governance by the SARS (Nugent Commission of Inquiry); Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector (Zondo Commission of Inquiry); Commission of Inquiry into Allegation of Impropriety Regarding the Public Investment Corporation (Mpati Commission of Inquiry); and the Life Esidimeni Arbitration (Moseneke Arbitration).

in the Constitution. It is submitted that a number of institutional changes to the administration together with institutional flaws in the design of the intergovernmental relations legislation and institutions, have hampered the development of an effective system. It is argued that the intergovernmental relations system in its present form is ineffective, and further, that the failures in intergovernmental relations are negatively impacting on government's ability to fulfil its constitutional mandate of developing an efficient and accountable public service which meets the needs of South African citizens.

Chapter 4 considered the formulation of the division-of-powers provisions in the Constitution and examined a number of problems arising from their formulation and implementation. The problems inherent in concurrency – such as duplication, lack of clarity and overlap, lack of accountability, and ineffective service delivery – were examined through the lens of four case studies drawn from local government. It was argued that government legislative practice has resulted in a deluge of poorly co-ordinated and often incoherent laws drafted in isolation by various national and provincial government departments. Local government is often not consulted in the manner required by the Constitution. This shows that the implementation of the constitutional allocation of powers has not been translated into state legislative practice which respects the constitutional status of local government. The argument advanced is that the cumulative outcome of all of these factors has been detrimental to good governance, accountability, and service delivery.

Chapters 5 and 6 examined judicial interpretation of the division-of-powers provisions. The jurisprudence confirms the status of local government as an autonomous sphere of government – the courts have tended to define the functional areas of planning by reference to the area of 'municipal planning'. In the *Le Sueur* case – discussed in Chapter 6 – the High Court interpreted a local government functional area as sufficiently wide to encompass a competence which is assigned by the Constitution to the other two spheres.⁹³⁸ A trend in which the courts give effect to subsidiarity can be discerned from the jurisprudence, and this underscores the importance of decentralisation as a counter-force to centralisation. The argument is put forward that the decision in *Le Sueur*, and the many differing academic opinions it has engendered, highlight the difficulty inherent in interpreting the Schedules to the Constitution. It is submitted

⁹³⁸ *Le Sueur & another v eThekweni Municipality & others* (9714/11) [2013] ZAKZPHC 6 at para 6.

that there is a need to revisit the formulation of the division-of-powers provisions in the Constitution.

The chapter also looked at the interaction between human rights and the division-of-powers sections of the Constitution. Two Constitutional Court cases in which the administrative arrangements of government and the division of powers between the spheres arose, were discussed.⁹³⁹ It is submitted that the courts have made it clear that they will not be limited by the allocation of responsibilities under the Constitution when deciding cases. Their approach is purposive and emphasises the constitutional duties resting on the state as a whole to provide services to its people. It is submitted that the implications of this approach for government planning, administration, and budgeting are very serious, and that government should take heed of these developments and initiate a process to review and realign how responsibilities are divided between the spheres. It is further submitted that the international obligations which South Africa has willingly undertaken place an obligation on the state to ensure their fulfilment. It is argued that a failure to address the deficiencies in state administration which are hampering service delivery carries serious reputational risk.

In Chapter 7, whether the public administration promotes the constitutional values of accountability, respect for the rule of law, and a culture which promotes respect for human rights and human dignity is assessed. It is argued that despite an impressive array of law and policy intended to regulate the administration, there has been no corresponding change in the culture of the public service, which continues to display a centralised and an authoritarian approach. This may be ascribed to a number of factors which have negatively impacted on effective implementation of the legal and policy frameworks.

It is further argued that certain aspects of the institutional apparatus of the public administration fall short of the requirements of the Constitution. This has resulted in undue executive influence over administrative and human-resource practices within the public sector to the detriment of independence and accountability.

⁹³⁹ *Joseph & others v City of Johannesburg and Others* 2010 (4) SA 55 (CC); *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd and another* 2012 (2) SA 104 (CC).

This final Chapter offers recommendations to address the shortcomings identified.

8.3 Recommendations

8.3.1 Introduction

Throughout this thesis, various recommendations have been made to improve aspects of the functioning of the administration which emerged during the discussions. In the following section these are crystallised into a proposal aimed at improving the efficiency and efficacy of the administration in all three spheres.

It is submitted that for effective service delivery the current institutional design of the administration is not optimal. Accordingly, a number of suggestions are made in order to address the shortcomings inherent in the current system. Most of these recommendations seek to effect changes to the structure, functioning, and processes which regulate intergovernmental relations in the administration. Certain of the changes address the institutional arrangements of government; others look at relations around specific processes, such as the drafting and adoption of legislation. Still others look to address the attitudes, skills, and behaviour of officials in all spheres with a view to improving intergovernmental relations. The aim of all of these proposed interventions is to improve the efficacy of government and in so doing, to improve governance and advance service delivery.

8.3.2 Division of Powers

First, the concurrent lists of power contained in the Schedules should be repealed. A revised constitutional allocation of powers should be introduced. For instance, two new lists of powers could replace the current lists - List A, outlining national powers and list B, outlining local government powers. The powers in List B should automatically reside only in Metropolitan Municipalities. (This list can be based on the current powers exercised by municipalities in practice including libraries, housing, etc.)List B powers can be exercised by Category B and C municipalities but only where they have demonstrated a clear capacity to do so based on objectively identifiable criteria. Henceforth, Category A municipalities should automatically have the power to legislate over the affairs in List B.

The legislative authority of provinces may be limited to the drafting of model by-laws, or by-laws applicable to Category B and C municipalities within their jurisdiction. The content of these by-laws should be mutually agreed upon, and must respect the constitutional status of local government. This will alleviate the widespread problem of smaller municipalities where there are no by-laws in place either because they lack the skills to draft them, or because they cannot afford the cost of promulgation in the *Government Gazette*.

Second, a process to review the functionality of all Category B and C municipalities should be established using objective criteria. Based on functionality, the number of municipalities should be rationalised. Smaller local municipalities with very limited capacity should be disestablished and the number of these municipalities should be reduced. Municipalities which lack capacity should be absorbed into larger municipalities.

8.3.3 Provincial Administrations

First, a process to review the alignment of constitutional functions with the administrative arrangement of government should be undertaken. This process must ensure that function and administrative capacity are correctly aligned. Particular attention should be paid to the provincial departments which should be assessed and rationalised.

Second, the Premiers' offices should be strengthened to become the centre for administration in a region. This includes administrative oversight of provincial programmes and monitoring and implementation. Provincial departments should report administratively to the Premier's office in their provinces and *not* to the national line department. The latter results in piecemeal planning and implementation. All programmes and policies should be approved at a central coordination point in the Premiers' offices. This will improve coordination, policy coherence, monitoring, and accountability.

Third, provincial departments should be reorganised to focus on service delivery at local government level – not only by managing local government to deliver services but by active involvement in the delivery of services in medium and low capacity municipalities. For instance, a mechanism may be designed which allows provincial departments of local government to better support service delivery in medium- and low-capacity municipalities. Latent human-resource capacity in provincial departments may be deployed, by agreement to

medium- and low-capacity municipalities either by placement in the municipality or on a ‘shared services’ basis.

8.3.4 Planning, Monitoring and Budgeting

First, planning cycles across all government departments in all the spheres should be synchronised and aligned.

Second, the Premiers’ offices should be the administrative centre of all planning and budgeting within their respective provinces. In coordinating planning and budgeting they should be assisted by the Provincial Treasury and the Department of Local Government in the provinces.

Third, all government programmes must appear in the Integrated Development Plan (IDP) of the municipal area in which they will be implemented. This is the bottom-up planning envisaged by the constitutional vision for participatory democracy based on developmental local government.

It is submitted that the system proposed above will not take power away from national levels of government but will simply allow better coordination of policies across all spheres. National Treasury retains control of the budgeting process. The individual provincial planning processes being coordinated via the Premier’s office will improve coherence in government planning. At a national level, the plans and budgets of the provinces and the management of cooperative governance should be coordinated through the Presidency, the National Treasury, National Department of Local Government, the Constitutional Development Branch of the Department of Justice and Constitutional Development, and the Department of Monitoring and Evaluation in the Presidency.

8.3.5 Legislation and Policy

First, the lack of coordination between national and provincial departments in the area of legislation within their mandates impacting on local government should be addressed as a matter of priority.

Second, a more inclusive consultative process for the drafting of legislation and policy impacting on local government should be implemented. Local governments must be included in the process of drafting and development of any laws that they are required to implement.

Third, a coordination structure with responsibility for coordinating legislation and clearing it for constitutionality and coherence with government policy and compatibility with existing policies and laws across government departments, should be developed. (This is distinct from the technical process of certifying a Bill for constitutionality as performed by the Premier's offices and the office of the chief state law advisor located in the Department of Justice and Constitutional Development.)

Fourth, all old-order legislation still on the statute books should be rationalised and either redrafted to bring it into line with the Constitution or repealed.

Fifth, the Local Government legislation should be reviewed and simplified. All laws which conflict with the Constitution must be repealed.

Sixth, the composition and functioning of the National Council of Provinces (NCOP) should be reviewed and revisited. A system needs to be adopted which promotes the advancement of provincial interests over party political concerns.

Seventh, the discretion to introduce legislation affecting the provinces in the National Assembly (NA) as opposed to the NCOP, should be removed from the Constitution so that it becomes compulsory for all section 76 legislation first to be introduced in the NCOP.

8.3.6 Intergovernmental Relations

First, the Cabinet Cluster system should be reviewed in order to address the many problems with the system identified in this study.

Second, the understanding of local government officials of the powers and functions of local government, the link between policies, laws, and budgets and of the meaning of the constitutional value of cooperative governance needs to be addressed. The department mandated with constitutional implementation and oversight of cooperative governance should

ensure that all government officials are trained and equipped on the Chapter 3 requirements of the Constitution.

Third, the alignment of government departments with the functional allocation of responsibilities needs to be addressed via a comprehensive process which includes an assessment of capacity in both local government and provincial and national departments.

Fourth, the independence of the PSC should be strengthened. There is a need to examine whether the PSC should not be granted greater independence and powers similar to other Chapter 9 institutions.

Fifth, the reform of the PSC must examine the politico-administrative interface and the need to address ethics and organisational discipline in the public service. These actions are crucial to the improvement of service delivery.

Sixth, the functioning of ward committees at municipal level should receive urgent attention in order to improve democratic participation by citizens in municipal decision making.

8.3.7 Public Administration Reforms

The following changes are recommended:

First, the Department of Public Service and Administration should get its house in order as a matter of urgency. All department-specific recommendations made in this part should be implemented first in the DPSA.

Second, the culture of non-compliance with legal prescripts governing the public service should be addressed first within the DPSA before it is progressively implemented in the rest of the public administration. Most importantly, the performance management system must be implemented universally.

Third, the DPME should address challenges with its performance system and resolve these with input from all government departments. Attention must be given to the nature of

performance targets and how effectively they measure departmental services. The emphasis needs to shift from rigid compliance to qualitative outputs.

Fourth, the DPSA engagements in managing the public administration need to shift from being ‘model’ or ‘programme’ based to being people based. The morale and working conditions of public servants requires urgent attention.

Fifth, a change in the way the DPSA approaches its mandate will result in similar changes throughout government. Programmes to effect a shift in the mind-set of managers at provincial and national government should be developed and implemented. Managers need to move away from formulaic, compliance-based models towards interaction, engagement and innovation. Management is not about ‘rule by compliance’.

Sixth, measures to address employee wellbeing and professional development should be developed. Perceptions of favouritism and bias on the part of management must be addressed. Greater emphasis needs to be placed on creating a fair, depoliticised environment.

Seventh, the provisions for the appointment and removal of PSC Commissioners should be revised so as to ensure greater independence for the commission.

Eighth, the PSC administration should be entirely independent of the executive. The appointment of the DG of the PSC and all budget-related matters should be managed and controlled independently.

Ninth, the powers of the PSC should be amended to include the power to make peremptory findings and recommendations on public service matters.

Tenth, the Executive Ethics Code should be amended in order to regulate the politico-administrative interface more effectively. This may require a proper delineation of matters falling within the executive versus those under administrative control.⁹⁴⁰

⁹⁴⁰ Executive Members Ethics Act 194 of 1998; Executive Ethics Code: Proclamation R 41 2000 *Government Gazette* 41 Regulation 8853.

Eleventh, matters concerning the appointment, career incidents, and management of discipline of public servants should be removed from executive control.

Twelfth, mechanisms to increase the security of tenure of DGs and DDGs should be put in place. In this regard, consideration should be given to appointing DGs on a permanent basis in order to increase stability in the administration. Mechanisms to constrain the abuse of disciplinary processes against DGs and DDGs should be developed. This may include removal of this power from individual ministries.

Thirteenth, all reports of the PSC should be made public.

Fourteenth, the PSC should be given the power to follow up on the implementation of its reports. Departments which fail to implement the finding in reports must be reported to Parliament.

Fifteenth, the implementation of programmes to address the authoritarian culture prevalent in the public service must be developed and implemented to transform government departments from within. An understanding of the Constitution and the rule of law must be fostered amongst public servants.

Sixteenth, measures to address professionalism in the public sphere must be introduced. At the same time, measures to de-politicise the public administration must be prioritised. This could include workshops and training for DGs and Ministers as outlined in the NDP.

Seventeenth, the conduct of members of the executive in government departments should be subjected to oversight to ensure compliance with the Constitution and the law.

Eighteenth, the implementation of programmes to educate public servants employed in employee relations units in government departments on the binding nature of legal and policy prescripts governing personnel practices and the importance of confidentiality in personnel matters.

8.4 Conclusion

This study has examined complex questions surrounding the division of powers in the South African Constitution and the implementation of the constitutional vision for an efficient and accountable and administration that meets the needs of its citizens from a local government perspective. It acknowledges that the practice of the state over close to twenty-five years of democracy in South Africa has resulted in vast improvements in service delivery in many areas.

This notwithstanding, the most recent survey by Statistics South Africa (STATSA) indicates that 75 per cent of municipal residents believe that municipalities are not doing enough to solve problems in their areas.⁹⁴¹ The high levels of dissatisfaction indicated in the 2016 Community Survey, the increasing incidence of service delivery riots, an increase in litigation against the state, and the many difficulties exposed in this study are alarm bells which the state ignores at its own peril. It is submitted that the system for the constitutional allocation of powers is in urgent need of reform. It is the sincere hope of the author that this thesis has made some contribution towards the existing discourse on this subject that will help initiate much needed reform.

⁹⁴¹ The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data' available at www.statsa.gov.za/publications/Report%2003-01-22/Report%2003-01-222016.pdf accessed on 28 September 2017.

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