

Introduction

1.1 Introduction

It is generally accepted that the interim Constitution¹ and the Final Constitution² of the Republic of South Africa were milestones in the development of constitutional law in South Africa. The new constitutional order represents a radical change from a system of parliamentary sovereignty in the hands of a minority government to a truly democratic constitutional state. The Constitution is now entrenched as the supreme law of the South African state, and any law or conduct inconsistent with it is invalid.³

Within this new constitutional dispensation, the government of the Republic has been divided into three spheres. The Constitution determines that the government be constituted as national, provincial and local spheres, which are distinctive, interdependent and interrelated.⁴ Each of the three spheres has been accorded specific constitutional powers, duties and responsibilities. The text of the Constitution deals mainly with the powers and functions of both the national and provincial spheres however. The third sphere, or local government sphere, is to a large extent neglected in the constitutional text, since the constitutional drafters have opted to include only a simple framework for local government. The completion of the legal framework of the local government sphere was left mainly to the national legislature and, in some instances, the provincial legislatures.

With the commencement of the interim Constitution on 27 April 1994, local government embarked on a process of transformation from administrative institutions under the control of provincial authorities in the former apartheid state to a non-racial

¹ 200 of 1993, hereafter referred to as the interim Constitution (IC).

² Previously the "final" Constitution (FC) was referred to as Act 108 of 1996. It should however be noted that according to the Citation of Constitutional Laws Act 5 of 2005 any reference to the Constitution of the RSA must be construed as a reference to the Constitution of the Republic of South Africa, 1996. No act number is to be associated with the Constitution or any law amending the Constitution. This change to the reference of the Constitution of the RSA was already pointed out by constitutional scholars in 1998. Refer to Malherbe EFJ "Die nommering van die Grondwet van die RSA 1996: Vergissing of onkunde?" 1998 *TSAR* 140. For purposes of this work, any reference to the Constitution should be construed as a reference to the Constitution of the RSA, 1996.

³ Refer to s 2 of the Constitution.

⁴ See s 40(1) of the Constitution.

and democratic sphere of government. Although the transformation was initiated under the interim Constitution and the Local Government Transition Act⁵ of 1993, the restructuring was to be completed under the Final Constitution of 1996 and the subsequent national legislation enacted under the Constitution.

The transformation and restructuring initiative was a long and sometimes difficult process. Since local government is operational throughout the territory of the state and affects the lives of all people in a direct and ongoing way, the old dispensation could not be changed overnight, and provision had to be made for phases of gradual transformation. The Local Government Transition Act provided for three phases, during which the new system of local government had to be implemented. The *pre-interim phase* lasted until the first elections for local government were held in 1995. The interim phase commenced after the local elections, held in November 1995 and in March 1996.⁶ The elections took place in terms of existing laws, but the premiers of the provinces could promulgate additional regulations. The final phase started with the local government elections held in December 2000, although not all local government matters mandated by the Constitution were in place. National government still had to enact various national laws, such as the Property Rates Act⁷ and the Municipal Finance Management Act⁸. These Acts were completed and enacted only during 2004.

Within the broad constitutional framework, Local Government law is probably one of the most uncertain and difficult fields of law with which to work. Local Government law not only encompasses municipal legislative and executive actions, it also operates within a legal framework where there are national, provincial and local legal requirements. An aspect that makes this field of law even more complex is the fact that many of the so-called “old order” laws that were in place before the new constitutional transition was initiated are still in place and still have the force of law. Although the broad constitutional framework relating to local government law has been finalised, it is anticipated that legal reforms will continue to dominate the local government legal scene for many years to come.

⁵ 209 of 1993.

⁶ It should be noted here that although all local government elections were to be held in November 1995, political unrest in certain provinces resulted in the postponement of the election until March 1996.

⁷ 6 of 2004.

⁸ 56 of 2003.

1.2 Research questions and research methodology

In light of the above, it becomes obvious that the Constitution has had a conclusive impact on and significance for all three spheres of government, particularly for the various new local government structures. However, the question remains as to what extent the new legal dispensation of local government complies with the various constitutional demands and requirements.

In an effort to answer this question, the aim of this research is twofold:

- Firstly, to provide a systematic and clear exposition of the various constitutional and other national legislative provisions that relate and structure the new local sphere of governance. The objective is not only to systemise the legal provisions but also to subdivide the particular field of law so that it becomes more user friendly and accessible.
- Secondly, to evaluate the extent to which the various constitutional demands and requirements relevant to the new local government legal dispensation have been complied with.

In order to achieve these goals, it was deemed necessary to distinguish between the broad principles or values of the South African constitutional law and the specific key principles that underpin the new local government legal dispensation. This distinction is made in this chapter, and both the general principles of the South African constitutional law and the key principles relating to local government are systematically presented, analysed and explained. Finally, an effort has been made to reconcile and link all the relevant principles and to create a unified structure for the research as a whole.

1.3 Founding principles of the new South African constitutional order

1.3.1 Introduction

As was stated above, the new constitutional dispensation of South Africa has changed the legal and governmental system radically.⁹ For the first time in South African legal history, the country has adopted a Constitution which not only is entrenched as the highest law of the state but which also manifests itself as the foundation of a new South African legal order. In general, the new Constitution is regarded as an autochthonous constitution which incorporates both universal and uniquely

⁹ See ss 1 and 2 of the Constitution.

home-grown features. Some uniquely defined features include an expansive and modern Bill of Rights, institutions to enhance democracy, principles of co-operative government and a separate constitutional court with the necessary judicial authority to oversee constitutional compliance and protection. The text of the Constitution furthermore reflects the history of the South African society and therefore provides an important tool for constitutional interpretation and social development.¹⁰

Broadly speaking, the main aim of the Constitution is twofold. In the first instance, it explains and creates the various state or government bodies that operate and exercise state powers within the state. It allocates such powers to such bodies and also determines how such powers must be exercised. Secondly, the constitution protects individual rights and freedoms and thereby guards against excessive and abusive state powers. It is important to note at this point that the Constitution not only protects against unlawful limitation of certain rights but also demands positive state action to ensure the fulfilment of socio-economic rights. The various state bodies are divided into three branches, namely a *legislative* branch, an *executive* branch and a *judicial* branch. Each branch of government has its own powers and functions. Such powers are generally defined as *government authority*. Since the new constitutional dispensation has moved closer to an integrated model of federalism,¹¹ government authority has further been divided amongst three spheres of government. The Constitution specifically states that the South African government is constituted as a national, provincial and local sphere of government which are distinctive, interdependent and interrelated.¹² The judicial authority is vested in a national court hierarchy, and both the legislative and executive authorities have been divided amongst the three spheres mentioned above. In some instances certain powers or competencies are concurrent, and in others they are exclusive.¹³ A specific determination of where and in whom a specific authority is vested is required constitutionally. Of all three types of government authority, legislative authority is generally regarded as the

¹⁰ Refer for example to the preamble of the Constitution.

¹¹ An integrated model of federalism refers to a system where although powers are divided, there is still an overarching integration between the various role players.

¹² See s 40(1) of the Constitution.

¹³ Refer specifically to sch 4 and 5 of the Constitution.

most important.¹⁴ Such authority influences and impacts on all aspects of the law and is thus more influential.¹⁵

Suffice it to say that in order to understand and exercise the various authorities within the state, a sound understanding and study of the Constitution is necessary. The Constitution not only constitutes a nation state or body politic, it also determines the internal functioning of all state bodies (also known as organs of state), and it entrenches the rights and freedoms of the entire citizens corps. The South African Constitution is a written law which establishes the state itself. In *Attorney-General v Dow*¹⁶ it was mentioned that a constitution paints in broad strokes on a large canvas all the institutions of the state. It allocates powers, defines relationships between government institutions *inter se* and also regulates the relationship between the government and the citizens of the state. The constitution concerns itself with political authority and the exercise of governmental powers. It involves matters of both substance and procedure.

In order to understand and interpret the text of a constitution, two approaches have been identified. The first approach, also known as the *descriptive approach*, regards a constitution as a codification of constitutional information. No critical or normative evaluation is done. In contrast, the *value-orientated or normative approach* entails the law/constitutional law of a state being studied critically and is compared against higher (legal) values within the overall legal dispensation. These values are not created by the state at will, but are basic values that have been founded on the will of the general population. South Africa follows the value-orientated approach to constitutional law. Constitutional law is studied critically and is tested against various values that have been constitutionally entrenched.¹⁷ In a value-orientated system, the government is bound by the underlying values incorporated in the constitution, and therefore the exercise of government authority can generally be justified.¹⁸ The underlying values not only create substantive requirements, they also demand specific

¹⁴ Refer to Rautenbach and Malherbe (1999) 124.

¹⁵ This is not necessarily true for the third sphere or local sphere. According to s 156(1), it would seem that executive authority is of more importance than local legislative authority. At local level, legislative authority is dependent on the authorisation of local executive authority. See s 156(2) of the Constitution.

¹⁶ 1994 (6) BCLR 1 T.

¹⁷ See the founding provisions of s 1 and also the values set out in ch 2 of the Constitution.

¹⁸ South Africa is generally regarded as a (social) constitutional state. The Constitution is the supreme law, and the government is also bound by the law/Constitution.

procedural requirements.¹⁹ Finally, and since the state comprises people with diverse political views and ideals, the constitution can be fully explained and understood only within the broad political context, its unique history and the particular needs and social demands of its people.

1.3.2 Basic constitutional features and principles

In view of the fact that the state is in a much stronger position of authority vis-à-vis the people living in its territory, various mechanisms have been constitutionally created and entrenched in order to protect the individual against excessive or abusive state actions or conduct and to ensure that the state fulfils its constitutional responsibilities. These principles thus have important implications for all branches exercising government authority, and are briefly identified below.

1.3.2.1 Constitutional Supremacy

The Constitution proclaims itself as the supreme law of the Republic of South Africa and also states that any law or conduct inconsistent with the Constitution is invalid. Furthermore, all obligations imposed by the Constitution must be fulfilled.²⁰ Both substantive and procedural requirements of the constitution relevant to all government authority must therefore be complied with or fulfilled.

1.3.2.2 Constitutional Entrenchment

The contents of the Constitution are also specifically protected or entrenched. Entrenchment refers to the manner in which the Constitution is protected against uncontrolled future amendments. In general, the South African Constitution is regarded as an *inflexible constitution*. Such inflexibility means that although the Constitution can be amended, such amendments are not easy and require special procedures and special majorities.²¹

1.3.2.3 Justiciability

Constitutional supremacy and entrenchment would mean very little if the provisions of the Constitution were not justiciable. In order for a supreme constitution to be effective and valuable, the judicial authority of the state must have the power to enforce the provisions and obligations of the constitution. Under the 1996 Constitution, the South African courts have been afforded significant powers to enforce the provi-

¹⁹ Compare ss 9 and 35, for example.

²⁰ See s 2 of the Constitution.

²¹ Refer to s 74 of the Constitution. The result of s 74 is that the South African Constitution is more entrenched in comparison with other legislative enactments.

sions of the Constitution. According to section 172, a court with appropriate jurisdiction “must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency”.²² Section 172 also provides for various other powers that a court may exercise when it makes an order that is just and equitable in constitutional matters. Appropriate courts also have special inherent powers.²³

Apart from the abovementioned invalidation authority, the Constitution also determines that: “[a]n order or decision by a court [with appropriate jurisdiction] binds all persons to whom and organs of state to which it applies”.²⁴ Finally, the Bill of Rights states that it applies to all law and binds the legislature, the executive, the judiciary and all organs of state. When applying the Bill of Rights, a court must apply or, if necessary, develop the common law to the extent that legislation does not give effect to a right in the Bill. Courts are also obligated, when interpreting any legislation and when they develop the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.²⁵

It should be noted on this point that any law or conduct which ostensibly is inconsistent with the Constitution does not become invalid merely because of such apparent inconsistency. An appropriate court must first determine such inconsistency with the Constitution, whereafter such inconsistency is automatically constitutionally invalidated.²⁶ It is part of the principles of judicial authority and justiciability that a determination of constitutional inconsistency can be made only by a judicial body with the necessary legal jurisdiction.

1.3.2.4 Constitutionalism and a Constitutional State

Since the concepts of constitutionalism and a constitutional state are closely related to one another, they are grouped and discussed together. Constitutionalism symbolises a state that is founded on the basic principles of the law. The government should derive its powers from the law, and these powers are limited to those powers determined by the law. Government powers are mostly defined in the form of a writ-

²² This section should be read in conjunction with s 2 of the Constitution.

²³ Read also s 173 of the Constitution.

²⁴ See s 165(5) of the Constitution. Special provision for the independence of the courts is also provided for.

²⁵ See ss 8 and 39 of the Constitution respectively.

²⁶ Read ss 172 and 2 of the Constitution respectively.

ten constitution.²⁷ A constitutional state expands on the concept of constitutionalism, as it entails that the law is supreme and that even the state is bound by the law. It should be clear that the South African constitutional dispensation incorporates both concepts.²⁸

1.3.2.5 The rule of law principle

The rule of law principle is attributed to the English constitutional writer and lawyer AV Dicey. The rule of law requires a government to act in accordance with pre-announced, clear and general rules. Oversight of compliance with the law is provided by impartial courts according to fair procedures. The rule of law therefore stipulates that no person may be deprived of his or her basic rights through the exercise of arbitrary and wide discretionary powers of the state; only courts may limit such rights. Government actions or conduct must be exercised in terms of the law, and the state is bound by the law. No-one, not even the state, is above the law, and no power, including state power, may be exercised, unless so authorised by the law. Actions or conduct without lawful authorisation is unlawful and invalid.

The rule of law principle as incorporated in the South African Constitution thus requires all actions or conduct of the government to be lawfully or legally authorised. This is often referred to as the *legality principle*. In order for conduct or actions to comply with the legality principle, two further aspects must be complied with. Firstly, there must be a rational relationship between the law and the achievement of a legitimate governmental purpose. Since the state may not act capriciously or arbitrarily, state action without a rational connection is contrary to the rule of law. Secondly, no state action may infringe on basic fundamental rights, unless such infringement is authorised in terms of the law itself.²⁹ The principle of the rule of law is specifically entrenched in the South African Constitution.³⁰

²⁷ Government may not exercise any power or perform no function beyond those powers and functions conferred upon them by law. In the set context, see *Minister of Correctional Services v Tobani* 2003 (5) SA 126 ECD.

²⁸ The Constitution is supreme, the state is bound by the constitutional provisions and state powers and functions are defined by the law, including the Constitution itself.

²⁹ See for example the cases of *NNP v Government of the RSA* 1999 (3) SA 191 (CC) and also *Pharmaceutical Manufacturers Association of SA v In Re: Ex parte President of the RSA* 2000 (2) SA 674 (CC).

³⁰ See s 1(c) of the Constitution, which states that: "The Republic of South Africa is... founded on the following values: ... (c) Supremacy of the constitution and the rule of law".

1.3.2.6 Principle of Democracy

South Africa prides itself as a modern democratic state. It is generally accepted that democracy is universally regarded as an essential element or principle of a true constitutional state. Democracy in its original sense means that a government can be legitimate only if it has the consent of the majority of its citizens. Democracy thus relates to the power of the people. However, the principle does not mean that the majority has unfettered powers. Majority decision-making only is not democracy. Even the majority may not limit or take certain rights or principles away. Democracy thus translates into majority decision-making within a system of predetermined rights, procedures and principles.³¹ Since the principle of democracy is specifically protected in the South African Constitution, any law or conduct inconsistent therewith will be invalid.³² Three forms of democracy are specifically recognised by the Constitution.³³ Finally, one must also look at the principle of *constitutional democracy*. Constitutional democracy means that elected representatives in government cannot adopt legislation freely and without control. The particular constitutional system allows for various checks and balances. Such checks and balances include: free and fair elections, regular elections, universal suffrage, protection of minority interests, accountability, openness and judicial oversight. These principles are all present under the new South African constitutional dispensation.

1.3.2.7 The Bill of Rights and other founding values

It was mentioned earlier that South Africa follows a value-orientated approach to constitutional interpretation. These values are particularly enumerated in the Bill of Rights, as well as under the founding provisions of section 1. The South African Bill of Rights protects various universally accepted fundamental rights, and it specifically affirms the values of *human dignity, equality and freedom*. These values are also emphasised in section 1 and the preamble to the Constitution.³⁴ Apart from the three core values, the Constitution further incorporates the values of non-racialism, non-sexism, adult suffrage, a national common voters' roll, regular elections and a multi-

³¹ Refer to *Numsa and others v Bader Bop (Pty) Ltd and another* 2003 (3) SA 513 (CC). People are protected through certain basic rights, such as the prohibition against slavery, to such an extent that not even the majority is entitled to allow for such a practice again.

³² Read the preamble, ss 1, 2 and 7 of the Constitution.

³³ The forms are representative democracy, participatory democracy and direct democracy. See also ss 57, 59, 66, 67, 19 and 19 of the Constitution.

³⁴ Refer to ss 1, 7, 36 and 39 of the Constitution.

party system of democratic government that should ensure *accountability, responsiveness and openness*. All powers and state bodies must exercise their respective powers and functions in a way that complies with such values.³⁵

Finally, the South African Constitution also indirectly incorporates the African principle or value of *Ubuntu*. In the case of *S v Makwanyane*³⁶ the constitutional court confirmed that the concept of *Ubuntu* underlies the new South African constitutional dispensation. *Ubuntu* is synonymous with the values of humaneness, social justice, fairness, rehabilitation and the abolition of victimisation, crime and cruel inhuman treatment.

1.3.2.8 The Principle of separation of powers

The principle or doctrine of separation of powers is fundamental to almost all constitutional systems. The *trias politica*, as it is also known, requires that governmental powers be divided into three categories, namely *legislative* powers, *executive* powers and *judicial* powers. Each power or authority is then exercised by specific bodies of state (also known as organs of state). These bodies are then referred to as legislative bodies, executive bodies and judicial bodies. The chief objective of the doctrine of separation of powers is to prevent the excessive concentration of governmental powers in one person or body. Separation of powers is specifically provided for in the new South African constitutional dispensation. Legislative authority is vested in parliament, the nine provincial legislatures and also in 284 municipal councils.³⁷ Executive authority again vests in the president, the nine premiers and the 284 municipal councils.³⁸ Judicial authority for the entire Republic of South Africa is vested in the courts.³⁹ It should be noted that the division of authority is not done on an absolutely rigid basis, and overlaps between the different branches of government do occur.⁴⁰ Overlaps provide an important check and balance on the exercise of a particular power or authority.

³⁵ See the founding values set out in s 1(a)-(d) of the Constitution.

³⁶ 1995 (3) SA 391 (CC).

³⁷ See ss 43, 44, 104 and 156 of the Constitution respectively.

³⁸ Refer to ss 85, 125 and 151(2) of the Constitution.

³⁹ S 165(1) of the Constitution.

⁴⁰ Refer to *In re: Certification of the Constitution of the RSA* 1996 (4) SA 744 (CC). The court confirmed that an absolute separation was not required.

1.3.2.9 Devolution of power and the principle of co-operative government

The new South African constitutional dispensation has evolved into a unique multi-tiered governmental order. The pre-1994 governmental structure of South Africa provided for different levels of government, but the lower levels, especially the local government level, were at the mercy of the national level. No integration or co-ordination was provided for. The Constitution now provides for spheres of government and for specific constitutional principles, ensuring co-operation and intergovernmental relations.⁴¹ Such provisions enhance features of co-operative federalism and intergovernmental co-ordination, rather than competitive political conduct. It is also accepted that the new system has moved closer to a so-called *integrated model of federalism*.⁴² Such a model provides for not only principles of co-operative government, procedures to settle intergovernmental disputes and provincial participation in the national parliament, it also provides for the *devolution of powers or functions* between the various spheres of government.⁴³ The devolution of powers or functions is especially important to the different legislative authorities, since a particular authority can exercise only such authority as is constitutionally allocated to it.⁴⁴ Particular care must be exercised to ensure that a particular legislator acts within its authority, as is determined by the Constitution. From the provisions of chapter 3 of the Constitution, it becomes clear that all spheres of government in South Africa are constitutionally obligated to assist and support one another. Especially the national sphere should assist and support the lower spheres.⁴⁵ Whereas exclusive powers should not cause problems between spheres, concurrent powers could more easily lead to internal conflicts. To address such disputes, the Constitution specifically provides for a mechanism to settle them.⁴⁶

Co-operation among spheres is further promoted via the authorisation of spheres to *delegate and assign* their powers or functions to other spheres. The Constitution provides for a general authorisation to delegate executive and legislative functions

⁴¹ See ss 40(1)-(2) and 41(1) respectively.

⁴² For more on this topic refer to De Villiers (1997) "Intergovernmental relations in SA" SAPL 198 and De Villiers (1994) "Intergovernmental relations: Bundestreue and the duty to co-operate from a German perspective" SAPL 430. See also Devenish (1998) 109.

⁴³ In this regard, the South African Constitution provides specifically for exclusive and concurrent legislative competencies. Refer to Sch 4 and 5 of the Constitution respectively.

⁴⁴ Encroachment by one sphere on the authority of another is unconstitutional, unless the Constitution allows otherwise.

⁴⁵ See ss 125 and 154 of the Constitution.

from one government to another and also to perform agency services for other governments.⁴⁷ Such authorisation is not without limits and must be exercised within the constitutional mandate. Parliament may, for example, delegate to other spheres any legislative power, except the power to amend the Constitution.⁴⁸ Provincial governments may also assign legislative powers to local governments.⁴⁹ Lastly, intervention into and supervision of the affairs of a lower sphere by a higher sphere is also provided. Since such interventions can have serious consequences, they must be strictly controlled.⁵⁰

1.3.2.10 Miscellaneous Aspects

The Constitution furthermore incorporates other provisions that have important implications for the exercise of government authority within each of the three spheres of government. Such aspects or provisions include the courts and the administration of justice,⁵¹ state institutions supporting constitutional democracy,⁵² security services,⁵³ principles governing the public administration⁵⁴, the recognition of traditional leaders⁵⁵, aspects relating to governmental finance⁵⁶ and certain general provisions which *inter alia* deal with aspects of international law and provide for specific definitions.⁵⁷ Especially the definitions of agency and delegation, diligent performance of obligations, national and provincial legislation and organs of state are of particular importance.⁵⁸

1.4 Key principles underpinning the new local government legal dispensation

1.4.1 Introduction

Mention was made above that apart from the totally revised constitutional system in South Africa, the entire local government dispensation had to be transformed and restructured under constitutional instructions. Notwithstanding the fact that all local

⁴⁶ See s 146 of the Constitution.

⁴⁷ See for example s 238 of the Constitution.

⁴⁸ See s 44 of the Constitution.

⁴⁹ S 104 of the Constitution. Note that not only legislative powers can be assigned, executive powers can too. See ss 99 and 126 of the Constitution respectively.

⁵⁰ See ss 44, 100 and also 139 of the Constitution.

⁵¹ Ch 8 of the Constitution.

⁵² Ch 9 of the Constitution.

⁵³ Ch 11.

⁵⁴ See ch 10 of the Constitution.

⁵⁵ See ss 211 and 212 of the Constitution.

⁵⁶ Refer to ch 13 of the Constitution.

⁵⁷ See ch 14 of the Constitution.

⁵⁸ See ss 236, 237, 238 and 239 of the Constitution.

governments form part of the governmental system in the new state and thus must comply with the overall constitutional requirements mentioned above, municipal governments have also been invested with unique features and principles that underpin the new local government legal dispensation. The unique features and principles have been specifically designed to facilitate a restructured and transformed local government dispensation that would achieve constitutionally defined objects and that would adhere to certain constitutional demands. In order to evaluate the extent to which the new local government legal order complies with the constitutional requirements, it is essential to identify and articulate the various principles and norms and then to assess the extent of compliance to such principles or norms. Consequently, the various principles and norms that underpin the new local government dispensation are systematically set out below and are briefly examined. Reference is then made to the relevant chapters of the research where such principles and norms are discussed and explained more fully. The final chapter then seeks to reconcile the principles and norms and provides an overall assessment and conclusion.

1.4.2 *The creation of a non-racial and democratic local government dispensation*

It is a specific aim of the new constitutional order to create spheres of government where people of all races would have equal rights and opportunities and where every citizen has a vote for his or her political representative of choice. The previous local government system did not allow for such a system, and people were divided because of colour and race and did not share the same political and civil entitlements. As the government closest to the people, local government had to establish what is regarded as the backbone of a new democratic order, where all people of South Africa are united and are granted equal treatment as human beings. Constitutionally, no distinction on racial or other grounds is permitted, and the general elements of a democratic order are promoted. (See chapters 1, 3, 4 and 5 of this work together with Constitutional Principle (CP) I as set out in Schedule 4 of the interim Constitution.)

1.4.3 *The nature, rights and duties of restructured municipal governments*

In the legal system prior to 1994, the legal nature and also the rights and duties of municipal governments were shrouded in doubt and uncertainty. The new dispensa-

tion had to rectify such uncertainties and had to clarify the legal nature of a municipal government as well as its general rights and duties. (Refer to chapter 8 of this work.)

1.4.4 *Local government within a system of co-operative governance*

In light of the constitutional confirmation that the government of the Republic of South Africa is constituted as national, provincial and local spheres, local government institutions are now undoubtedly part and parcel of the overall governmental structure of the South African state. The Constitution further demands that all three spheres are obligated to observe and adhere to certain principles that govern the envisaged system of co-operative government. Notwithstanding the fact that local governments are part of the governmental structure, they are often dependent on the two higher spheres, and thus the principles of co-operative government are of particular importance to them. (Read chapter 9 of this work.)

1.4.5 *The new structure and internal framework for local government*

It was integral to South Africa's constitutional reform that the final Constitution had to provide for a proper framework for the structures of local government. Since the entire constitutional dispensation was subject to change, this meant that a new structure and framework for local government had to be created. The Constitution provides for only a basic framework for the new structures of local government, and it was envisaged that national legislation would complete the fuller content of the framework. Various national laws were indeed enacted, and a new structure and internal framework for all local government structures was created. The new structure and framework is of particular importance in ensuring the fulfilment of the objects and duties of all municipal governments. (Refer to chapters 10, 12 and 15 of this work.)

1.4.6 *New boundaries for local government institutions*

The Constitution demands that the whole of the territory of the Republic of South Africa had to be incorporated within a municipal jurisdiction. This constitutional obligation resulted in both the external re-demarcation of municipal areas as well as the internal delimitation of municipal wards. Various legal requirements were laid down in order to facilitate and co-ordinate the establishment of new municipal jurisdictions. Apart from complying with the legal requirements, municipal boundaries also significantly impact on all municipal institutions regarding the effective exercise of their powers and duties and the fulfilment of their core municipal objectives. (For more on this point, see chapter 11 of this work.)

1.4.7 Compliance with the founding values of the Constitution and the obligations under the Bill of Rights

It is trite law post 1994 that the Constitution of the Republic of South Africa has been entrenched as the supreme law of the state. It thus follows that all constitutional obligations or requirements are of particular importance to all spheres of government. This is particularly true of municipal governments, which exist and function closest to the people living within the state as a whole. It therefore comes as no surprise that municipal governments should pay close attention to the founding values of the new legal order and also the fulfilment, protection, promotion and common respect for the fundamental rights that are incorporated in the Bill of Rights as part of the Constitution. (Read chapter 6 of this work.)

1.4.8 The role and importance of the institution of traditional leadership in local government

An issue that is somewhat unclear is the precise role and importance of the institution of traditional leadership in local government structures. Although constitutionally recognised and protected, the precise role of such institutions has not properly been defined. It was again left to the national government to expand upon the basic protection and recognition given to traditional leaders under the Constitution and to identify their role and importance more clearly. (More details and discussions are provided for in chapter 13 of this work.)

1.4.9 The allocation of specific powers and functions to municipal governments

As part of the certification process of the final Constitution, constitutional principles XX and XXIV respectively required that under the final Constitution, each sphere/level of government had to have appropriate and adequate legislative and executive powers and functions in order to fulfil their duties and to function effectively. A clear division of powers and functions between all three spheres was thus required. It was further also required that a framework for local government powers, functions and structures had to be set out in the Constitution and that the more detailed provisions regarding such powers or functions had to be determined within either parliamentary statutes or in provincial laws, or both. Extensive national laws have been enacted to comply with the abovementioned requirements. (See chapter 14 of this work.)

1.4.10 *Internal functioning and new leadership requirements for local government*

Modern municipal governments are becoming more and more complex in their nature and functioning. Such complexities create new and demanding challenges on both the internal functioning and the leaders within such government structures. The new legal framework for local government was specifically tasked with creating effective and sufficient internal procedures and with ensuring and establishing an effective municipal administration with a strong and visionary political leadership. (Refer to chapter 15 of this work.)

1.4.11 *Sustainable municipal service delivery*

One of the core objectives of the new local government legal order is to create a system of sustainable municipal service delivery. Without the sustained and effective delivery of municipal services, municipal settlements will not be able to grow and to provide for the basic needs of municipal communities. Services and also service delivery must be accessible, simple and, most of all, affordable. Various legal provisions have been included in the new legal order to ensure and facilitate such a system of service delivery to local communities. (Read chapter 16 of this work.)

1.4.12 *A new personnel corps for local government*

No local government will be able to function properly or to achieve its overall objectives and obligations without a dedicated and properly trained municipal personnel corps. The Constitution thus specifically determines that all municipal governments are entitled to employ as many personnel as is necessary to ensure the effective performance of municipal functions and duties. Under the final responsibility of a municipal manager, each municipality must therefore employ the required personnel to fulfil its functions. Many different requirements and legal provisions must be adhered to, however. (See chapter 17 of this work.)

1.4.13 *Municipal fiscal management and the exercise of fiscal powers*

The proper financial management and the diligent exercise of financial powers are essential elements of any effective and progressive government institution. Of course this is also the case within the new local government dispensation. Even under the interim Constitution it was constitutionally envisaged that the financial powers of all three spheres of government had to be clearly defined and entrenched within the constitutional text. Specific provision for appropriate fiscal powers and functions for the different categories of municipality had also been provided for. Equi-

table share in mainly national revenue and proper financial management and fiscal procedures had to be ensured. A comprehensive system has been put in place to address such important issues. (Refer to chapter 18 of this work.)

1.4.14 *Municipal governance and core principles of a new public administration*

The new constitutional order also impacts directly on the manner on which the public administration in general functions. Since municipal governments are part of the overall public administration of the South African government, such constitutional requirements are of particular importance. Apart from basic values and principles governing the public administration that are entrenched in the Constitution, the new legal order also determines various other requirements that must be fulfilled within the new transformed municipal administrations. (Read chapter 19 of this work.)

1.4.15 *Principles of municipal development planning, performance management, capacity building and public participation*

The new municipal dispensation incorporates and emphasises the core constitutional principles of development planning, performance management, capacity building and the enhancement of public participation in local government affairs. With reference to the principle of development planning, it will become evident that various aspects of local/municipal planning requirements have been decentralised to municipal governments. Proper municipal planning is essential to ensure effective and efficient municipal governments. Because of its importance, integrated development planning has become a core component of the new legal order.

Performance management and capacity building in turn relate to both the municipal staff and political components. If performance of municipal role players is not managed and controlled and if the internal capacity of municipal structures are not continuously strengthened, then municipal governments will hardly be able to fulfil and comply with their overall constitutional objectives and duties. Municipalities do not exist or function apart from their respective local communities, however. The main reason for the existence of local governments is to provide basic services to their local residents. In order to create and facilitate mutual respect and support, municipalities must work hand in hand with their communities to fulfil their obligations. However, such a relationship can be achieved only if local residents feel that they are consulted on important issues and that they are included in decision-making processes. The enhancement of governmental accountability and strengthening of

public participation in municipal processes and decisions are therefore constitutionally protected principles and must be provided for within a framework of certain minimum standards. (Compare chapter 19 and 20 of this work.)

1.4.16 *The new status and relative autonomy of local governments*

It was mentioned above that under the new constitutional dispensation all local governments have been confirmed as distinctive, interrelated and interdependent spheres of government. This new inclusion within the overall structure of the state has significantly enhanced the status and autonomy of all local government institutions. Government spheres are not isolated from one another, however, and are compelled to function within a broader system of co-operative government. Apart from the fact that the Constitution distinguishes between the powers and functions of each sphere, the local sphere is still subjected to the control and supervision of both national and provincial governments. In many instances local governments are still lower in rank than their national and provincial counterparts. Such relative autonomy is mandated by the Constitution itself and is not as a result of a control-hungry national or provincial government. The relative autonomy of local governments is seen in the light of ultimately ensuring an effective and efficient third sphere of government. (See chapter 7 of this work.)

1.4.17 *The essential objects of local governments*

The new constitutional dispensation specifically identifies five (5) core objects of local government in general. The objects are:

- to provide for a democratic and accountable government for local communities
- to ensure sustainable provision of services
- to promote social and economic development
- to promote a safe and healthy environment
- to encourage public involvement in the affairs of local government.

All municipalities are obligated, within their financial and administrative capacities, to achieve the abovementioned objects. In view of the nature of the objects, it is clear that they cannot be achieved or addressed in one particular chapter, but rather they are evident throughout the various chapters of this work.

1.4.18 *Developmental duties of local government*

Apart from striving to achieve the core objects of local government, all municipalities are constitutionally obligated to fulfilling certain developmental duties. The principle of developmental local government basically means that a municipality must manage

and structure its internal functioning and planning processes in such a way as to enhance and ensure the basic needs of its community. The provision of basic and essential services, as well as the promotion of social and economic development are generally regarded as the core pillars of a generally developmental local government. It should, however, be emphasised that local developmental duties cannot be achieved by municipalities alone and that both higher spheres must be actively involved in creating proper programmes and initiatives that will enhance developmental progress. (Read chapter 7 of this work.)

1.5 Conclusion

In the chapters that follow, all of the abovementioned constitutional prerequisites, as well as the extent to which the national government has fulfilled and complied with its constitutional obligations towards local governments are assessed. Some chapters deal with more than one constitutional requirement, whilst others with only one. In each chapter, specific reference is made to the extent of constitutional compliance. The concluding chapter aims at tying all the chapters together and at providing a general assessment of the extent to which the entire new local government dispensation complies with the mentioned constitutional imperatives.

Legal developments within the domain of local government law are taking place so rapidly that a complete and up-to-date reference source is unattainable. For this reason, a cut-off date of 30 June 2005 has been decided upon. Developments and especially legislative amendments after the mentioned cut-off date are not necessarily included.