

Concluding remarks

22.1 Introduction

It is clear from the above that the third sphere of government has changed drastically from the order that was in place prior to 1994. The new supreme Constitution with its comprehensive Bill of Rights has set a new legal paradigm for municipal government. It is especially the founding values and specific municipal objects of the new constitutional dispensation that had an unprecedented impact.¹ Compliance with the new constitutional provisions is imperative whether that relates to legislative or executive actions or even the conduct of bodies or institutions within the state. The Constitution however only provides a basic constitutional framework. In many instances the basic framework had to be completed through the enactment of various national or provincial laws.²

In chapter one of this research it was stated that the aim of the research is two-fold. The first objective was to provide a systematic and comprehensive exposition of the new constitutional and other national legislative provisions relevant to the new system of local government. In this respect it is submitted that the preceding chapters do indeed achieve such an objective. Almost all legislative provisions relevant to local government have been systematically subdivided into the various chapters and have been grouped together according to their topics and relevance. It is submitted that the compilation and systemisation of the many legal requirements should indeed contribute to making the legal dispensation regarding local government law more accessible which in turn could enhance more research and debate in this often neglected albeit important field of law.

¹ Read s 1 of the Constitution. According to s 2 the Constitution is entrenched as the supreme law of the SA state and any law or conduct inconsistent with the Constitution is invalid. All the obligations imposed by the Constitution must be fulfilled.

² See again the provisions set out in ss 151(3), 154(1), 155(2) and (3), 157(2), 160(5) and 164 of the Constitution which specifically require either national or both national or provincial laws on issues directly relevant to local government matters.

The second aim was to evaluate the extent of compliance with the new local government legal system, to the key normative principles set out in the Constitution and which underpins the new legal government system. Such a evaluation can only be conducted after due regard to all the constitutional and subsequent national legislative requirements. In an effort to link the various preceding chapters together and to tie-up the research as a whole, a brief summary of the extent of compliance with the key constitutional requirements and prerequisites is provided in this conclusion. The summary follows the same chronological sequence as was provided for in the introductory chapter of this work.

22.2 Evaluating compliance with the key normative principles of the new local government legal dispensation

22.2.1 *Is the new local government legal dispensation non-racial and truly democratic?*

The new dispensation has undoubtedly overturned the segregation and apartheid policies of the past and has provided a platform for a uniform democratic local sphere of governance where municipal services are rendered for the benefit of all people. The confirmation within the supreme law of the South African state of *inter alia* the founding values of equality, democracy, freedom, non-racialism and non-sexism has created a strong foundation to ensure that all spheres of government are constitutionally obligated to ensure a non-racial and democratic government.

22.2.2 *Does the new nature, rights and duties of municipalities comply with the new constitutional vision?*

It was indicated above that the new local government system does not only provide local government with a distinctive legal nature, but also sets down clear and precise rights and duties for all local government structures.³ This is necessary to ensure local governments are empowered to fulfil their duties. The new system not only provides local authorities with the required foundation to act, but also incorporates constitutional values of accountability and public participation. These values are particularly promoted through legislative provisions which confirm that local government consists out of political, administrative and local community components. As such, the new legal framework should enhance and promote the underlying values

³ Read ss 4, 5 and 6 of the Municipal Structures Act together with s 156 of the Constitution.

that the Constitution demands.

22.2.3 *Municipal government and the principles of co-operative government*

The Constitution obligates all three spheres of government to comply with specific principles aimed at ensuring a system of co-operative federalism. All spheres have been allocated with specific functional activities. Although significant protection of such powers is provided for, many overlaps between the specified functions do occur. Such overlaps in turn again require proper co-operation between the spheres in order to fulfil their functions and responsibilities. In an effort to ensure such co-operation the Constitution determines various principles with which all spheres must comply.⁴ The new legal framework, *via* the Municipal Systems Act, specifically expands on the basic constitutional provisions and thus enhances the envisaged constitutional scheme.

22.2.4 *The establishment of a new system and structure for local government*

It is a specific constitutional obligation, that all former local governments had to be restructured and that new institutional models for local government structures had to be provided for. Furthermore, the whole territory of the Republic had to be included in the jurisdiction of a specific municipal authority.⁵ The new legal dispensation indeed complies with these constitutional requirements. In the first instance, the entire territory of the South African state falls within the jurisdiction of a demarcated municipal government. Even areas that are not viable to have their own direct local government, ie district management areas, fall under the control of a district municipality within that area. Secondly, the Municipal Structures Act provides for various new institutional models of local government. Apart from the constitutionally defined categories of municipalities the act provides for the establishment of various models of municipal types by combining various municipal systems.⁶

In total five systems have been created. Three are so-called executive systems whilst two are participatory systems. Since the powers, functions and circumstances of municipalities differ it is submitted that the various combination possibilities indeed should be able to cater for the different needs and responsibilities of all municipalities. The new legal framework further aims not only to achieve more effective execu

⁴ Refer to ss 40 and 41 of the Constitution.

⁵ See s 151 of the Constitution.

⁶ See s 7 of the Structures Act.

tive functioning but also to ensure public involvement and participation, which again should enhance the underlying values of the Constitution. Although a clear division of the roles and responsibilities of the various types of municipalities has been determined, there seems to be some uncertainty in practise. Uncertainty especially exists relating to the division of powers and functions between local municipalities and their relevant district municipalities. Notwithstanding such difficulties, the new legislative provisions have ensured that all municipal institutions have been re-established and all former municipal authorities have been replaced by newly transformed local authorities. Municipal boundaries were re-determined and many municipalities were amalgamated into new enlarged and supposedly more effective institutions.

A significant number of municipalities however still face enormous challenges relating to their new structures and boundaries and the amalgamation of municipal administrations and personnel. Further legal directions are needed to address some of these challenges more effectively.

22.2.5 Confirmation of new municipal boundaries

It is clear from the new constitutional framework, that municipal boundaries had to be re-determined. This requirement was specifically fulfilled *via* the Municipal Demarcation Act which established an independent Municipal Demarcation Board.⁷ This board has demarcated all municipal boundaries and has fulfilled the requirement of creating a system of wall to wall municipal government in South Africa. Under the Constitution, national legislation had to determine the criteria and procedures to determine municipal boundaries by an independent authority.⁸ Two national acts, the Local Government: Municipal Structures Act and the Local Government: Municipal Demarcation Act were enacted.⁹ Together these two acts, address the overall constitutional obligations towards municipal boundaries.

Boundaries are important to ensure local governments can provide municipal services in an equitable and sustainable manner. It would seem that the new laws indeed comply and fulfil the constitutional demands. It should be noted however that the determination and internal delimitation of municipal boundaries are not once off

⁷ Read ss 151(1) and 155(3)(b) of the Constitution together with the provisions of Act 27 of 1998.

⁸ S 155(3)(b) of the Constitution.

⁹ 117 of 1998 and 27 of 1998.

exercises but are continuous in nature. Regular evaluation of municipal boundaries is thus required. It is also notable that after the demarcation process, the number of official local authorities were reduced from over 800 to 284.¹⁰ The demarcation process thus significantly rationalized local government structures. Such rationalization was needed under the Constitution to create a system of local governance that is effective and efficient and that would ensure the achievement of the objects of local government as set out under the Constitution.

22.2.6 Adhering to the founding values and the Bill of Rights

The Constitution specifically requires radical changes to the composition and election of municipal councils. In essence the new local government system had to be redesigned to ensure and achieve compliance to the Constitution's founding values and a truly democratic state. In order to complete such a system, many new changes had to be affected. On a closer evaluation, it seems acceptable to conclude that the new legal framework, indeed completes the basic framework of the Constitution regarding the composition and election of municipal councils. Local governments are now truly democratic spheres of government.

The new system is unique in some instances. For example, although the term of local governments is now similar to national or provincial governments, local governments are composed according to a electoral system that provides for a combination of proportional representation and constituency based electoral systems.¹¹ The unique features have been included to enhance the unique features of local governments and to ensure better representation and accountability. It seems as if the new legal system is well equipped to fulfil the broad constitutional requirements.

22.2.7 Recognising the role of traditional leadership

One area where the new local government legal dispensation still seems to lack clear direction is with regards to the role and involvement of traditional leaders in local government structures. Although the institution of traditional leaders is constitutionally recognised and protected,¹² the precise role of traditional leaders, specially in local government, has not been properly defined. This problem is confirmed by na-

¹⁰ The number of 284 is composed out of 6 Metropolitan municipalities, 47 District municipalities and 231 Local municipalities. For more detail refer to www.info.gov.za/localgovernment visited on 18/07/2005.

¹¹ Read ss 157(1) and (2)(a)-(b) of the Constitution.

¹² See ss 211 and 212 of the Constitution.

tional government, which has embarked on new policy and legislative initiatives aimed at clarifying the current uncertainties.¹³ Traditional leaders form an important part of traditional African cultures and structures and they should not only be included in municipal decision-making processes, but they can play a positive role in ensuring the ultimate success of especially rural municipalities.

The Constitution however only creates three spheres of government and allocates powers or authority only to such spheres and not to traditional leaders. One can thus argue, that unless a constitutional amendment is carried through, traditional leaders will be subjected to the authority of the local governments in which area such leaders fall. Since traditional leaders play an important role in maintaining traditional African customs, their roles should thus be more clearly defined. In view of the fact that the Constitution is the supreme law of the state, the role and functions of traditional leaders must comply with the Constitution. Traditional leaders are thus not autonomous institutions but function within the broad constitutional system. A strong need exists for co-operation and consultation between traditional leaders and local government structures. Clear national guidelines on such issues should ensure positive co-operation between the two institutions. Such legislative requirements are urgently needed.

22.2.8 The division of the powers and functions between the three spheres of government

Under the Constitution, local government is not only recognised as distinctive and autonomous sphere of government but the Constitution also determines the specific powers and functions of municipal governments. Such powers and functions are thus constitutionally entrenched and cannot be taken away unless constitutional amendments are executed.¹⁴ Local government powers are however not absolute, and are subject to national and provincial laws. In essence municipal powers and functions must be exercised to fulfil constitutional objectives and developmental duties. Under the constitutional framework, both the Structures Act and the Systems Act expand upon municipal powers and functions. It is of interest to note that within the new constitutional dispensation, local government powers are regarded as original pow-

¹³ See the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁴ Read s 156 together with parts B of Sch 4 and 5 of the Constitution.

ers.¹⁵ The Constitution does however not directly distinguish between the powers and functions of the different categories of municipalities *inter se*. Although it is constitutionally envisaged that a proper division of municipal powers should be made, such division had to be conducted in terms of national legislation.¹⁶ Since category A or Metropolitan councils have exclusive executive and legislative powers, the division is only relevant between Local Council and their relevant District Councils. This division is specifically provided under the Local Government: Municipal Structures Act.¹⁷ Powers not specifically allocated to a district will vest in the local municipality.

It is thus submitted that the new legal framework indeed complies to the broad constitutional requirements regarding the identification of municipal powers and functions and the division of such powers and functions between category B and C municipalities. Assignment of powers or functions are also permitted, and it is regulated through provisions set out in the Systems Act.¹⁸ The new system also provides for municipal financial powers. The current system however still faces problems relating to old order laws that are still applicable and new proposals that have not yet materialized. Although the national legislative framework has been enacted, both provincial and even municipal laws are needed to complete the overall legal framework.

22.2.9 Evaluating the new legal rules dealing with internal mechanisms and municipal leadership

It is an obvious fact that municipal governments are becoming more and more complex in comparison with their predecessors from yester year. Such complexities and duties require an effective, committed and educated leadership. On evaluation of the new legal framework, it would seem as if the new legal rules indeed support and facilitate the creation of such internal procedures and functions. The new system provides for various leadership options depending on the circumstances relevant in each particular municipal jurisdiction. To enhance and regulate municipal leadership,

¹⁵ See *Fedsure Life Assurance v Greater JHB TMC* 1999 (1) SA 3741 (CC).

¹⁶ According to s 155(3)(c) the Constitution determines the following: “[S]ubject to section 229, [National Legislation must] make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category 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”.

¹⁷ See ss 83-84 of the Systems Act.

¹⁸ See ss 8-9 of the Systems Act.

the Constitution directly regulates the internal procedures of municipal councils.¹⁹ These requirements are indispensable for effective municipal decision-making and the achievement of municipal goals and duties.

Both the Systems and the Structures Acts specifically expand on the basic constitutional provisions and thereby support and enhance the constitutional vision. Since the functioning of a local government is largely dependant on the effective exercise of functions, the new legal dispensation provides for specific codes of conduct for both political office bearers and also municipal administrative personnel.²⁰ It is thus submitted that the new legal provisions indeed have a significant role in regulating and controlling internal municipal functioning. Although the framework is extensive, regular overview should be employed and swift legal changes could be enacted to rectify or expand on existing rules in order to enhance or comply with practical problems.

22.2.10 Ensuring sustainable municipal service delivery

The new legal dispensation for local government also addresses the important aspect of service delivery and identifies various basic municipal services and functional activities. It must be remembered that the main objective/reason for existence of local governments is to provide sustainable and effective municipal services to local residents. Without such service delivery, local settlements cannot be sustained and the overall governmental structure of the state will be placed in jeopardy. The new system demands a system for service delivery that is accessible, simple, affordable, of high quality with incorporation of the values of accountability, sustainability and value for money.²¹

In compliance with the constitutional prerequisites, the Systems Act determines specific duties and requirements for all local governments in respect of municipal service provision and related aspects.²² The act is however silent on which mechanism municipal councils should use to achieve and comply with the abovementioned requirements. Municipal councils must put their own policies and programmes in place and should be monitored and controlled by the two higher spheres. Possible expansion on the current legal regulation could enhance better achievement of the

¹⁹ See s 160 of the Constitution.

²⁰ Refer to Sch's 1 and 2 of the Municipal Systems Act.

²¹ Read again ss 1, 152 and 153 of the Constitution.

²² See s 73 of the Systems Act.

mentioned goals. Municipal councils must also adopt tariff policies for the levying of fees for municipal services.²³ Services can be provided via internal mechanisms or external ones.²⁴ Although municipal services per se are not absolutely defined and other services can also be assigned to municipalities, the Constitution together with the new laws, determines what should be regarded as basic municipal services. The achievement and compliance with the constitutional demand on services, will largely depend on how local governments structure their policies and also to what extent effective oversight by national/provincial governments are provided.

22.2.11 Establishing a new local government personnel corps

In relation to municipal staff the Constitution determines that all municipal councils can employ personnel that are necessary for the effective performance of their functions.²⁵ Local governments are thus empowered to employ such staff members that are needed to fulfil their obligations and duties. The new requirements have specifically been incorporated to enhance the organisational efficiency of municipalities but vigorous training of personnel is required. Municipal personnel matters should not be seen in isolation but together with other labour related requirements that are set out in other laws.²⁶ The new dispensation determines that the municipal manager is the head of the municipal administration and as such has been given a wide range of duties and responsibilities. Such a person is also the highest accountable official.²⁷

Employment, especially of senior staff is linked to new performance standards and evaluations. Senior staff are mostly employed for fix periods only²⁸ and a comprehensive code of conduct for staff members has been included.²⁹ Continuous training and support is however a prerequisite for effective local government administrations. It is submitted that old order bureaucracies should be avoided and regular evaluation of the organizational structures of municipalities must be undertaken. Municipal staff matters should further be linked to the requirements of the public administration and guidelines on financial management. All in all it appears as if the basic constitutional

²³ S 74 of the Systems Act.

²⁴ Ss 26-81 of the Systems Act.

²⁵ S 160(1)(c) read with s 156(5) of the Constitution.

²⁶ Read for example acts such as the Labour Relations Act 66 of 1995 and also the Basic Conditions of Employment Act 75 of 1997.

²⁷ See s 55 of the Systems Act.

²⁸ See s 7 of the Systems Act.

²⁹ Refer to Sch 2 of the Systems Act.

demands are met and that local government administrations and personnel structures are adequately empowered to achieve and fulfil their important constitutional obligations.

22.2.12 Regulation of municipal fiscal management and fiscal powers

Mention was made above that municipal administrations and staff members are partly regulated in terms of a new and reformed legislative framework dealing with municipal finance and fiscal management. Without a proper financial system and effective control mechanisms, local governments will not be able to fulfil their obligations. Financial powers and proper fiscal management are essential in the new local government dispensation. From the chapter on municipal finance discussed above it becomes obvious that an entire new legal framework has been established. Not only does the Constitution determine basic fiscal requirements and obligations, but also that new national legislative provisions are authorized to create a uniform system for property tax assessments and recovery as well as a comprehensive system aimed at regulating municipal fiscal management.³⁰ It is suggested that the new dispensation indeed fulfils the constitutional demands but that the system should be constantly monitored to ensure effectiveness and efficiency. Swift amendments should be considered to better and regulate the new system should new financial challenges arise. Financial discipline is a key component for the success of local governments and careful and continuous oversight by national/provincial governments is essential. It is submitted that the new dispensation, if applied correctly, indeed should enhance and ensure effective municipal financial capacity and fiscal management.

22.2.13 Compliance to new vision for public administration

It was mentioned above that the Constitution sets various requirements dealing with the public administration and other related matters. The new legal system supports such requirements and seeks to adhere and advance to the supreme constitutional demands.³¹ Apart from the provisions dealing with the public administration, various other requirements such as principles and provisions of performance management, capacity building, municipal accountability and public participation have been included in the new system. Such provisions are aimed at fulfilling the new constitu-

³⁰ 56 of 2003.

³¹ See ss 195, 196, 50 and 51 of the Systems Act.

tional values set out in the founding provisions of our supreme law.³² The new dispensation aims at ensuring a more customer orientated public service with strict requirements of accountability and control. One can indeed argue that a sound foundation for a general people orientated local government system has been established, which system should not only ensure constitutional compliance but also a more brighter future for all South Africans.

22.2.14 Adhering to the principles of municipal development, planning, performance management, capacity building and public participation

The new legal dispensation also incorporates significant provisions relating to municipal development planning and the regulation of basic legal matters. Important aspects relating to municipal planning have been decentralized to municipal governments, and although municipal planning is a functional area of concurrent national and provincial legislative competence, all municipalities are constitutionally obligated to ensure proper and effective municipal development planning. Proper municipal planning is needed to structure and manage municipal administrations in such a way as to give priority to the basic needs of their communities. Municipalities are also obligated to promote the social and economic development of their communities and to ensure a safe and healthy environment. The Constitution specifically requires national laws to provide an overarching set of regulatory provisions to enable all municipalities to create and cater for basic planning needs. This requirement was partly met in the provisions of the Systems Act.³³ Integrated Development Planning is now a core component of the new legal framework and should significantly allow municipalities to fulfil their developmental responsibilities. Municipal Integrated Development Planning should however be continuously monitored and adjusted to keep abreast with local changes and circumstances.

Since municipalities are established throughout the territory of South Africa and since they have a large impact on local communities, many general legal rules are applicable to local government administrations. Apart from a general understanding and knowledge of the different legal fields relevant to the South African legal system, various unique legal provisions are also highlighted. Such unique legal matters pertaining to local government only have been identified in national legislation and is

³² See s 1 of the Constitution read together with ch 4 and 6 of the Systems Act.

³³ See ss 24-29 of the Systems Act.

directly regulated in terms of the Systems Act.³⁴ As a sphere of government, local governments are faced with general legal matters on a daily basis, and as such a complete understanding and compliance with the law of the state in general is a prerequisite for municipalities to be able to perform their functions and achieve their goals.

22.2.15 *Evaluating the new status and autonomy of local government institutions*

One of the more distinct features of the new face of local government in South Africa is the fact that it now has a new enhanced and protected status and autonomy. All local government institutions have been confirmed as a distinct and interdependent sphere of government.³⁵ Notwithstanding the constitutional confirmation of the new status and subsequent autonomy of local governments, such autonomy is not absolute and is often subjected to the oversight and control of both the national and provincial spheres of government.³⁶ In light of the constitutional provisions, the autonomy of municipalities is regarded as a limited or restricted autonomy. The crux of the limitation lies in the confirmation within the Constitution itself in that municipalities are in some instances subjected to national and provincial legislation. Any encroachment on the autonomy of a local authority must be justified and permitted under the Constitution or else it would be unconstitutional and invalid. Since the Constitution itself entrenches only a limited autonomy for local government, any dispute relating to such an issue should be resolved with reference and interpretation of the overall constitutional scheme. Many aspects could have an impact in such cases, for example the Bill of Rights, the principles of co-operative government or even the requirements dealing with government finance. It is however submitted that the limited autonomy of local government should not detract from the new role local governments are to play in our new constitutional dispensation.

22.2.16 *Achieving the five core objects of local government*

Arguably the most important function of a local authority, seen from a local community point view, is the provision of sustainable service delivery. This core function of all municipal governments has been at the forefront of municipal development, not

³⁴ See ch 11 of the Act for more detail.

³⁵ Refer to s 40 of the Constitution.

³⁶ See s 151(3) and (4) of the Constitution.

only in the South African context, but all over the world. It was explained above that the main reason for the existence of local authorities was to ensure and secure sustainable provision of certain municipal services to local communities. The most common problem facing local governments today is the lack or insufficient provision of such services. Since the provision of services is such a fundamental function of a local government, the new constitutional dispensation has specifically incorporated such a function within the new legal framework.³⁷ The provision of municipal services however is not the only important municipal object and therefore the Constitution has identified and entrenched five core objects of the new local government dispensation.³⁸ All municipalities are obligated to strive, within their financial and administrative capacities, to achieve the five objects mentioned above. Although the new legal framework should facilitate and enhance the fulfilment of the core objects of local government, it is ultimately left to municipal governments themselves to ensure that they structure their finances and administrations in a manner that will achieve the objects. Many municipalities in South Africa are not complying with this important constitutional requirement and subsequently many are not providing sustainable services and are not achieving the lawful expectations of local communities. It is this writer's submission that the new legal framework indeed fosters and ensures a legal order within which municipalities should be able to achieve their goals and objects. One should however not lose sight of the important role both national and provincial governments must play to ensure through oversight and control measures, that municipalities are indeed making positive progress in the achievement of local government objectives.

22.2.17 The principle of creating a local government dispensation that is developmentally orientated

Apart from the core objects of local government the new constitutional scheme also requires all municipalities to be developmentally orientated regarding their duties.³⁹ In essence, the developmental approach of local government entails the improvement of the quality of life of all municipal communities. In order to achieve the obliga-

³⁷ S 152(1)(b) of the Constitution states that one of the objects of local government is to ensure the provision of services to *local* communities in a sustainable manner.

³⁸ Refer to s 152(1)(a)-(e) of the Constitution. The objects are: democratic and accountable governance, provision of services, promotion of social and economic development, promotion of a safe and healthy environment and lastly the encouragement of public participation in municipal matters.

³⁹ See s 153 of the Constitution.

tion of being developmental in nature, all municipalities are obligated to do two things: (a) they must structure and manage their administrations and budgeting/planning processes in such a way as to give priority to the basic needs of their respective communities and thereby help to promote the social and economic development of such communities; (b) they must participate in national and provincial development programmes.⁴⁰ In view of the new legal system for local government, which includes aspects such as co-operative government and the new internal municipal structures and procedures, it is again writers submission that the new legal dispensation indeed caters and fosters a local government system where developmental duties and objects can be realised. Success however will ultimately depend on the manner in which municipalities themselves structure and manage their institutions in order to achieve such duties at best.

22.3 Conclusion

It is writer's overall conclusion that the new legal dispensation relevant to local government institutions of South Africa, as was created within the general constitutional framework, not only complies with the overall constitutional demands, but if correctly applied and if the envisaged support and oversight is provided, should indeed succeed in steering local government to be a more developmental and more people orientated sphere of local government. A broad and seemingly effective legal system has been created to allow and ensure that municipalities can achieve their specified constitutional duties and objects. The new dispensation not only seems to cover all necessary components of a successful legal dispensation but also provides for various mechanisms to ensure proper control and oversight. Many commentators have in the recent years suggested that both the two higher spheres of government were dragging their feet in completing the legal system for local government, and that especially national government has failed to timeously fulfil its constitutional obligations. In view of the extent and content of the new legal system and upon close evaluation of all the new laws that were enacted, one can however understand that the completion of the new system was not as elementary as many initially believed. It is this writers opinion that the new established legal system indeed signifies a monumental advancement in the creation of an effective and supported municipal government in the new South African constitutional state.

⁴⁰ See s 153(a)-(b) of the Constitution.

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