



## CHAPTER 6

### RESTRUCTURING OF LOCAL GOVERNMENT IN SOUTH AFRICA TOWARDS THE FINAL PHASE

#### 6.1. INTRODUCTION

This chapter will examine the evolution of the Final Constitution and its main provisions. What is important is the change from a three-level hierarchical intergovernmental system to a three-sphere system. The notion of a sphere must be looked at within the context of co-operative governance, which makes each sphere of government distinctive, interdependent and interrelated. This has uplifted local government from a subordinate level to being a significant sphere in its own right.

The main features of the local government chapter in the final Constitution are discussed. These include the constitutionally entrenched functions and powers of local government, the objectives and development duties of municipalities, the establishment of municipalities, the demarcation of boundaries and transitional arrangements. This chapter also evaluates the new local government system. It then examines the concept of co-operative governance.

#### 6.2. EMERGENCE OF THE FINAL CONSTITUTION

The Interim Constitution was drawn up with the involvement of all political parties. The results of the country's first national elections showed that many of these parties were not representative. In addition, technical experts, academics, and lawyers played a greater role in drafting the Interim Constitution than was the case with the Final Constitution, where elected politicians played a more dominant role (Van der Westhuizen, 1996). In terms of the Interim Constitution, the Constitutional Assembly (consisting of the National Assembly and the Senate) had to adopt a Final Constitution with a



two-thirds majority within two years. What the Interim Constitution makers did agree upon were 34 fixed constitutional principles to which both the Interim and Final Constitution makers had to adhere and which had to be certified by the Constitutional Court. These included general provisions such as a three-level government system, separation of powers, commitment to a democratic system of government and a Bill of Rights. The Constitutional Assembly interpreted these principles as being precisely that and not rules of law (Constitutional Talk 11, 1996: 7).

The Constitutional Assembly divided itself into six theme committees, each of which was assisted by a small committee of experts. The whole process went through a 30- to 40-person body called the Constitutional Committee and later its subcommittee, and the end product was eventually adopted by the Constitutional Committee (Van der Westhuizen, 1996; Constitutional Talk, Special Edition, 1996).

Provision was made for the general public as well as organized lobby groups to make oral and written submissions to the Constitutional Assembly. There were almost two million submissions although, in reality, unless the submissions approximated to the ideas of the major political parties, the ANC in particular, they did not influence the final outcome. Notwithstanding this, organized local government was far more influential and active in drawing up the local government chapter than had been the case with the Interim Constitution. This was due to the credibility and legitimacy that local government had acquired after the country's first non-racial local government elections (De Villiers, 1997: 2-3).

The Final Constitution is also, for the most part, less detailed than the Interim Constitution. The latter made provision for a variety of power-sharing clauses valid for the interim period only as part of the historical compromise between the African National Congress (ANC) and the National Party (NP). These power-sharing clauses have largely fallen away in the final phase. The Constitutional Court found in September 1996 that the first text submitted to it by the Constitutional Assembly did not comply fully with constitutional



principles. This included the chapter on local government. The Constitutional Assembly subsequently redrafted the Constitution, and the second text was certified by the Constitutional Court in December 1996. This culminated in the promulgation of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter referred to as the Constitution).

### **6.3. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 108 OF 1996**

The 1996 Constitution, like its 1993 predecessor, makes the Constitution the supreme law of the Republic of South Africa and any law inconsistent with the Constitution is invalid (Section 2). The Bill of Rights forms the cornerstone of the Constitution (Chapter 2). In the Constitution, provision is made for a three-sphere system of government comprised of national, provincial and local spheres which are distinctive, interdependent and interrelated (Section 40). The principle of co-operative governance underpins intergovernmental relations. Section 41 of the Constitution states that all spheres of government must:

- (a) respect the constitutional status, institutions, powers and functions of government in these spheres;
- (b) not assume any powers or functions except those conferred on them in terms of the Constitution;
- (c) exercise their power and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;
- (d) co-operate with one another in mutual trust and good faith; and
- (e) avoid legal proceedings against one another.

This concept of co-operative governance was not included in the Interim Constitution. Although partially borrowed from German experience, it is a *sui generis* attempt to develop South Africa's approach to intergovernmental relationships. The term 'sphere' is meant to indicate a shift towards a less hierarchical system of intergovernmental relations. The Interim Constitution did not significantly depart from the country's historical hierarchical intergovernmental relationships, in terms of which local government was rather tightly circumscribed by national and provincial government.

Parliament consists of the National Assembly and the National Council of Provinces (NCOP) (Section 42 of the Constitution). The legislative authority of the national sphere of government is vested in parliament (Section 43 of the Constitution). The directly elected National Assembly considers all national legislation (Section 55 and 73 of the Constitution). The National Council of Provinces (NCOP) is comprised of a single delegation from each province, consisting of ten delegates of whom four are *de facto* rotating delegates (Section 60 of the Constitution). These special delegates can be from the provincial executive or legislative bodies and can ensure that respective provincial concerns are taken into account when considering matters. In practice, the National Council of Provinces' (NCOP's) powers are likely to be restricted to delaying Bills affecting provinces (Section 76 of the Constitution). The National Council of Provinces (NCOP) has replaced the Senate and is intended to play a more focused provincial role than its predecessor.

The legislative authority of a province is vested in the elected provincial legislature. Provinces can pass legislation with regard to any matter within a functional area listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) and other matters assigned to the provinces by national legislation (Section 104 of the Constitution). Schedule 4 matters can be legislated by both parliament and provincial legislatures, with the former authority having an overriding power in certain instances (Section 146 of the Constitution).

The Constitutional Court is the highest court for all constitutional matters and has the power to decide on disputes between organs of state in the national or provincial spheres when these disputes concern the constitutional status, powers and functions of any of these organs of state (Section 167 of the Constitution). The Interim Constitution vested provinces with certain functions (Schedule 6 of the Constitution) which, in practice, because of extensive override mechanisms, were in fact concurrent powers. Certain provinces clamoured for more extensive powers in the Final Constitution, hence the introduction of exclusive Schedule 5 functions. The latter functions are, however, largely not significant in nature.

What is particularly important, is that local government, which was a provincial function in terms of the Interim Constitution, has been promoted to being a sphere of government in its own right. The chapter will address this sphere of government.

### **6.3.1. LOCAL GOVERNMENT**

As with the Interim Constitution, a chapter in the Final Constitution deals with local government. The entire chapter on local government was initially referred back to the Constitutional Assembly by the Constitutional Court on the grounds that the first text was too vague on how it should function. In particular, the Court requested greater detail about differing municipal structures, legislative processes and finances. This was rectified in the second text which was approved by the Constitutional Court.

Section 151 (1) of the Constitution states that the local sphere of government consists of municipalities, which must be established for the whole of the country. Local government is now the generic term for all third-sphere bodies, while the individual structures are referred to as municipalities (replacing the commonly used term of local authorities). Of particular importance are Sections 151(3) and (4) of the Constitution. Section 151(3) states that a municipality has the right to govern, on its own initiative, the local government

affairs of the community it serves subject to national and provincial legislation as provided for in the Constitution. Section 151(4) states that national or provincial government may not compromise or impede a municipality's right or ability to exercise its powers or perform its functions. These clauses indicate a fundamental shift away from the system of provincial control of local government which has characterized South Africa's intergovernmental system since 1910.

This argument can be developed further by examining Section 156(1) of the Constitution, which gives municipalities executive authority and the right to administer the local government assigned to them by national or provincial legislation. Local government has constitutionally guaranteed functions and, although local government may be regulated by the national or the provincial government, this must be done in a way that does not compromise its ability or right to govern.

Section 155(6) of the Constitution states that provinces, by legislative or other methods, must provide for the monitoring and support of local government in the provinces and promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs. Provinces now have to perform a technical support role and improve municipalities' capacity. Monitoring does not imply interventionist powers on the part of the provinces. It indicates a power of oversight, to observe or keep under review. Monitoring should also determine what type of capacity needs to be built. Municipalities will be the primary repositories of legislative and executive authority in relation to local government matters. The national and provincial governments must be considered as secondary repositories in this regard (Gauntlett & Breitenbach, 1997: 41). At least, this was the intention of the Constitution framers although it will probably take a Constitutional Court judgement to provide greater clarity in this regard.

Section 139 of the Constitution deals with provincial supervision of local government. Section 139(1) states that when a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial

executive may intervene by taking any appropriate steps to ensure fulfilment of the obligation. Such steps include issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligation and stating any steps required if it is to meet its obligation, and assuming responsibility for the relevant obligation in that municipality to the extent necessary:

- (a) to maintain essential national standards or meet established minimum standards for the rendering of a service;
- (b) to prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; and
- (c) to maintain economic unity.

However, if a provincial executive intervenes in a municipality in terms of Subsection 1(b):

- (a) the intervention must end unless it is approved by the Cabinet member responsible for local government affairs within 14 days of the intervention;
- (b) notice of the intervention must be tabled in the provincial legislation in the National Council of Provinces within 14 days of their respective first sittings after the intervention began;
- (c) the intervention must end unless it is approved by the Council within 30 days of its first sitting after the intervention began; and
- (d) the Council must review the intervention regularly and make any appropriate recommendations to the Provincial executive.

National legislation may regulate the process established by this section in terms of the emergence clause that deals with the non-performance of local government. There are sufficient checks and balances to ensure that

intervention of this nature will be used sparingly and, when used, will be of short duration in that the specific consent of both the Minister of Provincial Affairs and Constitutional Development (PACD) and the National Council of Provinces (NCOP) (where local government is represented) is required for specific interventions. This provision also makes it difficult for the Inkatha Freedom Party (IFP)-controlled KwaZulu-Natal province and the National Party (NP)-controlled Western Cape province to discipline African National Congress (ANC)-controlled municipalities in their respective provinces, as the National Council of Provinces (NCOP) will be predominantly African National Congress (ANC)-controlled.

A second qualification is that Section 139 of the Constitution is limited to cases where a municipality cannot or does not fulfil an executive obligation in terms of legislation. Section 139 does not, however, apply to cases where the executive obligation derives directly from the Constitution.

A more general limitation of provincial powers is the fact that provinces have a constitutional obligation to support the capacity of local government. If a municipality is unable to fulfil an executive function, a municipality could claim that the province has failed in its constitutional obligation to improve the capacity of local government. The problem here is that provinces themselves are suffering from lack of capacity. Weak leadership and management (in particular financial management), the early retirement of skilled staff (Department of Public Service and Administration: The Provincial Review Report, 1997) and unskilled affirmative action appointees have contributed to a haemorrhaging of provincial capacity.

The Constitutional Court has, in terms of the Constitution, held that provincial governments' powers of supervision, monitoring and support are not insubstantial. According to the Court:

Taken together, these competencies are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer these matters in Part B of Schedule 4 and 5.



This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administration of local government matters (cited in Gauntlett & Breitenbach, 1997: 36).

This is a rather sanguine view of provincial powers over local government, which does not appear to be borne out by early experience of the new Constitution. This experience suggests that municipalities are exercising considerably more powers and functions compared to provinces than was the case hitherto. A final point is that any residual matter regarding local government not dealt with in the Constitution may be prescribed by national or provincial legislation within the framework of national legislation (Constitution of the Republic of South Africa, 1996 (Act 108 of 1996): Section 164).

### **6.3.2. OBJECTIVES AND DEVELOPMENT DUTIES OF MUNICIPALITIES**

This elevated status does not mean that local government has *carte blanche* when deciding local priorities. This is clear from a reading of Sections 152 and 153 of the Constitution. Section 152(1) states that the objectives of local government 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.

Section 152(2) of the Constitution states that a municipality must strive, within its financial and administrative capacity, to achieve the objectives set out in Subsection 1.

Section 153 of the Constitution deals with the development duties of municipalities. It states that a municipality must:

- (a) structure and manage its administrative and budgeting and planning processes, to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial development programmes.

These development provisions must be read in conjunction with Section 95 of the Constitution (which lists the basic values and principles governing public administration). This states that public administration must be development orientated. The role of local government has to shift from the traditional role of local service delivery and administration to local socio-economic development (Fitzgerald *et al.*, 1995). Economic development, in particular, is an important new local government function.

Firstly, reference can also be made to the Development Facilitation Act (DFA) of 1995 (Act 45 of 1995), which lists in detail a set of principles for land development as well as land development objectives (LDO's), including development strategies, to be applied by local government. These LDO's can also include economic development goals (Department of Constitutional Development, 1997a). Secondly, in terms of the amendment to the Local Government Transition Act (LGTA), both Metropolitan Councils (MC's) and Metropolitan Local Councils (MLC's) previously Transitional Metropolitan Substructures (TMS's)) are required to formulate and implement Integrated Development Plans (IDP's). The Metropolitan Council (MC) must formulate and implement a metropolitan Integrated Development Plan (IDP) incorporating metropolitan land use planning, transport planning, infrastructure planning and the promotion of integrated economic development. Metropolitan Local Councils (MLC's) must formulate and implement similar plans at local level in accordance with the metropolitan Integrated Development Plan (IDP).



Furthermore, the constitutional obligations of local government to meet basic needs in terms of Section 153(a) of the Constitution must be seen in the light of the extensive infrastructural backlog. Some four million people have access to untreated water; eight million have minimal sanitation; seventeen million have no electricity and eight million have no formal road access to residential areas (Moosa, 1997a).

Section 153 of the Constitution means that, although local government has constitutionally listed functions, it is, to a certain extent limited in the way it exercises these functions. Local government is already participating in national development programmes, in particular the Reconstruction and Development Programme (RDP) and the Growth, Employment and Redistribution (GEAR) strategy, so Section 153(b) is not a novel innovation. There have been concerns that the tribunals created in terms of the Development Facilitation Act (DFA) could erode the autonomy of municipalities (Centre for Policy Studies, 1996). There are also concerns that new water and electricity legislation could lead to local government losing these functions, along with their sources of revenue, to envisaged statutory single-purpose bodies.

These clauses are, nevertheless, an improvement upon the Interim Constitution, which said little about the purposes of local government except for a rather vague commitment to its making provision for services to persons within its area of jurisdiction (Section 175(2) and (3) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)).

### **6.3.3. ESTABLISHMENT OF MUNICIPALITIES**

The first constitutional text did not deal in any detail with the establishment of municipalities and the different categories thereof and was rejected by the Constitutional Court because it did not provide a framework for the structure of local government. The drafters of the Final Constitution, however, kept this deliberately vague in order to ensure that structures should follow function;



that is, the role and purpose of local government should be established before structures were established (*Mail and Guardian*, September 1996: 13-19 ). The attempt to introduce flexible structures had been influenced by the experience of the Interim Constitution, which made provision for fixed categories of metropolitan, urban and rural local governments (Section 174(2) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)). This had led to numerous demarcation disputes around issues such as the differences between metropolitan and stand-alone urban areas. There were even some rural pockets within metropolitan areas lobbying for separate rural local government structures. There were also demarcation disputes between stand-alone towns and their surrounding rural areas. The listing of these different categories certainly precluded the introduction of the city/surrounding rural hinterland model which had been used in other countries.

The formulators of the Constitution thus formulated a less vague chapter, which nevertheless still provided sufficient flexibility for local government policymakers when it came to the establishment of local structures. Section 155 of the second constitutional text made provision for the following categories of municipalities:

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

Section 155(2) of the Constitution states that national legislation must define the different types of municipality that may be established within each category. This implies that central government must provide a menu of options in each category. This must be read in conjunction with Section

155(3)(a) of the Constitution, which states 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 from both Categories B and C.

Provinces must determine the type of municipalities to be established in the respective areas (Section 155(5) of the Constitution of the Republic of South Africa, 1996 (act 108 of 1996)). They can choose from the menu of options bearing in mind the criteria provided for in national legislation.

Section 245(4) of the Interim Constitution, however, preserves existing local government structures for three years from the date they were elected except in accordance with an Act of parliament further regulating the local government transition process or by way of proclamation in the Provincial Gazette by the premier of a province acting in consultation with the Minister of Provincial Affairs and Constitutional Development.

#### **6.3.4. DEMARCATION OF BOUNDARIES**

The intention of national government was to have a further re-demarcation of boundaries for municipal elections. The argument is that many boundaries were created for elections in the interim period only. The concern of the Minister of Provincial Affairs and Constitutional Development is that there are too many municipalities, many of which are not viable; that the two-tier system in both metropolitan and rural areas has led to a costly, unintelligible and inefficient division of functions and powers, and that there has not been a proper demarcation of boundaries in rural areas (Provincial Affairs and Constitutional Development (PACD), 1997(a): 34).

The Final Constitution states that national legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority (Section 155(3)(b) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)). However, during the interim phase,

these criteria and procedures were laid down in the Local Government Transition Act (LGTA), which guided the demarcation process during this phase. The Interim Constitution did not make any provision in this regard. As has been pointed out, demarcation disputes did, however, delay the holding of elections in both KwaZulu-Natal and the Western Cape provinces. There was a feeling within the Ministry of Provincial Affairs and Constitutional Development that the ability of political parties to manipulate the demarcation process to their advantage should be minimized; in particular the ability of provincial Members of the Executive Committees (MEC's) for Local Government to gerrymander boundaries should be prevented – this, as has been pointed out, had been a major cause of the delaying of the previous elections (Election Task Group, 1996: 67-68). The cost of protracted court cases around demarcation disputes was another concern.

This led to a change in the way members were appointed to provincial demarcation boards via the 1996 amendment to the Local Government Transition Act (LGTA). Previously, demarcation boards had been appointed by the ex-Provincial Administrators (in effect Members of the Executive Committees (MEC's) for Local Government) in conjunction with provincial committees and on the basis of expertise. There was the requirement that the membership should be structured in such a way as to be balanced, representative, non-racial and gender inclusive. There was also no limitation on numbers. In the terms of the 1996 amendment, provision was made for a six-person municipal demarcation board in each province. Two members were to be appointed by the provincial Member of the Executive Committee (MEC) for Local Government, two by the Minister of Provincial Affairs and Constitutional Development, and the remaining two by the relevant provincial municipal organization. In addition, provision was made for a national demarcation board consisting of nine members appointed by the Minister of Provincial Affairs and Constitutional Development. Requirements about expertise and the need for a balanced membership remained in place.

Previously, demarcation board decisions had had to be considered by the Provincial Administrator (the Member of the Executive Committee (MEC) for

Local Government in practice) in conjunction with the provincial committee. If consensus was not reached, the matter went to a Special Electoral Court for decisions. In terms of the Local Government Transition Act (LGTA) amendment, if a Member of the Executive Committee does not act in accordance with the recommendations of the municipal demarcation board, the matter is referred to the national demarcation board for a final decision.

The motivation behind this new method of appointment was to try to ensure that no single politician had the authority to appoint the demarcation board on his or her own. This was intended to facilitate the reaching of (political) consensus in demarcation boards between what, in effect, could be mandated representatives of the different spheres of government. This system was also intended to prevent further conflicts between boards and provincial Members of the Executive Committees that might delay future elections.

There were strong feelings in technical local government circles, which were supported by some legal opinions, that the new system of demarcation boards was unconstitutional. Because members could be appointed by political parties or bodies with a direct interest in the matter, they could not be construed as being independent, as required by the Constitution. In particular, the concern was that municipal and national demarcation boards would become politicised, with members being appointed on the basis of political connections and not expertise. (The criteria in this respect are wide enough to permit political appointments to be made under the guise of technical appointments.) Furthermore, such political appointees could push the mandated positions of their appointing masters.

The Local Government Transition Act Second Amendment Act, 1996 (Act 97 of 1996), also added an extra criterion, "the will of the community". The reason for this is not clear, but this amendment was apparently pushed through by the Portfolio Committee on Constitutional Affairs. This amendment also reduces the powers of the Members of the Executive Committees and increases those of the national Minister of Provincial Affairs and Constitutional Development. The Interim Constitution did not specifically mention



demarcation boards; these were regulated by the Local Government Transition Act (LGTA). The Member of the Executive Committee could appoint members of demarcation boards (although this had to be in conjunction with the provincial committee). A Member of the Executive Committee now can only appoint one third of a demarcation board's membership; he or she is obliged to accept their reports otherwise the report goes to a national demarcation board appointed by the Minister of Provincial Affairs and Constitutional Development for a final decision. During the White Paper process, the government was persuaded by the argument that these boards could be unconstitutional and commissioned research on various demarcation options (Cameron, 1997a; 1997b). In early 1998, legislation establishing a new independent national board to replace the system of national and provincial boards was being drafted.

Another important development is the promulgation of the Electoral Commission Act of 1996 (Act 51 of 1996). The Constitution states that the Electoral Commission must manage elections for national, provincial and municipal legislative bodies in accordance with national legislation and ensure that they are fair and free (Section 190). The Electoral Commission Act of 1996 (Act 51 of 1996) gives the Commission the power to demarcate wards in the local sphere of government, or to cause them to be demarcated. This removes the power to demarcate wards from the demarcation boards, although the Commission could delegate this responsibility to boards. These boards are now responsible for the demarcation of outer boundaries and the Commission for the delimitation of wards.

At a theoretical level it could be argued that the function of outer boundary demarcation is to create optimally sized, viable municipalities which can upgrade service capacity and promote economic development, while ward demarcation is primarily about the identification of voting districts for election purposes. Given that demarcation was largely subordinate to election purposes in 1995, it makes sense to elevate it out of the sphere of elections and into an important field in its own right.





In practice, the splitting of functions will require a great deal of co-ordination between the Electoral Commission and the demarcation boards. There is already evidence that this is not happening. The Commission is already identifying voting districts based on census statistics, before outer boundary demarcation has commenced. There is the danger that this could pre-empt, or at least complicate, the work of the demarcation boards. Identifying wards on different criteria from outer boundaries is problematic because the possibility exists that future outer boundary demarcations could cut across such voting districts.

### **6.3.5. TRANSITIONAL ARRANGEMENTS**

Schedule 6 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) deals with transitional arrangements. Certain clauses of the Interim Constitution have been retained. Section 26(1) of Schedule 6 states that, notwithstanding the provisions of Sections 151, 155, 156 and 157 of the new Constitution, the provisions of the Local Government Transition Act (LGTA), as may be amended from time to time by national legislation, consistent with the new Constitution, remain in force until 30 April 1999 or until repealed. The Constitutional Court has interpreted Section 26(1)(c) to mean that the Local Government Transition Act (LGTA) is not subject to Sections 151, 155, 156 and 157 of the 1996 Constitution until 30 April 1999 or until the Local Government Transition Act (LGTA) is repealed.

Another important transitional provision is the section in the Local Government Transition Act Second Amendment Act, 1996 (Act 97 of 1996) which is an exhaustive list of the powers and functions of both Metropolitan Councils (MC's) and Metropolitan Local Councils (MLC's) (Schedules 2a and 2b). The provision not only freezes existing structures, but (unlike the Constitution) details the functions of different types of municipalities. These schedules also deal with certain matters which are not listed in the Constitution. In addition, this amendment makes provision for a relatively strong Metropolitan Council

(MC), although Metropolitan Local Councils (MLC's) did not have insignificant powers before.

However, Metropolitan Councils (MC's) and Metropolitan Local Councils (MLC's) may agree on the reallocation of powers and duties listed in Schedule 2 and 2a, provided that in the reallocation of powers the issues of practicability, technological advisability and economic and financial efficiency are taken into consideration. This provision was included in order to preserve locally negotiated powers agreements (Metropolitan Restructuring Forum (MRF): 1996).

This amendment also changed the designation of lower-tier authorities from Transitional Metropolitan Substructures (TMS's) to Metropolitan Local Councils (MLC's). The subservient status inherent in the Transitional Metropolitan Substructure (TMS) designation had been a source of resentment amongst many local authorities and this name change was intended to reflect a less subservient role. Whether this change was more than symbolic is a moot point, given current government attempts to abolish lower-tier structures. The 1996 amendments to the Local Government Transition Act have also reduced the powers of provincial Members of the Executive Committees (MEC's). The power to make proclamations regulating local government transition has lapsed. Admittedly, these powers had to be exercised in conjunction with the multi-party provincial committee, but this amendment is, nevertheless, a diminution of the Member of the Executive Committee's (MEC's') powers. A Member of the Executive Committee may now amend or repeal proclamations and regulations, but only in concurrence with the Minister of Provincial and Constitutional Development (Section 10 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)).

#### **6.4. THE WHITE PAPER ON LOCAL GOVERNMENT**

The government released the White Paper on Local Government in March 1998. The rationale for the White Paper was that, while a great deal of

attention had been focused on deracializing local government and establishing democratic and non-racial authorities, it was time to start looking at the wide spectrum of policy matters facing local government. The Constitution of 1996 lays down only the broad outlines of local government. The policy details have to be filled in by the White Paper and legislation based on the White Paper (Provincial Affairs and Constitutional Development 1997a: 1-2). A three phase process to develop the new local government policy framework was followed:

- Phase 1: Discussion document – This document provided an overview of the major issues and strategic questions to be answered in policy. This document was released in early 1997 (Provincial Affairs and Constitutional Development 1997a).
- Phase 2: Green Paper – This phase involved extensive research into international and South African experience with reference to the discussion document. This phase also provided certain policy options. The Green Paper was published in October 1997 (Provincial Affairs and Constitutional Development 1997b: 3).
- Phase 3: White Paper – The White Paper of March 1998 attempted to identify the necessary policy choices with regard to the options set out in the Green Paper.

New local government legislation based on the White Paper has been promulgated, being the Local Government Municipal Structures Act, 1998 (Act 117 of 1998).

#### **6.5. LOCAL GOVERNMENT MUNICIPAL STRUCTURES ACT, ACT 117 OF 1998**

The Local Government Municipal Structures Act, 1998 (Act 117 of 1998) was signed by the President on 18 December 1998. The Demarcation Act, 1998



(Act 27 of 1998), becomes effective on the date on which the Local Government Municipal Structures Act, 1998 (Act 117 of 1998) comes into effect.

Chapter 1 of the Local Government Municipal Structures Act, 1998 (Act 117 of 1998) provides for:

- a) the establishment of local authorities in accordance with the requirements relating to categories and types of local authorities;
- b) the establishment of criteria for determining the category of local authorities to be established in an area;
- c) the definition of the types of local authorities that may be established within each category;
- d) a division of powers and functions between categories of local authorities;
- e) the regulation of internal systems, the structures and office-bearers of local authorities; and
- f) appropriate electoral systems and matters related thereto.

As the exclusion discretion regarding outer boundaries of local authorities lies with the Demarcation Board, stakeholders should concentrate on ensuring that, firstly, the right category of local authority and, secondly, the right type of local authority is designated for their area.

### **6.5.1. CATEGORIES OF LOCAL AUTHORITIES**

In terms of Section 2 of the Local Government Municipal Structures Act, 1998 (Act 117 of 1998), it is stated that an area must have a single Category A local authority if the area can reasonably be regarded as:



- a) a conurbation featuring:
- (i) areas of high population density;
  - (ii) an intense movement of people, goods and services;
  - (iii) extensive development; and
  - (iv) multiple business districts and industrial areas;
- b) a centre of economic activity with a complex and diverse economy;
- c) a single area for which integrated development planning is desirable; and
- d) having strong interdependent social and economic linkages between its constituent units.

Section 3 requires areas that do not comply with Section 2 to have local authorities from both Categories B and C as described in the Constitution, 1996 (Act 108 of 1996).

The importance hereof is that, once an area complies with the criteria stated in Section 2, it must have a Category A local authority. Category A local authorities are what is commonly referred to as single cities and have exclusive legislative and executive powers (Section 155 of the Constitution, Act 108 of 1996).

Section 4 of the Local Government Municipal Structures Act, 1998 (Act 117 of 1998) empowers the Minister responsible for local government to apply the criteria set out in Section 2 to decide what category local authority an area should have. The Minister may, however, only determine that an area has a Category A local authority after consultation with the MEC for local government in the province concerned, the Demarcation Board, the South African Local Government Association and organised local government in the province. The decision of the Minister must be made public in the Government Gazette.

## 6.6. CO-OPERATIVE GOVERNANCE

The term co-operative governance is a new and recurrent term in the legislation for local government. The concept of co-operative governance is not clear and needs to be developed as the Constitution evolves.

What can be said, is that, firstly, each sphere of government has its own area of competency (distinctiveness), subject to the Constitution, and areas where it must co-operate with one or more other spheres of government (interrelatedness and interdependency). Secondly, the idea of governance is meant to indicate that the government does not run and regulate society on its own. Government has to consult with civil society, which includes labour, business and civics, when making policy (Boraine, 1996: 75-76). A senior African National Congress (ANC) negotiator has stated that co-operative governance reflects the fact that the country cannot afford a political culture of confrontation between different spheres of government (Gordhan, 1996: 10).

The idea of co-operative governance seem to have been drawn from the German system of *Bundestreue* although it has been adapted to South Africa's *sui generis* conditions (Van der Westhuizen, 1996: 22). It is worth examining the German system briefly in this regard. De Villiers (1995: 6) defines *Bundestreue* as the duty of national and regional governments within a federal state to take each other's interests into account in the exercise of their respective responsibilities. Each level of government is, therefore, under an obligation to use its powers in a way that will not be harmful to the other. *Bundestreue* is an unwritten constitutional norm and is not formally part of the Constitution, although it is an inherent part of the substantive constitutional law of the nation. The German Constitutional Court has played a pivotal role in developing *Bundestreue* as a constitutional norm. Nevertheless, the legal basis of *Bundestreue* is disputed and is sometimes unclear (De Villiers, 1995: 9-20). Co-operative governance is, therefore, a somewhat nebulous concept and its essence will inevitably have to be interpreted by the Constitutional Court.



A major difference between Germany and South Africa is that *Bundestreue* refers to a bipartite relationship between the federal and state governments, while in South Africa it is a tripartite relationship involving national, provincial and local spheres. Finally, despite the emphasis on co-operative relationships, the German Constitution's commitment to uniformity of living standards has led to greater centralization, due to the need for such uniform standards (Bulmer, 1991: 104-114). The South African equivalent of uniform living standards is basic needs. Similar calls for uniform basic needs could well lead to greater centralization in South Africa.

## 6.7. CONCLUSION

This chapter has traced the evolution of local government towards becoming a distinctive, interdependent, interrelated sphere in its own right. The second part of the chapter contains a critical analysis of the new local government system. In order to comprehend the evolution of local government, it is important to understand the reasoning behind the empowering of local government.

During the negotiations for the Interim Constitution, the National Party (NP) wanted local government to be an exclusive provincial power. Its strategy was that minority interests, in particular those of whites, could be protected through decentralization to provinces and/or local government. Strong local government with extensive powers and functions was seen as an important check and balance on any future African National Congress (ANC)-controlled government. Historically the African National Congress (ANC) had a more centralist vision of local government. Extensive devolution was seen as a mechanism to protect white privilege and to prevent the essential redistribution needed to ameliorate inequalities caused by apartheid. This led to the Interim Constitution being criticized for including contradictory clauses on local government autonomy. In reality, local government powers did not improve substantially. The hierarchical relationship still persisted.



The Final Constitution has elevated the powers of local government significantly. Yacoob (1996: 41-43) points out that a disparate local government empowerment lobby played a significant role in this regard. This debate cut through the centralist-provincialist dispute, with both sides pushing for more powers and local government only playing a role with respect to which level of government would control it. Within the National Party (NP), there was still a pro-local government lobby and a strong pro-local government lobby also developed within the African National Congress (ANC). This was supported by strong technical submissions from organised local government. Yacoob (1996: 41-43) states that the local government chapter was a settlement, not between political parties, but between different tendencies which existed in all parties. While the local government lobby did not achieve everything it had hoped for, it certainly won major concessions for the local sphere of government.

The reasons for the promotion of local government were that, firstly, the African National Congresses (ANC's) fear of white-controlled local authorities becoming the last bulwarks of apartheid had largely dissipated with the creation of non-racial boundaries and an African National Congress victory in most of the major municipalities. The African National Congress local government lobby grew accordingly.

A second reason for local government's greater status was the growing view that cities must be seen not only as service-delivery agents, but rather as dynamic areas for economic, social and cultural development. Cities are seen as arenas for economic competition in the global marketplace. Cities are where the majority of the country's Gross Domestic Product (GDP) is generated, and they need to be globally competitive in order to prosper. The arguments are that, given this critical need, cities should largely be masters of their own destiny and should not be shackled by unnecessary provincial controls that may reduce competitiveness.

The third reason was that strong local government was seen as a way of empowering people. The Constitution lays heavy emphasis on participatory





governance, namely involving civil society in decision-making. It was felt that local government, being the sphere of government closest to the person in the street, was ideally situated to perform this role.

The fourth reason was a political one. The African National Congress (ANC) had failed to win two of the provinces, namely KwaZulu-Natal (won by the Inkatha Freedom Party (IFP)) and the Western Cape (won by the National Party (NP)). The African National Congress (ANC's) support was significantly higher in metropolitan areas and large towns in these provinces, as evidenced by the fact that they won all the major cities/towns in KwaZulu-Natal as well as the Cape Town Municipality in the Western Cape. By upgrading local government at the expense of provinces, they could strengthen their support at the expense of the opposition-controlled provinces. Yet this step was not only about the behaviour of opposition provincial politicians. There was also concern that the African National Congress (ANC) provincial Members of the Executive Committees (MEC's) of Local Governments were adopting actions inimical to local government, such as the gerrymandering of the Transitional Metropolitan Substructure (TMS's) boundaries.

A final reason was the administrative capacity of provinces. Some provinces are entirely new creations; some are struggling to amalgamate former homeland administrations with parts of the old white provincial administrations. Voluntary retirement programmes have further eroded the skill base, while affirmative action appointees are, in many cases, still trying to find their feet (Department of Public Service and Administration: The Provincial Review Report, 1997). Local government, despite going through a disruptive reorganization in some cases, is still generally in a better state than provincial administrations. Many municipalities have not offered voluntary retrenchment programmes, so there has not been the same haemorrhaging of skills. The current capacity of provinces was taken into account when drawing up the Constitution.

Credit must be given to the architects of the new local government system. The idea of enabling local government is a noble one. However, doubt must

be expressed about the ability of local government to perform its new constitutional role.

The crucial problem, hinges on the ability of local government to deliver co-operative governance within the complex categorization of local government for the final dispensation. The following chapters will evaluate the adaptation and practical problems experienced by local government in the City of Tshwane, referred to as the Greater Pretoria Area up to the interim phase, in the evolution of local government since proclamation of the Local Government Transition Act, 1993 (Act 209 of 1993).