

## **The process of transformation and restructuring of local government**

### **5.1 Introduction**

For most of South Africa's history the final control and management of local authorities has fallen under higher government institutions. Apart from this lack of proper autonomy, local governments were also racially divided between white local authorities and "non-white" local authorities. This policy ultimately resulted in a political uprising and drive towards a radical transformation. As was explained in the previous chapter, many attempts were made during the apartheid system to construct separate local governments for different racial groups. These various systems could not be sustained, however, and the total local government system fell apart. After the positive outcome of a referendum held in 1989, in which white voters voted overwhelmingly in favour of political and constitutional reforms, the restructuring and democratisation process of the whole country was fully set in motion. This process also set the scene for the restructuring and transformation of local governments throughout the country.

The initial process of transformation was set in motion by the Local Government Negotiating Forum (LGNF) in 1993. The LGNF identified the important goal of local authorities to provide equal and acceptable services to all local communities. It thus called on all local structures to resume and improve services and to establish the principle of one municipality, one tax base.<sup>1</sup>

Despite the general agreement that all local governments and the system as a whole had to be transformed, such transformation would take considerable time and effort and could not be achieved overnight. Furthermore, it would have been impractical and impossible to dismantle the system and institutions that were in place at the

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<sup>1</sup> See Chaskalson et al (2000) 5A-3.

time.<sup>2</sup> Provision therefore had to be made for a gradual and properly planned process of reform.<sup>3</sup> In order to achieve this progressive restructuring process, the LGNF had reached agreement between all participants on a specific transformation programme. The programme was initiated by agreement in the LGNF on the content of the Local Government Transition Act (LGTA).<sup>4</sup> The main objective of the LGTA was to facilitate local government matters during the transition from the formerly racially based system to a new reformed system of sustainable, uniform and fully democratic local government.<sup>5</sup> From the wording of the Act, three distinct phases of the transition of local governments were identified.<sup>6</sup> While the LGTA had structured the transitional process of local government in the country, it was mostly up to parliament and the Constitutional Assembly, elected under the interim Constitution,<sup>7</sup> to complete and enact the final Constitution of 1996<sup>8</sup> and also to enact all other national legislation that was envisaged in the Constitution. This would then complete the interim phase and enable the final phase to commence.

In light of the above, three important legislative stages could be identified during the restructuring process. The first stage was applicable under the provisions of the LGTA itself. Thereafter, the second stage commenced on 4 February 1997 and was

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<sup>2</sup> It should be remembered that local governments are directed to provide essential services to local residents, and such services could not be suspended while a process of transformation was being implemented.

<sup>3</sup> See Rautenbach and Malherbe (1999) 315-316.

<sup>4</sup> 200 of 1993. See the LGTA as well as the content of the chapter on local government as set out in the interim Constitution of 1993.

<sup>5</sup> The aim of the LGTA can be found in the long title of the Act, which states as follows: "To provide for revised interim measures with a view to promoting the restructuring of local government, and for that purpose to provide for the establishment of Provincial Committees for local government in respect of the various provinces; to provide for the recognition and establishment of forums for negotiating such restructuring of local government; for the exemption of certain local government bodies from certain provisions of the Act; for the establishment of appointed transitional councils in the pre-interim phase; for the establishment of transitional rural local government structures; for the issuing of proclamations by the MECs of the various provinces; for the establishment of Local Government Demarcations Boards in the various provinces; and for the repeal of certain laws; and to provide for matters connected therewith" – the long title was substituted by proclamation no R.65 of 1995 and by s 18(1) of Act 89 of 1995.

<sup>6</sup> These phases were the *pre-interim* phase, which would commence on the date of the commencement of the LGTA itself and end with the commencement of the interim phase; the *interim phase*, which would commence on the day after the elections were held for transitional councils as contemplated in s 9 of the Act and end upon the implementation of final arrangements enacted by a competent legislative authority; and the *final phase*, which would commence on the date of the last local government elections, to be held in terms of the provisions of the Constitution of the Republic of South Africa 1996 and the new national and provincial laws applicable to local government, as mandated by the Constitution. These elections were held during December 2000.

<sup>7</sup> See again the interim Constitution of 1993.

<sup>8</sup> Hereafter referred to as the Constitution.

controlled by the LGTA, the IC and also the FC. The third and final stage was controlled in terms of the provisions of the FC as well as the new national, provincial and even local government laws enacted in accordance with the provisions of the Constitution. Each of these three stages will be referred to in more detail later in this work.

## 5.2 The restructuring of local government under the Local Government

### Transition Act

The LGTA commenced on the 2nd of February 1994, almost two months before the introduction of the IC. As was stated above, the primary role of the Act was to re-integrate and provide the basis for local government structures during the transformation of the previously race-based municipal system.<sup>9</sup> From the outset it is important to remember that the Act was applicable for the entire territory of the Republic of South Africa, which also included the former TBVC states and other Bantustans.<sup>10</sup>

In terms of section 3 of the LGTA, many provincial committees were appointed by the Transitional Executive Committee (TEC) in order to facilitate further discussions and negotiations during the transitional phases. The TEC was again established as a control body over the powers of the former administrators of the provinces.<sup>11</sup> All powers of the provincial administrators could be lawfully exercised only in concurrence with the relevant provincial committee.<sup>12</sup> Any disputes that the parties could

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<sup>9</sup> See also *Gcali No v MEC for Housing of Local Government*, EC 1996 (4) SA 456 (TkS).

<sup>10</sup> See the case of the *ANC v Minister of Local Government and Housing* 1998 (3) SA 1 (CC) where the court held that the restructuring of local government could be effected in terms of the LGTA only and the import thereof was that only the national Parliament would be competent to direct the transformation of local government until the time period identified in s 245(1) had elapsed. The section and the process of transition in local government did not mean that for other purposes the provisions of ch 10 of the Constitution had no effect. The argument that local government established in terms of the LGTA after elections had been held was not local government contemplated by ch 10 was therefore misconceived. See para F-H at 12.

<sup>11</sup> The TEC was established in terms of Act 151 of 1993. Later the reference to administrator was substituted with the MEC responsible for local government in each province. See also the case of *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC).

<sup>12</sup> For more on this refer to the case of *Gardener v East London Transitional Local Council* 1996 (3) SA 99 (E). The background to the case in terms of the Act is that the Greater East London Local Government Negotiating Forum ("the forum") had been established, comprising statutory local government bodies, political parties and other interested organisations. On 4 November 1994 the forum reached agreement ("the agreement") on the establishment of the East London Transitional Local Council (the first respondent). Clause 11(iii) of the agreement provided that the post of town clerk of the Transitional Local Council had to be advertised and filled in accordance with the provisions of the Profession of Town Clerks Act 75 of 1988, and the Municipal Ordinance 20 of 1974 (C). The salary and fringe benefits of the town clerk would be in accordance with directions issued by the Board on Remuneration and Service Benefits of town clerks. Clause 11(iv) stipulated that "until such time as the post of town clerk is filled, the Transitional Local Council shall appoint the town clerk of the former Municipality of East London as acting town clerk and he shall be remunerated on the same basis as he was prior to the establishment of the Transitional Local Council or in accor-

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not resolve themselves were referred to a special Electoral Court for final adjudication.<sup>13</sup>

According to the LGTA, the National Minister, which the Act defined as the Minister for Provincial Affairs and Constitutional Development,<sup>14</sup> was empowered to issue regulations concerning any matter referred to in terms of the Act.<sup>15</sup> However, regulations could be issued only after consultation between the Minister and administrator of a province.

Part IV of the Act contained provisions directed at the pre-interim phase specifically. The goal was to achieve a 50/50 statutory/non-statutory formula for the nomination of members to the various transitional structures that were envisaged by the Act. In compliance herewith, many previously excluded representatives of local communities and other interest groups were for the first time involved in the processes of local government affairs.<sup>16</sup> In general, the different negotiating forums served as vehicles for the creation of transitional local structures which were to function prior to the holding of the first democratic local elections planned for November 1995. Many different functions and powers were afforded to the negotiating forums and if a decision of a forum was taken in compliance with the requirements of the

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dance with the matter prescribed by the Board on Remuneration and Service Benefits of town clerks". The second respondent (the Administrator) exercised the powers vested in him by s 10 of the Act and gave effect to the agreement by Proc 79 of 1994 (EC). The Court held that in terms of clause 11(i) the employees of the disestablished local government bodies were transferred to the service of the first respondent on conditions of service not less favourable than those previously enjoyed and that, since the agreement contained no specific provision regarding the executive officers and other employees of the East London Municipality, it was implicit that they should retain their corresponding positions in the first respondent, that was with the exception of the town clerk whose post had to be advertised and filled in accordance with paras (iii) and (iv) of clause 11. As to (a), the Court held that in terms of s 10(3) of the Act "a proclamation" could provide for the dissolution of any local government body, including the transfer or admission of persons to or in the service of any transitional council, subject to conditions not less favourable than those under which they served and applicable labour law. S 10(3)(i) stipulated further that "a proclamation" could provide for "the protection of the rights and benefits, including the remuneration, allowances and pension benefits, of employees of a local government body, subject to applicable labour law and due consultation between employer and employee bodies". This protection did not extend to the guarantee of the status of any executive officer in any of the affected local government bodies as it would be incompatible with the objects of the Act. The applicant had lost his status of town clerk but his employment was otherwise firmly protected by applicable labour law and, as to his conditions of service (apart from status). This conclusion accorded with the objectives of the Act, viewed in the light of the relevant socio-economic and political considerations which had given rise to the legislation.

<sup>13</sup> See Chaskalson *et al* (1999) 45 A-4.

<sup>14</sup> See the definitions in the Act in s 1. The definition of the term minister was amended in 1995 to refer to the minister of Constitutional Development and Local Government.

<sup>15</sup> See s 12 of the Act.

<sup>16</sup> See the case of *Munisipale Raad van Bainsvlei v Premier of Province of OVS* 1995 (1) SA 772 (OPA).

LGTA, the administrator was bound to adhere to such a decision. If disputes arose between an administrator and a forum they were referred to independent mediation, which was later substituted by a process of arbitration.<sup>17</sup>

Part V of the LGTA was again directed at the interim phase. Transitional structures were now in place and were named as transitional local councils or transitional metropolitan councils in local or metropolitan areas respectively. In every metropolitan area there was an overarching metropolitan council which had to perform specific functions for the whole area and a number of substructures of that metropolitan area, which, in turn had specific functions in that area.<sup>18</sup> The LGTA also specifically defined a metropolitan area as follows:

“Metropolitan area – means any area –

- (a) comprising the areas of jurisdiction of multiple local governments;
- (b) which is densely populated and has an intense movement of people, goods and services within the area;
- (c) which is extensively developed or urbanized and has more than one central business district, industrial area and concentration of employment; and
- (d) which, economically forms a functional unit comprising various smaller units which are interdependent economically and in respect of services.”<sup>19</sup>

The LGTA also established a specific demarcation board for each of the provinces of the country. These demarcation boards had specific functions, namely to investigate and make recommendations regarding the demarcation of any area of a local government.<sup>20</sup> After the consideration of all written representations from the demarcation board and other role players, the administrator/MEC was empowered to delimit specific areas and to predetermine powers or functions through the issuing of proclamations.<sup>21</sup> The Act further provided a broad framework for the first local government elections for the transitional metropolitans, councils and sub-councils. These elec

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<sup>17</sup> See *Town Council of Lichtenburg v Premier of North West Province* 1995 (8) BCLR 959 (B).

<sup>18</sup> See Cloete (1997) 32. The writer refers to the example of Pretoria where four separate councils were established. Firstly there was the Greater Pretoria Metropolitan Council (the Metro Council) and then there were three other substructures known as the Northern Pretoria Metropolitan Substructure (Akasia-Soshanguve), the Central Pretoria Metropolitan Substructure (Pretoria) and the Southern Pretoria Metropolitan substructure (Centurion).

<sup>19</sup> See the definition in s 1 of the LGTA. See also the case of *Fedsure v Greater Johannesburg Metro Council* 1999 (1) SA 374 (CC).

<sup>20</sup> See s 11 of the LGTA.

<sup>21</sup> Refer to s 8 of the LGTA.

tions were scheduled to take place at the end of 1995 and in fact were held during November 1995 and May and June 1996. The administrators/MECs were empowered to make various regulations with reference to the electoral process and procedures, but such regulations had to be consistent with the LGTA and also the provisions of the interim Constitution.<sup>22</sup>

As can be expected of an Act that is aimed at regulating a transitional process, the LGTA was in certain instances unclear and imprecise. To address these shortcomings the Act was amended in 1994 in order to empower the president of the country to further amend the Act by specific proclamations.<sup>23</sup> Various proclamations were indeed issued in terms of this amendment;<sup>24</sup> however some of them were challenged by the Western Cape provincial government and were found to be unconstitutional.<sup>25</sup>

Apart from the abovementioned proclamations the LGTA was amended a further four times during 1995 until 1996.<sup>26</sup> The Second Amendment Act of 1995 was directed to create the basic framework for rural local government, which was at the time not properly addressed. With the Second Amendment Act of 1996, a new Part VI A was inserted in the LGTA to deal with post-electoral aspects, to repeal the Local Government Demarcation Boards and to substitute the term "Administrator" with the term "Member of the Executive Council (MEC)". Principles of development and co-operative government were also introduced which served to bring the role of local governments within the ambit of the requirements of the FC.<sup>27</sup> Many extensive changes were also included in section 10 of the Act.<sup>28</sup>

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<sup>22</sup> See, eg, *Democratic Party v Miller No 1997 (2) BCLR 223 (D)*; *Tumisi v ANC 1997 (2) SA 741 (O)*; *O'Meara No v Padayachi 1997 (2) BCLR 258 (D)*; *Frans v Munisipaliteit van Groot Brak 1998 (2) SA 770 (C)* en *De Villiers v Munisipaliteit van Beaufort-Wes 1998 (9) BCLR 1060 (C)*.

<sup>23</sup> See s 16A of the LGTA Amendment Act 34 of 1994.

<sup>24</sup> See Proclamations nos R35, R54, R58, R59 and R65 of 1995.

<sup>25</sup> See *Executive Council of the Western Cape supra* fn 11.

<sup>26</sup> See the LGTA Amendment Act 61 of 1995; the LGTA Second Amendment Act 89 of 1995; the LGTA Amendment Act 12 of 1996 and the LGTA Amendment Act 97 of 1996.

<sup>27</sup> Note that the "final" Constitution was only in draft form at the time.

<sup>28</sup> These included three objects of metro councils, namely to promote integrated economic development, equitable redistribution of resources and the equitable delivery of services; to alter municipal jurisdictions and names and the recognition of organisations representing the majority interests in municipalities on both national and provincial levels. These organisations were the forerunners of so-called organised local government, the establishment of national and provincial demarcation boards and finally the introduction of co-operation between local governments and other spheres of government and horizontal co-operation between municipalities *inter se*. See also Chaskalson *et al* (1999) 5A 13.



### 5.3 The role and impact of the interim Constitution on the transition process

The interim Constitution came into effect after the commencement of the LGTA in April 1994. The IC required that the transitional phases of the restructuring of local government had to be done in terms of the LGTA.<sup>29</sup> According to the amended section 245(2) of the IC, provision was made that the post-election restructuring of local governments was to be affected in terms of the principles set out in chapter 10 of the IC specifically, and the whole of the IC and LGTA in general. On a broad reading of sections 245(1) and (2) of the IC, the enforcement of chapter 10 of the IC could be excluded from the transitional restructuring process until the first elections within local government were held. This did not mean exclusion of the Constitution until the end of the overall transitional process, however, as this would have excluded the IC from the restructuring process for its entire existence.<sup>30</sup> After commencement of the IC, some uncertainty existed about the status of the LGTA. Some people held the view that the LGTA was indeed incorporated in the text of the IC. The court clarified the position in two cases, however, and clearly distinguished between the IC and the LGTA.<sup>31</sup>

A close investigation of chapter 10 of the IC reveals that the chapter was written very basically and contains many vague and uncertain provisions. Notwithstanding its uncertainties, the inclusion of chapter 10 in the IC had a profound effect and provided local government with constitutional recognition and a range of original powers.<sup>32</sup> Thus for the first time in South African constitutional history local government was recognised as an autonomous part of the overall governmental structure, with its own powers, functions and constitutional importance. The IC further required that the powers, functions and structure of local government had to be determined by law.<sup>33</sup>

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<sup>29</sup> See interim Constitution s 245 and also the Constitution of Republic of South Africa Second Amendment Act 44 of 1995. Refer also *Premier of KwaZulu v President of the RSA* 1996 (1) SA 769 (CC).

<sup>30</sup> Refer to Chaskalson *et al* (1999) 5A/15 fn 2. See also *Beukes v Krugersdorp* 1996 (3) SA 467 (W); *ANC v Minister of Local Government and Housing* 1998 (3) SA 1 (CC) and *Executive Council of Western Cape* *supra* fn 11.

<sup>31</sup> In *Executive Council of the Western Cape*, the court regarded the operation of the interim Constitution ch 10 as constitutionally delayed, rather than the LGTA being incorporated in the interim Constitution itself. Later in *In re: Certification of the Constitution of RSA* 1996 (4) SA 744 (CC) the Constitutional Court again confirmed that the interim Constitution did not incorporate the LGTA or any portion thereof.

<sup>32</sup> This recognition and entrenchment as part of the highest law of the state was later confirmed in *Fedsure v Greater Johannesburg Metropolitan Council* *supra* fn 19.

<sup>33</sup> See the interim Constitution s 174.

Even financial powers were delegated to local authorities, as long as such powers were exercised in terms of a uniform structure for each municipal area.<sup>34</sup> Lastly, the IC also confirmed the commitment to establish democratic institutions at local government level and also to include traditional authorities in such processes.<sup>35</sup>

#### **5.4 The importance of the 34 constitutional principles included in the interim Constitution and the certification process of the final Constitution**

It was a unique feature of South Africa's new constitutional dispensation that the FC of the Republic had to be certified by the Constitutional Court for compliance with all the constitutional principles set out in the IC. Many of these constitutional principles were very important to the new local government structure that had to be established. Some of the constitutional principles that were applicable to local government can be summarised as follows:

- The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.<sup>36</sup>
- Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in chapter 3 of the IC. The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.<sup>37</sup>
- The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.<sup>38</sup>
- The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that

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<sup>34</sup> The different financial powers of local governments were often the cause of legal disputes. See, eg, *Beukes v Krugersdorp Local Council supra* fn 30; *Frans v Municipality of Groot Brak supra* fn 22; *East London Transitional Local Council v Tax Payers Action Organisation* 1998 (10) BCLR 1221 (E); *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) and *Fedsure Life Association v Greater Johannesburg Metro Council supra* fn 19.

<sup>35</sup> See *DP v Miller No supra* fn 22; *ANC v Minister of Local Government supra* fn 30.

<sup>36</sup> See the interim Constitution CP I in Sch 4.

<sup>37</sup> See the interim Constitution CP II and III.

<sup>38</sup> CP IV.



have as their object the amelioration of the conditions of the disadvantageded, including those disadvantageded on the grounds race, colour or gender.<sup>39</sup>

- There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.<sup>40</sup>
- There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll and, in general, proportional representation. Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government. Formal legislative procedures shall be adhered to by legislative organs at all levels of government.<sup>41</sup>
- The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.<sup>42</sup>
- Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy. Government shall be structured at national, provincial and local levels. At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.<sup>43</sup>
- Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.<sup>44</sup>
- A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features

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<sup>39</sup> CP V.

<sup>40</sup> CP VI.

<sup>41</sup> See CP VIII, IX and X.

<sup>42</sup> CP XIII.

<sup>43</sup> See CP XIV, XVI and XVIII.

<sup>44</sup> See CP XX.

of local government shall be set out in parliamentary statutes or in provincial legislation or in both.<sup>45</sup>

- The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.<sup>46</sup>
- Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.<sup>47</sup>

In the first certification judgement,<sup>48</sup> the Constitutional Court refused to certify the first submitted text of the FC because the text did not comply with all of the above-mentioned constitutional principles. Some of the reasons for non-compliance were specifically related to local government matters. In this regard the Constitutional Court concluded as follows:

- Chapter 7 of the new text failed to comply with CP XXIV in that it did not provide a framework for the structures of local government, with CP XXV in that it did not provide for appropriate fiscal powers and functions for local government, and with CP X in that it did not provide for formal legislative procedures to be adhered to by legislatures at local government level.
- Section 229 failed to comply with CP XXV in that it did not provide for appropriate fiscal powers and functions for different categories of local government.
- As to the provisions relating to the powers and functions of the provinces, the text failed to comply with CP XVIII.2 in that such powers and functions<sup>49</sup> were substantially less than and inferior to the powers and functions of the provinces under the IC.<sup>50</sup> As to the powers and functions of the provinces, which were substantially diminished in the text, the court stated the following:
  - (a) The new text did not comply with CP XXIV, CP X and CP XXV. At the very least CP XXIV necessitated the setting out in the new text of the different categories of local governments that could be established by the provinces

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<sup>45</sup> CP XXIV.

<sup>46</sup> CP XXV.

<sup>47</sup> CP XXVII.

<sup>48</sup> *In re Certification of the Constitution of the RSA 1996 supra* fn 31.

<sup>49</sup> Specifically with regard to local government matters.

<sup>50</sup> Refer to para 482 at 910-911.

and a framework for their structures. In the new text, the only type of local government and local government structure referred to was the municipality, which was insufficient to comply with the CP. In addition, a structural framework should indicate the formal legislative procedures demanded by CP X that have to be followed by a local government structure. The failure to make provision for appropriate fiscal powers and functions in respect of the different categories of local government was in breach of CP XXV.<sup>51</sup>

- (b) As to the Local Government Transition Act,<sup>52</sup> the effect of the LGTA on the powers and functions of the provinces in respect of local government in the IC had to be ignored for the purpose of the certification exercise. The transitional provisions of the IC were not relevant to this exercise.<sup>53</sup>
- (c) As to the relevant provisions of the IC and the new text, while local government structures were given more autonomy in the new text than they were given in the IC, it had to be borne in mind that the IC contemplated that local government would be autonomous, though it did not delineate the boundaries of such autonomy as clearly as the new text. Whereas in the IC the potential concurrency of powers in parliament and provincial legislatures was in respect of the whole field of local government, in terms of the new text power this would be allocated to specific areas of competence. It was in this process that the local authorities were afforded greater autonomy at the expense of both parliament and provincial legislatures. There was a corresponding diminution of the powers in respect of local government with regard to both national and provincial legislatures. CP XVIII.2 related only to the diminution of provincial powers and functions and not of those of parliament.<sup>54</sup>
- (d) As to the source and ambit of provincial powers and functions, section 155 placed a substantial constraint upon the general provisions which vested legislative authority in the provincial legislatures. Section 155 had the consequence that the ambit of provincial powers and functions in respect of local government was largely confined to the supervision, monitoring and support of municipalities. What the new text sought to realise was a structure for local

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<sup>51</sup> See paras 299-302 at 861A-H.

<sup>52</sup> 209 of 1993.

<sup>53</sup> See paras 357-358 at 876F-877A/B.

<sup>54</sup> Par 364 at 879B-E.

government that revealed a concern for the autonomy and integrity of local government and a desire to prescribe a hands-off relationship between local government and other levels of government on one hand and a need to acknowledge the requirement that higher levels of government monitored local government functioning and could intervene where such functioning was deficient or defective in a manner that compromised this autonomy on the other.<sup>55</sup>

- (e) Under the IC, the provincial government could have assumed powers and functions beyond the areas of supervision, support and monitoring of local government. The extent of such powers afforded to the provinces in the new text was substantially less. Under the new text the provinces could not assume powers outside of these areas or certainly could not assume them to the same extent permissible under the IC. Accordingly, there had been a diminution of provincial powers and functions in some areas.<sup>56</sup>
- (f) As Schedule 6 of the IC granted provinces a broad functional area of legislative competence, the new text detailed specific functional areas in relation to local government in schedules 4 and 5. Notwithstanding that the lists of local government matters in Part B of Schedules 4 and 5 were extensive, it had to be recognised that the enumerated list approach had to be more restrictive than a loosely defined area of competence to some extent. This meant that the new text attenuated the manner in which the legislative powers was exercised and to that extent diminished provincial powers.<sup>57</sup>
- (g) To the extent that provincial legislative powers had been diminished or increased, executive powers of the provinces were also diminished or increased. This followed since both the IC and new text provided that a province had executive authority over all matters in respect of which it had exercised its legislative competence.<sup>58</sup>
- (h) As to the powers of national legislature and executive to regulate and control the exercise of provincial powers regarding local government matters set out in sections 139, 155, 159, 160(3), 161, 163 and 164, it precluded or circum-

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<sup>55</sup> See paras 366, 367, 371, 373 at 879-882.

<sup>56</sup> Par 374 at 882E-G.

<sup>57</sup> See paras 375-377 at 882-883.

<sup>58</sup> Par 379 at 883-884.

scribed provincial legislative competence and as such diminished provincial legislative and executive powers and functions.<sup>59</sup>

In light of the objections the court refused to certify the text of the FC submitted for certification. In accordance with the procedures set out in the IC, the Constitutional Assembly redrafted the FC and later resubmitted the text for certification. The second time round the court found the revised text to comply with the constitutional principles of the IC and thus certified and approved the FC. The FC came into effect on 4 February 1997.<sup>60</sup>

Notwithstanding the enactment of the FC and its specific requirements regarding local government,<sup>61</sup> the provisions of the LGTA as amended had to remain in force until 30 April 1999 or until the Act had been repealed by new legislation, whichever occurred first.<sup>62</sup> The intention was thus to maintain the transitional arrangements of the LGTA and the IC until such time as parliament had passed new legislation to give effect to the provisions/requirements set out in chapter 7 of the FC and until provincial and local governments had completed the new scheme by enacting provincial laws and municipal by-laws to regulate local conditions.

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<sup>59</sup> Para 379 at 883-884.

<sup>60</sup> See *In re: Certification of the amended text of the Constitution of the RSA, 1996, 1997 (2) SA 97 (CC)*. The court held *inter alia* that a number of the grounds for non-certification in the first certification judgment had clearly been eliminated in the amended text (AT). There was accordingly no longer any sustainable ground for objection to the constitutional provisions relating to the legislative procedures of local government. Furthermore that ch 7 of the amended text dealing with local government complied with CP XXIV (requiring a framework for the structures of local government), CP XXV (requiring provision for appropriate fiscal powers and functions in respect of different categories of local government) and CP X (requiring provision for formal legislative procedures to be adhered to by legislatures at local government level), and that in terms of CP XXIV the Constitution had to provide a "framework for local government powers, functions and structures", while the details of the local government system were a matter for legislation. See p 127-130.

<sup>61</sup> See the Constitution ch 7.

<sup>62</sup> The Constitution Item 26 of Sch 6. See also the second certification judgment *supra* fn 60 where the court held that item 26(1)(a) of Sch 6, which preserved certain sections of the LGTA 209 of 1993 from repeal until 30 April 1999, complied with CP IV (constitutional supremacy). The item did not immunise the LGTA from constitutional review. The Act remained subject to constitutional review, but was not subject to the framework provisions of ss 151, 155, 156 and 157 until 30 April 1999. All other provisions of the amended constitutional text applied to it, and any amendment of its provisions had to be consistent with the AT. The item was a transitional provision designed to enable an orderly transition to be made from the existing system of local government to a system which conformed with the requirements of the AT. It was implicit in CP XXIV that this could be done. There was nothing in the language of CP XXIV that required the framework provisions to come into force immediately. On the contrary, the CP contemplated that legislation would be needed to make provision for the comprehensive powers, functions and other features of local government that would be required. The drafting and implementation of such legislation were likely to present difficulties and to require time. A decision as to the period of grace allowed for local government transition was within the authority of the Constitutional Assembly. In view of the complexities of a

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The FC supported the abovementioned position by confirming that all laws that were in place when the new Constitution took effect would continue to be in force subject to any amendment or repeal and subject to consistency with the new Constitution. It was further confirmed that old-order legislation that continued in force:

- (a) did not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have wider application and
- (b) continued to be administered by the authorities that had administered it when the new Constitution took effect, subject to the new Constitution.<sup>63</sup>

### **5.5 The impact of the final Constitution and the commencement of the new local government legal dispensation**

It is evident from the background information provided above that local government has been undergoing profound changes since 1994. These changes were regulated mostly in terms of the LGTA and, to a lesser degree, in terms of the IC. The final phase of the transition process commenced on 5 December 2000 with the general elections that were held on local government level according to the requirements of the FC and new legislative framework mandated by that Constitution.<sup>64</sup> The vision and framework of new local government systems as set out in the FC had originally been established by the White Paper on Local Government, which had served as the founding platform of the restructuring of local government that had to follow. It was important that the new system of local authorities would be able to ensure service delivery, the eradication of poverty and the improvement of social and economic living conditions for all. The FC and new local government laws that were enacted in terms of the Constitution now form the new building blocks of a post-transitional local government system in South Africa. It should be emphasised, however, that at the time of the writing of this work, not all newly proposed local government laws have been enacted, as was authorised by the FC.

Although the transition process has entered into its final phase, the final restructuring process has not been finalised yet, and it is envisaged that this restructuring

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transition to a new order, it could not be said that the period until April 1999 was unreasonable or that the Constitutional Assembly had exceeded its authority in fixing this period.

<sup>63</sup> See the Constitution Item 2(1) and (2) of Sch 6.

<sup>64</sup> It should again be emphasised that the Constitution only provided the vision and basic framework for the new system of developmental local government, and that such vision and structure had to be completed by various national and provincial laws.



process will be a continuous process over many years to come.<sup>65</sup> The final system of a restructured local sphere of government is thus to be founded mainly on the two following fundamentals:

- (a) to provide new local governance that is directed at working with all local residents and communal interests in order to establish sustainable mechanisms to fulfil needs and improve overall quality of life
- (b) to find and maintain solutions for the acceleration and continuous provision of essential services.

The newly transformed local sphere of government in a post constitutional dispensation in South Africa is directed at achieving the following goals and objectives:

- to establish and maintain an effective system and structure
- to enhance service delivery and development
- to ensure representation, participation and accountability
- to maintain high professional administrations
- to ensure and provide effective political leadership and
- to ensure financial support and sustainability.

These goals and objectives mentioned above have been incorporated into the final text of the Constitution<sup>66</sup> and can be achieved only through proper restructuring. In order to adhere to and achieve the constitutionally required objectives and duties, the restructuring/transformation process essentially focused on the following aspects:

- (a) to establish a new institutional framework
- (b) to create newly demarcated municipal jurisdictions and establishments and
- (c) to formulate and execute new operational requirements for all local governments.<sup>67</sup>

The establishment of new municipalities required a legal process during which all municipalities were renamed, redefined and restructured. This was necessary to recreate a stable legal framework for each local authority. Under the Municipal Structures Act<sup>68</sup> all municipalities were formally re-established through a notice of establishment procedure, which was intended to define the structural framework of each

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<sup>65</sup> At the time of writing, many national and provincial laws have not been enacted.

<sup>66</sup> Refer to the Constitution ss 152 and 153.

<sup>67</sup> See the LGIS No 2: Local Government for the 21st century (1999) at 5-8 and 24-28.

<sup>68</sup> 117 of 1998 as amended.

municipality and also to address the transfer of staff and assets.<sup>69</sup> Municipalities also had to be newly demarcated because of the uneven and racially fragmented system of the past. New boundaries were needed to ensure development and sustainability. The main process was finally completed in terms of the Municipal Demarcation Act,<sup>70</sup> and the areas of the 843 former local authorities were re-demarcated and reduced to 284 new local governments. The most important aspects of the demarcation process were laid down in terms of the Local Government: Municipal Structures Act and will be discussed elsewhere.

## 5.6 Conclusion

In retrospect it is safe to say that the restructuring and finalisation of new local government dispensation, which required both national and provincial legislation, was a long and often difficult process. In order for the final process to be successful, all role players such as municipal councillors, officials and local community members had to play their part. Most municipalities all over South Africa were severely constrained by financial difficulties, which was and still is a difficult obstacle in the overall process. All spheres of government must play an active role in ensuring the financial viability and sustainability of municipalities. This can be achieved through the implementation of three distinctive initiatives, namely:

- (a) A drive to improve the financial management of local governments. All municipalities should have a well-balanced budget, strong monetary control measures and must adjust expenditure to revenue income. All revenue sources should be effectively and efficiently utilised and strengthened by a system of political support where the local community is informed and committed to the payment for services rendered.
- (b) Co-ordination and communication within the public financial sphere must be improved. Local governments must be provided with their respective equitable share of national revenue.
- (c) The creditworthiness of municipalities must be developed and strategic investment programmes should be introduced.

In order to achieve success in the restructuring process a so-called Local Government Transformation Programme (LGTP) has been developed by all three spheres

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<sup>69</sup> Thus indicating its boundaries, type, category and powers. See Act 117 of 1998.  
<sup>70</sup> 27 of 1998.

of government. The LGTP has been made up of representatives from local government institutions, provincial governments, national governments, SALGA, the National South African Local Government Bargaining Council (NSALGBC), the National Department of Finance and also some Non-Governmental Organisations (NGOs). Apart from the LGTP, a new local government training system has also been developed with a specific aim at strategic and career-orientated training programmes for councillors and officials alike.<sup>71</sup> Current local government training boards are in the process of being replaced by the Local Government: Sector and Training Authority (LGSETA), which is to be formally established in terms of the Skills Development Act.<sup>72</sup> Again, the LGSETA will have to follow the guidelines for training and qualifications, as is set out in the South African Qualifications Authority Act.<sup>73</sup> The SAQA has introduced standard methods and qualifications for training within the local government sphere.

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<sup>71</sup> See LGIS No 2: Local Government for the 21st century (1999) 27.

<sup>72</sup> 97 of 1998.

<sup>73</sup> 58 of 1995.