

The legal nature and general rights and duties of local government institutions

8.1 Introduction

In the previous chapter the specific status as well as the constitutionally entrenched objects of local government were identified and discussed. It must be remembered that apart from these objects and developmental duties, local governments have a specific legal nature with specific rights and duties that are statutorily confirmed. From earlier discussions it should be evident that the Constitution is the basic framework of the new local government structure and that this framework was to be completed in terms of various national or sometimes provincial legislation. Various pieces of legislation were enacted to complete and fulfil this constitutional requirement.¹ Together with the basic provisions in the Constitution, these Acts provide the core legislative basis of the new local government system in South Africa and should be studied in conjunction with one another. With reference to the specific legal nature and general rights and duties relevant to the local government sphere, the Municipal Systems Act is of importance. Before the sections of the Act are investigated, it is important to look at the specific purpose of the Act. The purpose of the Act is multi-fold and can be summarised as follows:

- to provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities and to ensure universal access to essential services that are affordable to all people

¹ These national Acts are: The Local Government: Municipal Demarcation Act 27 of 1998; the Local Government: Municipal Structures Act 117 of 1998; the Local Government: Municipal Systems Act 32 of 2000; the Local Government: Municipal Electoral Act 27 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003.

- to define the legal nature of a municipality as including the local community within the municipal area that should be working in partnership with the municipality's political and administrative structures.
- to provide for the manner in which municipal powers and functions are exercised and performed
- to provide for community participation in the different processes of municipalities
- to establish a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government
- to provide a framework for local public administration and human resource development
- to empower the poor and to ensure that municipalities put in place service tariffs and credit control policies that take their needs into account by providing a framework for the provision of services, service delivery agreements and service districts
- to provide for credit control and debt collection
- to establish a framework for support, monitoring and standard setting by other spheres of government in order progressively to build local government into an efficient, frontline development agency that is capable of integrating the activities of all spheres of government in order to benefit the overall social and economic upliftment of all communities in harmony with their local natural environment
- to provide for legal matters pertaining to local government as well as for matters incidental thereto.²

As was explained elsewhere, the pre-1993 local government system failed to meet and sustain the basic needs of the majority of South African people. In the new local government dispensation, all municipalities are constitutionally obligated to provide services to all the people and to be fundamentally developmental in orientation. To achieve and fulfil these obligations, local government needs to identify some basic core principles that should provide a

² See long title of the Municipal Systems Act.

clear understanding of what local governments are required to achieve. These core values will help municipalities to move progressively towards the social and economic upliftment of all communities in our country and to succeed in providing basic life sustaining services.³

From the purpose and preamble to the Municipal Systems Act, read within the context of the Constitution, it becomes clear that, apart from the provision of services, all local governments are actively to promote and engage their community's involvement in the affairs concerning their local area. These affairs particularly refer to aspects of planning, service delivery and performance management. The constitutional foundation requires an efficient, effective and transparent local public administration that conforms to the new principles of openness, transparency and effectiveness. These aspects could ensure a financially and economic viable local government system. In the light of these principles it is of importance to establish a strong system of local government that will be capable of exercising and fulfilling its powers and functions and will create a more harmonious interaction between all spheres of government, between local governments *inter se* and between municipalities and their local administrations, political leaders and local communities. To enable and protect local authorities to comply with the abovementioned objectives, the Municipal Systems Act specifically protects and explains not only the legal nature of municipalities but also the general rights and duties of municipal councils, of the local community and of the municipal administrations.⁴ Before one investigates these provisions in detail, it is of value to look briefly at the character of local government according to the new legal framework.

8.2 The specific character of local government

In order to understand the legal nature of a local government fully, it is necessary briefly to investigate the basic characteristics of such a sphere of government. Apart from being a constitutionally recognised and protected

³ Reference to the word "progressively" is not unimportant in this context. It indicates that there should be a balance between financial and administrative capacity of a local government and its specific programmes of upliftment. The provision of all basic services is not attainable at once and is strongly linked to available resources, especially financial resources.

⁴ See the Municipal Structures Act ss 4, 5 and 6.

sphere of government, a municipality also has the following general characteristics:⁵

- It is a public institution.⁶
- It functions and performs its powers under the direction and control of an elected municipal council⁷
- It is a corporate body with legal personality, which exists separately and independently from the persons who head the municipal council.
- It is created to give the residents/local community of the area a say in the local government affairs that affect them. In this regard it is important to note that the Municipal Systems Act specifically distinguishes between the terms “local community”, “ratepayer” and “resident”.⁸
- It is vested with specific powers and functions.⁹
- It is also an institution/sphere of government that is constitutionally obligated to be a democratic entity.¹⁰

With reference to the mentioned characteristics the Systems Act then goes further and explains the legal nature of municipalities in specific terms.

⁵ See Cloete (1997) 46.

⁶ According to the Municipal Systems Act a municipality is an entity as is described in s 2 of the Act. Refer also s 1 definitions.

⁷ The Systems Act defines political structure in relation to a municipality as the council of the municipality or any committee or other structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act. See s 1 of Municipal Systems Act.

⁸ According to the Act s 1 *a local community or community*, in relation to a municipality means that body of persons comprising (a) residents of the municipality; (b) the ratepayers of the municipality; (c) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality; and (d) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality. The Act also states that local community includes, more specifically, the poor and other disadvantaged sections of such body of persons. This inclusion is somewhat unnecessary, as such people will automatically be included in the abovementioned categories. To argue that the poor or disadvantage groups in a specific community should be afforded stronger protection or should be given more emphasis than other people or organisations in that area is unfounded and could be contrary to the equality provision in the Constitution; a *ratepayer* in relation to a municipality means a person who is liable to the municipality for the payment of (a) rates on property in the municipality; (b) any other tax, duty or levy imposed by the municipality; or (c) fees for services provided either by the municipality or in terms of a service delivery agreement; lastly a *resident* means a person who is ordinarily a resident in the municipality.

⁹ The provision and entrenchment of specific powers and functions is constitutionally protected and will be discussed elsewhere. See the Constitution s 156.

¹⁰ See the Constitution ss 1, 40, 41 and 152(1)(a).

8.3 The legal nature of a municipality

The legal nature of a municipality is explained in terms of the Municipal Systems Act as follows:¹¹

- A municipality is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act.¹² The reference to the word “state” in this regard is often the basis of uncertainty, as the term “state” is not always clearly defined. However, two decisions are of importance in this regard. In the case of *Greater Johannesburg TMC v Eskom*¹³ the court held that the expression “the state” as used in section 24 of the Eskom Act¹⁴ was not limited to central and provincial government but covered the state in all of its manifestations, including bodies such as regional service councils and transitional metropolitan councils.¹⁵ In the case of *Mateis v Ngwathe Plaaslike Munisipaliteit*,¹⁶ where a judgment had been obtained against a municipality and execution steps were taken, the court held that in terms of the State Liability Act¹⁷ the concept “state” was an amorphous juristic-political concept and had no fixed, general meaning in legislation. The meaning of the word “state” thus depended on every specific piece of legislation. For purposes of the State Liability Act, the word “state” did not include a municipality, and municipalities were not protected against liabilities to third parties.¹⁸
- A municipality consists of (i) the political structures and administration of the municipality; and (ii) the local community of the municipality.¹⁹
- A municipality functions in its area in accordance with the political, statutory and other relationships between its political structures, political office bearers and administration and its community.²⁰

¹¹ See the Municipal Systems Act s 2.

¹² 27 of 1998. Organs of state are defined in the Constitution s 239. Reference should also be made to the Constitution s 151(2) which confirms that the executive and legislative authority of a municipality is vested in its Municipal Council.

¹³ 2000 (1) SA 866 (SCA).

¹⁴ 40 of 1987.

¹⁵ See paras 18, 22 and 23 at 877-879.

¹⁶ 2003 (4) SA 361 (SCA).

¹⁷ 20 of 1957.

¹⁸ Paras 7-9 at 367-368.

¹⁹ The constitutional objective of community involvement/public participation is specifically incorporated.

- A municipality has a separate legal personality which excludes liability on the part of its community for the actions of the municipality. This confirmation of the legal personality of a municipality allows a municipality to sue or be sued by other natural or legal persons. It is also important to note that although liability on the part of the local community for the actions of a municipality is excluded, such exclusion has not been given to either the political structures or administration component of a municipality.²¹

A clear understanding of the legal nature of local authorities is thus of great importance. It not only explains the basic composition of a municipality but also provides for significant responsibilities in terms of the political and administrative structures. Confirmation of these responsibilities is again in compliance with the constitutional foundation of a government based on the values of accountability, responsiveness and openness.²² The extent of such political and administrative responsibility for the actions of local authorities will be discussed elsewhere.

8.3.1 General rights and duties of a local government

The Municipal Systems Act specifically provides for various rights and duties that are vested in the municipal council, the local community or the municipal administration.²³ It is important, however, to distinguish between rights and duties on one hand and powers and functions on the other. The Constitution specifically refers to the powers and functions of municipalities,²⁴ but provides no direct reference to the rights and duties of municipalities. However, these rights and duties are incorporated in national legislation. This is explained below.

²⁰ The political dimension of local government as being part of the government structure in general must never be ignored. The various political interactions and tensions play a major role in local government affairs and must not be underestimated. As such, the political structures represent the local interests within each municipal council.

²¹ This clearly indicates that the drafters of the legislation did not intend to excuse the political or administrative components of local governments from liability and responsibility for actions of the municipality. If a political or administrative structure of a municipality has caused harm/damages to that local authority, they could be held responsible and liable for such actions or decisions.

²² See the Constitution s 1.

²³ See the Municipal Systems Act ss 4, 5 and 6.

²⁴ See the Constitution s 156.

8.3.2 Rights and duties of municipal councils

According to the Municipal Systems Act, a municipal council has the following rights and duties:²⁵

- To govern on its own initiative the local government affairs of the local community.²⁶
- To exercise the municipality's executive and legislative authority and to do so without improper interference.²⁷ Improper interference by the other sphere of gov-

²⁵ See the Act s 4.

²⁶ This seems to be in confirmation of the Constitution s 151(3), which states that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

²⁷ See the Constitution s 151(3). Again the autonomy of local government is protected.

ernment is outlawed.²⁸

- To finance the affairs of the municipality by (i) charging fees for services and (ii) by imposing surcharges on fees, rates on property and, to the extent that municipalities are authorised by national legislation, impose other taxes, levies and duties.²⁹

Apart from these general rights, the Municipal Systems Act also confers certain duties on the council of a municipality. The Act states that the council of a municipality, within the municipality's financial and administrative capacity and after having regard to practical considerations, has the duty to³⁰

- exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community
- provide, without favour or prejudice, democratic and accountable government
- encourage the involvement of the local community
- strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner
- consult the local community about (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and (ii) the available options for service delivery
- give members of the local community equitable access to the municipal services to which they are entitled
- promote and undertake development in the municipality
- promote gender equity in the exercise of the municipality's executive and legislative authority
- promote a safe and healthy environment in the municipality and
- contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

²⁸ What will be interference is not altogether clear and will be interpreted according to the circumstances of each case as well as in context with the broad constitutional framework.

²⁹ These financial rights will be discussed in more detail in the chapter on finances that are to follow later.

³⁰ See the Municipal Systems Act s 4(2).

These duties are in compliance with the broad constitutional obligations and requirements and must be read in conjunction with such sections. Subsection (3) also confirms a municipality's responsibility in the exercise of its executive or legislative authority to respect the rights of citizens and those of other persons that are protected by the Bill of Rights. With reference to the duties of municipalities in relation to their local residents, our courts have already confirmed this. In *Fedsure Life Assurance v Greater Johannesburg TMC*³¹ the court held that there was an important element of trust in the relationship between municipalities and their ratepayers. The ratepayers therefore had a sufficient interest in seeking to impugn those decisions of the respondents impacting on the utilisation of ratepayers' funds which they contended to be unlawful. The appellants therefore had *locus standi* to seek an order against the respondents to set aside the resolutions.³²

A similar view was expressed in *Kempton Park/Tembisa Metropolitan Substructure v Kelder*³³. It was confirmed that in a broad sense there is a fiduciary relationship between a local authority and its ratepayers. Local government should be representative of the inhabitants of its area of jurisdiction, and its actions should be open and transparent. However, private law duties derived from the law of trusts cannot be attributed to a local authority. A local authority owes its existence to the provisions of the Local Government Transition Act³⁴ and the proclamations made in terms thereof, and its powers and duties are conferred by the Constitution (IC), by other statutes and the relevant principles of public and administrative law. Therefore, to impose upon it additional duties in accordance with the principles of private law negates its function as an organ of state and a branch of government.³⁵

8.3.3 Rights and duties of members of local communities

It was explained above that a municipality consists of the political structures, the administration and the community of the municipality. Community participation and involvement in local government matters are thus of

³¹ 1998 (2) SA 1115 (SCA).

³² At 1122-1123.

³³ 2000 (2) SA 980 (SCA).

³⁴ 209 of 1993.

³⁵ See para 15 at 986A-G.

significant importance. Contrary to what is generally accepted, the local community not only has rights with regard to its local authority and can make certain demands of that authority, it has specific statutory duties with which it must comply. In this regard the Municipal Systems Act provides that members of the local community have the right³⁶

- to contribute to the decision-making processes of the municipality and to submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or to the administration of the municipality through mechanisms and in accordance with processes and procedures provided for in the act or other applicable legislation³⁷
- to prompt responses to their written or oral communications, including complaints, to the Municipal Council or to another political structure or political office bearer or the administration of the municipality³⁸
- to be informed of the decisions of the Municipal Council or another political structure or any political office bearer of the municipality that has an effect on their rights, property and reasonable expectations³⁹
- to regulate disclosure of the state of affairs of the municipality, with inclusion of its financial affairs and status⁴⁰
- to demand that the proceedings of the municipal council and those of its committees *must* be open to the public, subject to section 20; conducted impartially and without prejudice and untainted by personal self-interest⁴¹

³⁶ See the Act s 5.

³⁷ This not only confirms public participation in both legislative and executive functions of a municipality but it also indirectly requires a municipality to apply its attention to such recommendations or public comments.

³⁸ Through this protection the local community is ensured of accountable and responsive government and the municipal council is not only committed to comply to public request or complaints but more specifically municipal councillors as political office bearers are required to respond to requests from their local constituencies.

³⁹ This right is of particular importance to all local residents, as many decisions of municipalities will impact on their rights in one way or another. It is further also a drastic departure of the draconian exclusion of information by the previous local government system and if implemented as intended should foster strong, acceptable, open and accountable local government institutions.

⁴⁰ Local community members and ratepayers to a local authority must make use of these rights to ensure a measure of control over the internal political and administrative functions and financial management of their local governments. Even potential investors should satisfy themselves that the local authority in the area in which they consider to invest is in control of its financial and administrative functions.

⁴¹ See the Municipal Systems Act s 5(e).

- to the use and enjoyment of public facilities, including facilities such as parks and recreations facilities which were often in the past reserved for certain groups of people only
- to have access to municipal services which the municipality provides, provided that the duties set out in subsection (2)(b) are complied with.⁴²

Members of a local municipal community have rights not only against their municipality, they also have specific duties. These duties are the following:

- to observe the mechanisms, processes and procedures of the municipality
When exercising their rights
- to pay promptly service fees, surcharges on fees, rates on property and other taxes levies and duties imposed by the municipality, where applicable and subject to section 97(1)(c)
- to respect the municipal rights of other members of the local community
- to allow municipal officials reasonable access to their property for the performance of municipal functions
- to comply with the relevant by-laws of their municipality.

8.3.4 Duties of municipal administrations

Municipal administrations must be seen as part of the public administration in general. In this regard and in compliance with the constitutional obligations toward the public administration in general, the Municipal Systems Act provides for the following:⁴³

- A municipality's administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution.⁴⁴
- The administrations of municipalities are further obligated to ensure and adhere to the following principles:
 - (a) to be responsive to the needs of the local community
 - (b) to facilitate a culture of public service and accountability amongst staff
 - (c) to take measures to prevent corruption

⁴² According to s (2)(b) members of the local community have the duty to pay promptly for service fees, surcharges on fees, rates on property and other taxes, levies and duties that are imposed on them by their municipality.

⁴³ See the Act s 6(1) and (2).

⁴⁴ The Constitution s 195 is part of ch 10, and it provides the basic values and principles that must govern the public administration. S 195 should also be read in conjunction with the Constitution s 1(d), which requires a democratic government founded on *inter alia* the values of accountability, responsiveness and openness.

- (d) to establish clear relationships, and facilitate co-operation and communication, between it and the local community
- (e) to give members of the local community full and accurate information about the level and standard of municipal services they are entitled to receive
- (f) to inform the local community of how the municipality is managed, of the costs involved and the persons in charge.

The rights and duties of municipal councils and the members of their local communities and the duties of the administrations of municipalities are subject to the Constitution as well as to the Municipal Systems Act and other applicable legislation. These rights and duties should therefore not be evaluated in isolation but within the context of the new system of local governance.

8.4 Conclusion

Within the new system of local government, municipalities have been afforded a specific statutory legal nature together with various rights and duties that must be fulfilled. Strong emphasis should also be placed on the fact that the municipalities are not mere political institutions but comprise political, administrative and local community components. Each component has its own rights and duties within that specific sphere of government, and strong interactions and co-ordination between the various components is a *sine qua non* for political stability, community participation, regular payment for services and a committed and effective local administration.

There can be no doubt that the new legal framework which not only explains the legal nature of all municipal authorities but also give statutory protection thereto has significantly advanced the requirements and objectives of the Constitution. Not only does the new legal framework give expression to the structural framework that had to be created, it also furthers values such as accountability and public participation, to mention but two. The nature and legal character of municipal governments are specifically entrenched as unique democratic public institutions with specific powers and functions in specific areas which involve not only political structures but also the local community and the administration of the particular authority. Each of the three distinct components has its own rights and duties which, when combined should result in a more effective and sufficient local sphere of governance. In this regard it is submitted that the entrenched legal nature and divided rights and duties of local government institutions significantly contributes to the system that is envisaged under the Constitution.