

The powers and functions of municipal governments

14.1 Introduction

Within the new constitutional dispensation, local governments are not only recognised as a distinctive and autonomous sphere of government, but are also accorded specific powers and functions that are unique and appropriate to the lowest sphere of government in the state. Similar to the position with regard to national and provincial spheres, local government powers and functions are constitutionally entrenched and protected and cannot unilaterally be taken away by a higher sphere of government without a constitutional amendment.¹ Notwithstanding the fact that LG is constitutionally protected, the powers and functions of municipalities are not absolute and are subject to both constitutional and national legislative requirements.² In essence, there are two broad requirements to which municipal powers and functions are subjected. The first is that municipalities can perform only such powers or functions that are legally permissible for them to perform or exercise. This requires a substantive evaluation of the law – constitutional or otherwise – to determine if a municipal council indeed has a certain power or may exercise a particular function. The second requirement stipulates that if it has been established that a local government indeed has a specific power or may perform a certain function, such power or function must be performed or exercised according to predetermined and procedurally correct legal requirements. This entails a procedural evaluation of the manner in which powers or functions are or were indeed exercised or performed.³

¹ See the Constitution s 156 and Sch 4 and 5 Part B.

² Eg, the Constitution requires that municipal legislative actions must conform with national or provincial legislation. See the Constitution s 156(3). Both national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions as listed in Sch 4 and 5. See also the Constitution s 155(7).

³ Both the substantive and the procedural requirements are mandatory and must be complied with in order for a municipal council to exercise a power or perform a function lawfully.

Before one begins to investigate the various substantive and procedural requirements regarding the powers and functions of municipal councils, it is important to consider a few background principles. In general, all local governments in the new local government structure are obliged to perform their functions and to exercise their powers in such a manner as to achieve their objectives and fulfil their developmental duties.⁴ In essence, the general objectives of local government and the mentioned developmental duties project the basic rationale of local government existence. These objects and duties provide for an overarching set of obligations or sweeping duties that must be achieved, depending on the capacity of municipal councils only. Upon a closer evaluation of the constitutional chapter on local government, one is confronted by other provisions in the Constitution that circumscribe the power and functions of municipalities and thus have a restrictive impact on the fulfilment of the sweeping duties and objectives.⁵ A further and equally important fact is that although local governments have their own powers and functions, they ultimately exercise such powers under the watchful eyes of the national and provincial governments.⁶

Similar to all other aspects regarding local governments, the Constitution provides only a basic foundation regarding the power and functions of municipalities. Both the Municipal Structures Act and the Municipal Systems Act further elaborate on this constitutional foundation. Before the Constitution and other relevant national legislative requirements are evaluated it must be pointed out that municipal powers and functions are divided into two categories: executive and legislative. Simply put, legislative authority is the power to make, amend and repeal rules of law, while executive authority is the power to implement and enforce legislation, to manage the administration and to develop policy. Both legislative and executive authority is distributed between all three spheres of government. Contrary to the position on national and provincial spheres, where legislative and executive authorities are vested in different

⁴ According to the Constitution ss 152(2) and 153(a), all municipalities must strive, within their financial and administrative capacities, to achieve the objectives laid down for local governments in general, and must also structure and manage their administrations, budgeting and planning processes to give priority to the basic needs of their communities.

⁵ Some commentators have argued that this constitutional curtailment of the duties of local governments is an 'unhappy' position, as it suggests a predominantly more administrative role for local governments in contrast with its newly protected and recognised original and distinctive character with accompanying powers and functions. See Chaskalson *et al* (1999) 5A-34.

⁶ See the Constitution s 155(7).

governmental bodies, both executive and legislative authority on the local sphere of government are vested in a municipal council. Only one body is responsible for the proper exercise and performance of municipal legislative and executive authority.⁷ The rationale for only one body to exercise both legislative and executive powers is based on greater effectiveness, quicker decision making and performance of functions, as well as money saving. The biggest negative impact of a municipal council's having both executive and legislative powers is the fact that the built-in checks and balances of one government body over the other is lost. For example, in both the national and provincial spheres the executive authority is responsible to the relevant legislatures for the proper performance of its powers and functions. This is not the case at local government level, where the body that exercises executive powers is also the same body responsible for legislative powers. It is suggested, however, that the negative impact of the loss of internal control over the powers and functions of municipalities could be sufficiently countered by other oversight mechanisms such as the control and supervision of both national and provincial governments over the exercise and performance of municipalities of their powers and functions.⁸ Before one considers the new constitutional framework concerning the powers and functions of local government, one should note that the exercise of municipal powers and functions is not without challenges. Many local governments face certain key issues regarding the exercise and fulfilment of their powers and functions. Some of these key issues are *inter alia* the following:

- Municipalities are facing a rapid increase in their responsibilities as many issues are assigned or delegated to them.
- Functions are often vaguely defined, especially where services are vertically integrated or shared by other spheres.
- Municipalities are often ignored when decisions are taken by the higher spheres of government and mostly lack the required capacity to perform their functions.

Speedy solutions to the abovementioned issues are of critical importance in order to ensure an effective system of municipal performance and constitutional compliance.

⁷ According to the Constitution s 151(2), both the executive and legislative authority of a municipality are vested in the municipal council.

⁸ Again refer to the Constitution s 155(7), which specifically entrenches such power of control and supervision.

14.2 The constitutional basis of municipal powers and functions

In light of the aspects mentioned above, the Constitution of the Republic of South Africa now specifically entrenches specific powers and functions applicable to all municipalities in the state. This position was confirmed in the Constitutional Court in the case of *Fedsure Life Assurance v Greater JHB TMC*.⁹ The court stated that the constitutional status of local government is thus materially different from what it was when Parliament was supreme and when not only the powers but the very existence of local government depended entirely on superior legislatures. Although the detailed powers and functions of local governments have to be determined by laws of a competent authority, this does not mean that the powers they exercise are “delegated” powers and does not prevent the powers from being regarded as “original” and not “delegated”.¹⁰ It should be pointed out that the Constitution addresses aspects of municipal powers and functions in two categories. On one hand the Constitution directly provides for the powers and functions of municipalities, while on the other the Constitution also indirectly incorporates and mandates certain aspects that are also of importance to municipal powers and functions. For clarification purposes, the various direct and indirect requirements will be discussed separately.

14.2.1 *Direct constitutional directives regarding municipal powers and functions*

According to section 156 of the Constitution, municipal powers and functions are now addressed and protected directly in the Constitution. The section states the following:

- (1) A municipality has executive authority in respect of, and has the right to administer
 - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.
- (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
- (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or

⁹ 1999 (1) SA 374 (CC).

¹⁰ See paras 35-39 at 393-394.

provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

- (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if
 - (a) that matter would most effectively be administered locally; and
 - (b) the municipality has the capacity to administer it.
- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

On close evaluation of the text of section 156 one can make several comments. The Constitution starts off by confirming and referring to the executive authority of a municipal government without including legislative authority in the same instance. Some commentators see this confirmation of municipal executive authority as placing more emphasis on the executive authority than on municipal legislative authority. It is argued that the Constitution still echoes something of the previous dispensation, when local governments were mere administrative institutions under the control of predominantly the provincial authorities and when their executive and administrative functions were regarded as more important than their legislative authorities.¹¹ Apart from the constitutional confirmation of municipal executive authority, the Constitution also confirms that all municipalities have the right to administer such executive matters.¹² It is of importance to note that the Constitution distinguishes between executive authority on one hand and the administration of such matters on the other.¹³ On this point, it is of interest to note that in national and provincial spheres of government, legislative authority is often perceived to be of more importance than executive authority. Legislative power is stronger and more important than executive powers because legislative powers entail the creation of new laws or the amendment or

¹¹ See Chaskalson *et al* (1999) 5A-35, where the writer states that the legislative authority is subsidiary to its executive or administrative functions.

¹² The Constitution s 156(1).

¹³ Executive authority has been explained as the power to implement and fulfil legislative requirements and to perform certain related executive functions.

repeal of existing legal rules. To a large extent executive authority is thus subjected to legislative authority unless such executive authority is protected against manipulation by the Constitution. This seems not to be the constitutional intention on local government level, however. It would seem that more emphasis is directed at executive and administrative functioning.

The Constitution also specifically clarifies the matters on which a municipality has executive and administrative authority. Two sources of such authority are identified. The first source is the various local government matters that are listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. These sources indicate a pre-determined list that encapsulates executive and administrative powers and functions, which cannot be reduced or expanded upon without constitutional amendment. It thus provides an exact indication of such powers and functions. The functional areas of municipal executive and administrative authority as determined by the Constitution are the following:

Schedule 4

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART B

The following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Fire fighting services

Local tourism

Municipal airports

Municipal planning

Municipal health services

Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law

Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

Storm water management systems in built-up areas

Trading regulations

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Schedule 5

FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

PART B

The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):

Beaches and amusement facilities

Billboards and the display of advertisements in public places

Cemeteries, funeral parlours and crematoria

Cleansing

Control of public nuisances

Control of undertakings that sell liquor to the public

Facilities for the accommodation, care and burial of animals

Fencing and fences

Licensing of dogs

Licensing and control of undertakings that sell food to the public

Local amenities

Local sport facilities

Markets

Municipal abattoirs

Municipal parks and recreation

Municipal roads

Noise pollution

Pounds

Public places

Refuse removal, refuse dumps and solid waste disposal

Street trading

Street lighting

Traffic and parking

A striking difference between Part B of Schedule 4 and Part B of Schedule 5 of the Constitution is that the matters listed in Part B of Schedule 4 are areas falling under concurrent national and provincial legislative competence. As such, these matters require a degree of intergovernmental cooperation and coordination. All three spheres of government have certain powers relating to such matters. On the other hand, the matters listed in Part B of Schedule 5 are the functions typically associated with local governments. The provincial authorities have exclusive legislative competence over such matters, and national government may not exercise legislative authority over such matters unless constitutionally authorised to do so under its “emergency powers”.¹⁴ One can thus conclude that the matters mentioned in Part B of Schedule 5 require mainly a strong cooperation and coordination between municipalities and their applicable provincial governments.

The second reference to municipal executive and administrative authority is found in section 156(1)(b) of the Constitution. According to this section, municipalities have authority over any matter that is not included in Part B of Schedule 4 or Part B of Schedule 5 of the Constitution and that has been *assigned* to them in terms of national or provincial legislation. The Constitution thus does not cast the powers and functions of municipalities in stone, but allows the two higher spheres of government to assign certain matters to them when appropriate. It is suggested that such assignment can be a general one, for example national legislation assigning a function to all municipalities, or a specific assignment where a function or matter is assigned to only one or a few municipalities either in a province or in the country as a whole. On this issue, the provisions of section 156(4) are specifically important. National and provincial governments are obligated to assign the administration of one or more matters listed in Part A of Schedule 4 or Part A of Schedule 5, which necessarily relates to local government to municipalities. There are two further requirements that must both be met before such an assignment can take place, however. Firstly, the relevant matter must be of a nature that could be most effectively administered locally and, secondly, the municipality concerned must have the capacity to administer

¹⁴ Refer to the Constitution s 44(2).

such matter or matters.¹⁵ Emphasis should also be placed on the fact that any assignment in terms of subsection 156(4) must be done by agreement between the assignor and assignee and is subject to any conditions set out in such an agreement. It thus seems possible for a municipality to agree to such an assignment only if certain conditions, for example financial support, are provided for by the assigning higher sphere of government. The Constitution also protects municipalities against unilateral decisions of higher spheres to assign the administration of matters which municipalities cannot or do not want to perform.¹⁶

A somewhat uncertain aspect in the Constitution is whether subsection 156(4) also affords a municipality executive authority over matters listed in Part A of Schedules 4 and 5 and which have been assigned to it. On one hand the subsection refers only to the administration of such matters and not to the exercise of executive authority related to such matters.¹⁷ A counter argument in this regard is the fact that, apart from matters listed in Part B of Schedules 4 and 5, the Constitution indeed allows for municipal executive authority over any other matter assigned to it by national or provincial legislation.¹⁸ The Constitution further affords a municipality the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. Essentially, this gives municipalities a residual or implied power – either executive or legislative – in order to perform their functions effectively. If Part A matters have been assigned to a municipality, therefore, and the municipality has certain obligations to meet or functions to perform

¹⁵ It is submitted that an independent evaluation of not only the relevant matter but also the capacity of a municipality concerned should be undertaken. All relevant circumstances should be considered carefully before an assignment is concluded. The higher spheres of government must guard against so-called “unfunded mandates”, where the lowest sphere is burdened with the administration of matters for which they do not have the capacity or the financial support. The assignment of functions specifically relates to the principle of decentralisation, which requires that functions should be allocated to the lowest spheres of government, where such functions can be exercised most effectively. For more detail see Rautenbach and Malherbe (1999) 93 with reference to the principle of subsidiarity.

¹⁶ In this instance it is submitted that if no agreement is reached no assignment can take place. National or provincial government should not be able to force municipalities unwillingly to accept such assignments. In this regard the importance of the principles of cooperative government, as set out in the Constitution ch 3, must not be overlooked.

¹⁷ The distinction between executive authority and the right to administer, as referred to in s 156(1) was mentioned above. It would thus seem possible that if the constitutional drafters also intended to accord executive authority over Part A matters that have been assigned, they would have specifically provided for this in the text of the Constitution.

¹⁸ Refer to the Constitution s 156(1)(b). It should thus be possible to argue that matters listed in Part A of the relevant schedules which have been lawfully assigned to a municipality or municipalities also permit such local authorities to exercise executive authority over such matters.

under such assignment, then such municipality should have the right to exercise *any*¹⁹ power concerning such matters. One can thus conclude that municipalities have not only administrative powers on matters assigned to them but also executive authority, notwithstanding the fact that the matter assigned is a matter falling under either Part A of Schedule 4 or Part A of Schedule 5 of the Constitution. An aspect that is very clear from the Constitution, however, is the fact that if a matter falls outside the matters listed in Part B of Schedule 4 or 5 of the Constitution and has not been lawfully assigned to a municipality, then a municipality has no executive or administrative authority over such matter or matters.²⁰

Apart from the executive authority mentioned above, subsection 156(2) specifically provides for constitutional confirmation of the legislative authority accorded to local governments. Municipalities are allowed to make and administer by-laws for the effective administration of the matters which they have the right to administer. In the first instance it should be evident that municipal legislative authority is not without restrictions and that the extent of such authority is in need of careful consideration. The making of a by-law is undoubtedly referring to legislative authority.²¹ The Constitution seems to suggest that a municipality may make and administer by-laws in respect of only those matters which it has the right to administer.²² Municipal legislative authority is further restricted in the sense that the Constitution allows such legislative authority only for the effective administration of the matters which are administered by such a municipality.²³

The Constitution is also very clear on the fact that municipal by-laws are subordi

¹⁹ Own emphasis added.

²⁰ This is, of course, excluding matters that are reasonably necessary for, or incidental to, the effective performance of the functions already entrusted to local governments. The Constitution s 156(5).

²¹ The term "by-law" was also used in the previous dispensation. Some writers argue that the term by-law is inappropriate and should rather be called a "local law" or "municipal law", similar to "national laws" or "provincial laws". The term by-law is often still perceived as being subordinate to national or provincial laws, as was the case under the previous dispensation. See Meyer (1997) 116.

²² To determine which matters a municipality has the right to administer, one must again look at the Constitution s 156(1)(a)-(b). The conclusion is thus that only the matters listed in Sch 4 Part B and Sch 5 Part B or any other matter specifically assigned to a municipality by either national or provincial legislation would qualify as matters over which a municipality has legislative authority. This would also include matters reasonably necessary for, or incidental to, the effective performance of a municipality of its functions. The Constitution s 156(5).

²³ If a by-law is thus enacted for other reasons than to provide for the effective administration of the matter(s) falling under a municipality's jurisdiction, it would seem to fall foul of the constitutional mandate and thus be unconstitutional and invalid.

nate to national or provincial legislation. In this respect it is confirmed that if a by-law conflicts with national or provincial legislation it is invalid.²⁴ It should be noted that the Constitution defines national or provincial legislation to include subordinate legislation made in terms of an Act of parliament, or a provincial Act, and it also includes legislation that was in force when the Constitution took effect and is administered by either national government or provincial governments respectively.²⁵ The invalidation of a by-law that conflicts with national or provincial legislation is subjected to the constitutional obligation that neither national nor a provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions, however.²⁶ *Prima facie* this situation seems to refer to a *contradictio in terminis*. On one hand, a by-law which represents the constitutionally permitted legislative power of a municipality that conflicts with legislation of the two higher spheres is invalid, but on the other, the Constitution restricts the two higher legislatures from compromising or impeding municipal abilities or the exercise of its functions, through either legislative or executive actions. Both national and provincial legislatures must thus guard against enacting legislation that would compromise or impede municipal powers that would result in a conflict between municipal by-laws and such national or provincial laws. It follows that although municipalities have original legislative authority, such authority cannot be exercised in contradiction with national or provincial legislation. Municipal by-laws are subsequently subordinate in comparison with national or provincial laws. The only protection given to municipalities regarding a total domination by national or provincial laws is that such laws may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. In light of this protection, it would seem that if national or provincial legislation is mainly directed at or has the effect of compromising or impeding a municipality's ability or right to exercise its powers or perform its functions, a municipal by-law should have preference over such national or provincial legislation.²⁷ Subsection

²⁴ See the Constitution s 156(3).

²⁵ Refer to the Constitution s 239 definitions.

²⁶ See the Constitution s 156(3) read together with s 151(4).

²⁷ In this regard it would be of importance to look and evaluate the purpose of the national or provincial legislation. One must remember that the Constitution allows both national and the provincial legislatures to exercise legislative authority over the matters listed in the Constitution Schs 4 and 5 Parts A and B respectively. There is thus no prohibition on such legislatures to legislate on the matters that are also listed and over which municipalities can make by-laws. The purpose of the national or provincial law is a decisive factor, however.

156(3) further requires an investigation of section 149 of the Constitution. Section 149 states that a decision by a court that legislation (either national or provincial) prevails over other legislation, such a decision does not invalidate that other legislation, but such other legislation becomes inoperative for as long as the conflict remains. Because provincial legislatures have both exclusive legislative competencies and concurrent legislative competencies, conflict between a national law and a provincial law is a strong possibility. National legislation does not have automatic dominance over provincial legislation.²⁸ If such a conflict has occurred and a court has given a decision in favour of either the national law or the provincial law then the other law which is part of the conflict becomes inoperative for as long as the conflict remains. If a municipal by-law in turn conflicts with legislation that is inoperative, the by-law is not invalid and must be regarded as valid for as long as that legislation is inoperative.²⁹

14.2.2 Constitutional provisions that indirectly impact on municipal powers and functions

The Constitution itself provides for various obligations and requirements that have an impact, albeit often indirectly, on the powers and functions of municipal governments. These aspects are briefly identified and discussed as follows:

- The Constitution confirms that both the executive authority and legislative authority of a municipality is vested in its municipal council. There can be no doubt therefore as to the ability of a municipality to exercise or perform executive or legislative authority. Such authority vests only in the municipal council, however.³⁰
- Municipalities are also accorded a right to govern the local government affairs of their communities on their own initiative. Once it has been determined that a specific matter(s) is to be classified as part of local government affairs, a municipality has a constitutional right to govern that matter on its own initiative. However, this

²⁸ See the Constitution s 146, which indicates how such a dispute is to be resolved.

²⁹ Take the following practical example: Imagine both a national law and a provincial law on the environment. The two laws are in conflict with one another and a court has decided that the provincial law is to prevail over the national law. The national law becomes inoperative insofar as the conflict remains. If such a national law is also in conflict with a municipal by-law, the by-law will not be invalid and must be regarded as valid for as long as the national legislation is inoperative. See s 156(3). Such circumstances, especially within the constitutional framework of cooperative government, should be very rare, however.

³⁰ See the Constitution s 151(2).

right is circumscribed by the Constitution to the extent that it is subject to national and provincial legislation, as provided for in the Constitution.³¹

- Municipal powers and functions are also protected through the provision that national or provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.³² Any consideration of a dispute in this regard would call for an objective evaluation of all relevant facts and circumstances.³³
- Apart from being subject to national and provincial legislation as mandated by the Constitution, municipal powers and functions are also largely influenced by mostly national legislation.³⁴ In this regard and subject to section 229, which deals with financial matters, national legislation is required to make provision for an appropriate division of powers and functions between municipalities in areas which have both category B and C municipalities. Such division of powers between category B and C municipalities need not be uniform across a province.³⁵
- Mention has already been made of the fact that the Constitution mandates both national and provincial governments to have legislative and executive authority to

³¹ See the Constitution s 151(3). This subsection must be read together with s 156(3), which invalidates a municipal by-law that conflicts with national or provincial legislation. The wording "as provided for in the Constitution" used in s 151(3) is somewhat controversial, however, and in need of clarification. Two possible interpretations seem possible: one is that the Constitution refers only to those national or provincial laws which are specifically mentioned in the Constitution ch 7 and which deal with local government aspects. The other possibility, which suggests a broader interpretation, refers to any national or provincial legislation that is constitutionally legitimate or lawful, evaluated in the broad constitutional framework. The latter interpretation seems to be the one that should be favoured.

³² Refer to the Constitution s 151(4).

³³ The principles and requirements of cooperative government set out in the Constitution ch 3 are also important in such cases. Such principles require all spheres of government to *inter alia* respect the constitutional status, institutions, powers and functions of governments in the other spheres; not to assume any power or function except those conferred in terms of the Constitution and to exercise their powers and perform their functions in a manner that do not encroach on the geographical, functional or institutional integrity of another sphere of government. See the Constitution s 41(e)-(g).

³⁴ Throughout the chapter on local government in the Constitution, many obligations are set whereby national legislation must establish criteria, define the types of municipality and determine various other aspects applicable to local governments. See, eg, the Constitution ss 155(3)(2) and (3)(a) and 160(5).

³⁵ According to s 155(3)(c) the Constitution determines that a division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B and C municipality. All that is constitutionally required is an appropriate division method whereby such powers and functions are divided. It should be noted that the national legislation referred to in this instance is obligated to take into account the need to provide municipal services in an equitable and sustainable manner. See the Constitution s 155(4). The division of powers and functions between category B and C municipalities must thus be carefully considered.

see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5. This national or provincial authority to oversee municipal performance is exercised through a process of regulating the exercise by municipalities of their executive authority referred to in section 156(1).³⁶

- In respect of the internal procedures of a municipal council, the Constitution also determines that a municipal council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality. Municipal councils are also permitted to employ personnel that are necessary for the effective performance of municipal functions.³⁷ The fact that the municipal legislative authority is a function that may not be delegated by a municipal council and must be exercised by the council self is also constitutionally protected.³⁸ Furthermore, municipal councils are constitutionally authorised to make by-laws, thus exercising legislative authority, through rules and orders for its internal arrangements, its business and proceedings and the establishment, composition, procedures, powers and functions of its committees.³⁹ *Prima facie* these provisions refer to additional legislative authority of municipal councils apart from the ones mentioned earlier, closer evaluation suggests that such authority is a further elaboration of the so-called “implied powers” of municipalities permitted under section 156(5) of the Constitution.

In the discussion of the constitutional requirements regarding the powers and functions of municipalities, mention was made of the important role that mostly national legislation is obligated to play in the new local government system. Such national legislation is also important in relation to the powers and functions of municipal governments. Both the Local Government: Municipal Structures Act and the Municipal Systems Act contain important legislative requirements in this respect. These are discussed briefly below.

³⁶ See the Constitution s 155(7). Through the regulation of municipal executive authority, municipal legislative authority is also regulated. Municipal legislative authority is thus dependent on the existence of municipal executive authority. See the Constitution s 156(2).

³⁷ See the Constitution s 160(1)(a) and (d) respectively.

³⁸ Refer to the Constitution s 160(2)(a).

³⁹ See the Constitution s 160(6)(a)-(c).

14.3 National legislation to enhance the constitutional foundation on the powers and functions of municipal councils

The importance of both national and provincial legislation on the powers and functions of municipalities have been clearly indicated above. Apart from the most obvious influence, namely that national or provincial governments may, or sometimes must, assign other matters to municipalities through legislation,⁴⁰ the Constitution also requires national legislation to provide for an appropriate division of powers and functions between category B and C municipalities.⁴¹ Such division is per definition relevant only between a category B municipality (local municipality) and a category C (district municipality). Category A or metropolitan municipalities have exclusive municipal executive and legislative authority within their areas of jurisdiction.⁴² In compliance with the abovementioned constitutional requirements, the following national legislative provisions have been enacted.

14.3.1 Functions and powers of municipalities under the Local Government: Municipal Structures Act⁴³

In general, the Municipal Structures Act provides that a municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution. Such powers must be divided between a district municipality and local municipalities within the area of a district municipality.⁴⁴ The Act further obligates a district municipality to achieve the integrated, sustainable and equitable social and economic development of its area as a whole. Such development is to be achieved through exercising or providing the following powers or functions:⁴⁵

- (a) Ensuring integrated development planning for the district as a whole;
- (b) By promoting bulk infrastructural development and services for the district as a whole;
- (c) By building the capacity of local municipalities in its area to perform their functions and to exercise their powers where such capacity is lacking; and

⁴⁰ See the Constitution s 156(1)(b) and 156(4).

⁴¹ This is confirmed in the Constitution s 155(3)(c).

⁴² See the Constitution s 155(1)(a)-(c) for an explanation of the three categories of municipalities.

⁴³ 117 of 1998.

⁴⁴ See the Structures Act s 83(1) and (2).

⁴⁵ See s 83(3)(a)-(d). It is clear that the Act accords significantly more responsibility and authority to district councils over local councils in its area. This seems to be in line with the Constitution's definition and creation of the two different categories of municipality. The Constitution s 155(1).

- (d) To promote the equitable distribution of resources between the local municipalities in its area and to ensure appropriate levels of municipal services within the area.

Apart from the general emphasis on the responsibilities of district municipalities, the Act also specifically provides for the division of functions and powers between district and local municipalities. Accordingly, all district municipalities are accorded the following functions and powers:⁴⁶

- (a) Integrated development planning for the district municipality as a whole, including a framework for integrated development plans of all municipalities in the area of the district municipality.
- (b) Potable water supply systems.
- (c) Bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and, where applicable, the generation of electricity.
- (d) Domestic wastewater and sewage disposal systems.
- (e) Solid waste disposal sites, in so far as it relates to –
 - (i) the determination of a waste disposal strategy;
 - (ii) the regulation of waste disposal;
 - (iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district.
- (f) Municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole.
- (g) Regulation of passenger transport services.
- (h) Municipal airports serving the area of the district municipality as a whole.
- (i) Municipal health services.
- (j) Fire fighting services serving the area of the district municipality as a whole, which includes –
 - (i) planning, coordination and regulation of fire services;
 - (ii) specialised fire fighting services such as mountain, veld and chemical fire services;
 - (iii) coordination of the standardisation of infrastructure, vehicles, equipment

⁴⁶ See the Structures Act s 84(1)(a)-(p).

and procedures;

(iv) training of fire officers.

- (k) The establishment, conduct and control of fresh produce markets and abattoirs serving the area of a mayor proportion of the municipalities in the district.
- (l) The establishment, conduct and control of cemeteries and crematoria serving the area of a mayor proportion of municipalities in the district.
- (m) Promotion of local tourism for the area of the district municipality.
- (n) Municipal public works relating to any of the above functions or any other functions assigned to the district municipality.
- (o) The receipt, allocation and, if applicable, the distribution of grants made to the district municipality.
- (p) The imposition and collection of taxes, levies and duties as related to the above functions or as may be assigned to the district municipality in terms of national legislation.

All the remaining powers and functions afforded under section 83(1) which have not been vested in terms of section 84(1) in the district municipality of a relevant area will fall under the authority of the relevant local municipalities.⁴⁷

Although section 84(1) of the Structures Act clearly distinguishes between the powers and functions of district and local municipalities, the Act does allow for a local municipality to perform certain powers and functions that have been allocated to district municipalities. In this regard, the Act requires that the minister (responsible for local government) may authorise a local municipality to perform a function or exercise a power mentioned in subsection 84(1)(b), (c), (d) or (i), or any aspect of such function or power, in the area of that local municipality

- by notice in the *Government Gazette*
- after consultation with the cabinet member responsible for the functional area in question
- after consulting the MEC for local government in the provinces and, if applicable,

⁴⁷ The Structures Act s 84(2). A comparison between the Constitution ss 156 and 229 and the functions and powers allocated to district municipalities under s 84(1) shows that only a few powers and functions will remain under local municipalities. In this regard it should be obvious that the authority of local municipalities is severely restricted in favour of district municipalities, which are legally empowered with more powers and functions.

subject to national legislation.⁴⁸

According to subsection 84(3)(a), only the powers and functions regarding potable water supply systems, bulk supply of electricity, domestic waste water and sewage disposal systems and municipal health services can be allocated to local municipalities.⁴⁹ It is also required of the Minister of Local Government that if he/she issues a notice in terms of section 84(3)(a), such notice must regulate the legal, practical and other consequences of his/her authorisation. Such consequences may include the transfer of staff, the transfer of assets, liabilities, rights and obligations and administrative and other records, and also the continued application of any by-laws and resolutions in the area of the municipalities concerned. The minister may amend a notice and then regulate the legal, practical and other consequences of such amendment.⁵⁰

The Structures Act also provides for the adjustment of the division of functions and powers between district and local municipalities. The Act states that, subject to section 85 and within a prescribed policy framework, the MEC for local government may adjust the division of functions or powers between a district and local municipality as set out in section 84(1) and (2) by

- allocating any of those functions or powers vested in the local municipality to the district municipality
- allocating any of those functions or powers vested in the district municipality to the local municipality.⁵¹

An MEC may allocate a function or power mentioned above only if the municipality in which the function or power is vested lacks the capacity to perform that power or

⁴⁸ The Structures Act s 84(3)(a). Strictly speaking, the Minister of Local Government does not have to follow the decision reached after consultation as long as the consultation was held, but from a political and cooperative point of view unilateral decisions should not be accepted.

⁴⁹ This would thus require the involvement of the Ministers of Water, Energy and Health respectively.

⁵⁰ See the Structures Act s 84(3)(b)-(e) as amended.

⁵¹ Note that a function or power referred to in s 84(1)(a), (b), (c), (d), (i), (o) or (p) is excluded from such allocation from the district municipality to the local municipality. See the Structures Act s 85(1)(b). Note that the MEC may adjust the division of functions and powers between a district and a local municipality by allocating a function or power within a particular policy framework. According to the policy framework for the adjustment of division of functions and powers regulations published under GN 2592 in GG 21370 of 12 July 2000, the allocation of a function or a power must be aimed at specific objectives. Refer to s 2(b)(i)-(xi) of the regulations.

function and the MEC has consulted the Demarcation Board and has considered its assessment of the capacity of the municipality concerned.⁵²

Apart from the general role of the Demarcation Board explained in chapter 10 of this work, the Demarcation Board must consider the capacity of a district or local municipality to perform the functions and exercise the powers vested in the municipality as set out in section 84(1) or (2). This consideration must be done in two distinct instances:

- where the Board is determining or re-determining the boundaries of such municipalities
- when requested to do so in terms of subsection 85(2)(b) of the Structures Act by the MEC for Local Government in the relevant province.

The Board must also convey its assessment in writing to the relevant MEC.⁵³ If an MEC disagrees with the assessment of the Board and still decides to adjust or refuses to adjust the division of powers and functions between the municipalities concerned, the MEC must furnish reasons to the relevant municipalities and the Minister before finalising such an adjustment.⁵⁴ An important aspect to note is that any adjustment of the division of powers or functions must be reflected in the section 12 notices whereby the concerned municipalities have been established.⁵⁵ The MEC's decision can be vetoed by the Minister because after consulting the MEC and municipalities concerned the Minister is given the power to vary or withdraw any allocation or to adjust the division of powers and functions between a district municipality and local municipality in instances where the MEC has refused to make an adjustment in accordance with the assessment of the Demarcation Board. It is the MEC's responsibility to amend the section 12 notices in order to give effect to any variation or withdrawal of any allocation or reallocation and also regularly to review the capacity of the relevant municipality(s) and to reallocate a function or power to a municipality when it acquires the capacity to perform or exercise that power or function.⁵⁶

⁵² Note that the second requirement does not apply if the Demarcation Board omits to comply with a request from the MEC within a reasonable period. Disputes in this regard will depend on the circumstances of each case. See the Structures Act s 85(2) and (3).

⁵³ See the Structures Act s 85(4).

⁵⁴ The Structures Act s 85(5).

⁵⁵ See ch 9 of this work dealing with the establishment of municipalities. See also the Act s 85(6).

⁵⁶ See the Act s 85(7)-(9). Any reallocation must be made with the concurrence of the receiving municipality or, if such concurrence cannot be obtained, after consultation with the Demarcation

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According to the Structures Act, if a dispute arises between a district and local municipality concerning the performance of a function or exercise of a power, the MEC may resolve the dispute by defining their respective roles by notice in the *Provincial Gazette*. Such resolve by the MEC may be done after consultation with the municipalities concerned.⁵⁷ It is furthermore also provided that if the provision of basic services by a district or local municipality collapses or is likely to collapse because of a lack of capacity or *any other reason*,⁵⁸ the MEC, after written notice to the relevant municipality and with immediate effect, may allocate any power or function necessary to restore or maintain those basic services to a local or district municipality, depending on the circumstances of the case.⁵⁹ Either the district or local municipality concerned may lodge a written objection against such "emergency" allocation to the minister. In return, the minister has the power to confirm, vary or withdraw the allocation after he/she has consulted the Demarcation Board. A written objection such as that mentioned above must be lodged within 14 days of the date of the official notice of the MEC in the *Provincial Gazette*, and any failure to lodge an objection timeously will be regarded as consent to the allocation by the municipalities concerned. When a municipality has lost a power or function but is again in a position to resume the provision of those basic services, then the MEC must reallocate such power or function to the original municipality.⁶⁰

Mention has been made of the importance of the principles of cooperative government, especially in respect of the powers and functions relating to municipalities. Not only cooperation between municipalities and the two higher spheres of government is important, but also co-operation between municipalities *inter se*. In order to enhance such cooperation, both a district municipality and local municipalities within the area of that district municipality must cooperate with one another by assisting and supporting each other. Cooperation also includes provision of financial, technical and administrative support services, if capacity allows. Support will be requested by

Board regarding the capacity of that municipality. In this regard, municipalities are protected against being allocated powers or functions which they cannot or do not have the capacity to exercise or perform.

⁵⁷ See the Structures Act s 86 as substituted by Act 33 of 2000 s 8.

⁵⁸ Own emphasis.

⁵⁹ The Structures Act s 87.

⁶⁰ See the Structures Act s 87(2)-(4). During difficult times municipalities are thus protected against being deprived of the powers and functions on a permanent basis; they are deprived of

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mostly one municipality from another, and include support between a district municipality or local municipality or *vice versa* or between local municipalities *inter se*.⁶¹

Lastly, it should be noted that no division of powers and functions is applicable in a category A or metropolitan municipality. All municipal powers and functions assigned in terms of sections 156 and 229 of the Constitution are vested in the metropolitan council itself. The position is similar in district management areas, where all the municipal powers and functions are vested in the relevant district municipality within whose area the district management area falls.⁶²

14.3.2 Aspects regarding municipal functions and powers under the Local Government: Municipal Systems Act⁶³

In order to further regulate aspects regarding the powers and functions of municipalities and also to compliment and support the Constitution and Structures Act, the Municipal Systems Act provides that a municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution and must exercise such powers and functions subject to chapter 5 of the Municipal Structures Act.⁶⁴ A municipality also has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.⁶⁵

The Systems Act originally dealt with two types of assignment of powers or functions. The first type was assignments initiated by the national or provincial executives to all municipalities generally. In this regard the Act provided that a cabinet member or depute minister that initiated the assignment of a function or a power by way of national legislation to municipalities in general had, before the draft legislation is introduced in parliament to:

- consult the Minister of Local Government, the National Minister of Finance and

them only temporarily – until they resume a position of service delivery. Simultaneously the community is also assured of continuous service delivery.

⁶¹ See the Structures Act s 88(1)-(3). When a district municipality is to provide support services to a local municipality, the MEC is obligated to assist that district municipality to provide the relevant support services.

⁶² See the Structures Act s 89.

⁶³ 32 of 2000.

⁶⁴ The Municipal Structures Act ch 5 encompasses s 83 to 89 of the Act, which is discussed above.

⁶⁵ Refer to the Systems Act s 8(2). This subsection is in confirmation of the Constitution s 156(5).

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- consider any assessment by the Financial and Fiscal Commission (FFC) and
- publish the draft legislation in terms of section 154(2) of the Constitution.⁶⁷

The position was very similar when an MEC (thus a provincial executive) initiated the assignment of a function or power in terms of provincial legislation to municipalities in that province. The legislative position was changed, however, during 2003⁶⁸. The Systems Act now allows for the assignment of functions or powers to municipalities generally by Acts of parliament or provincial Acts. According to the amended provisions, a cabinet member or deputy minister who seeks to initiate the assignment of a function or power by way of an Act of Parliament to municipalities in general, or to any category of municipality, must, within a reasonable time before the draft bill is introduced as the following:

- (a) He/she must request the Financial and Fiscal Commission (FFC) to assess the financial and fiscal implications of the proposed legislation. For purposes of the assessment, the FFC must be informed about the possible impact of the assignment on the future division of revenue between the spheres of government in terms of section 214 of the Constitution; the fiscal power, capacity and efficiency of municipalities or any category of municipalities and the transfer, if any, of employees, assets and liabilities.
- (b) He/she must consult with the minister of local government, the ministers of finance and organised local government who represent local government nationally. The consultation should have regard to the assessment by the FFC; the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option; the financial implications of the assignment projected over at least three years; any possible financial liabilities or risks after the three year period; the manner in which additional expenditure as a result of the assignment will be funded; the implications of the assignment for the capacity of municipalities; the assistance and support that will be provided to municipali-

⁶⁶ OLG is represented by SALGA at national level.

⁶⁷ According to the Constitution s 154(2), draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in parliament or a provincial legislature. The publication must be done in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to such draft legislation.

⁶⁸ See Act 44 of 2003 sec 2.

ties and, finally, any other matter that may be prescribed by regulation under the Act.⁶⁹

When draft legislation, as is mentioned above, is introduced in parliament or a provincial legislature, then the legislation must be accompanied by a memorandum which should give a projection of the financial and fiscal implications, disclose any possible financial liabilities or risks, indicate how any additional expenditure will be funded and indicate the implications of the assignment for the capacity of the municipalities involved. The official assessment of the FFC must also be annexed.⁷⁰

The Systems Act also provides for the assignment of functions or powers to specific municipalities by acts of the executive or by agreement. In this regard it is provided that if a function or power is assigned to any specific municipality in terms of a power contained in an Act of parliament or a provincial Act, or by agreement in terms of section 99 or 126 of the Constitution, then the organ of state assigning the function or power must submit a memorandum to the Minister of Local Government and the National Treasury. The memorandum must give at least a three-year projection of the financial implications of the function or power for the municipality, disclose any possible financial liabilities or risks and indicate how additional expenditure will be funded.⁷¹ It is further provided that the Cabinet member, MEC or other organ of state initiating an assignment of a power or function to a municipality in terms of sections 9 or 10 of the Systems Act must take appropriate steps to ensure sufficient funding and capacity building initiatives for the performance of the assigned power or function, if:

- the assignment imposes a duty on the municipality
- the power or function falls outside the functional areas listed in parts B of Schedules 4 and 5 to the Constitution or is not incidental to any of those functional areas
- the performance of the power or function (duty) has financial implications for the municipality.⁷²

⁶⁹ Refer to s 9(1)(a)-(b) of the Systems Act. The position is very similar when an MEC seeks to initiate the assignment of a function or power by way of a provincial Act to municipalities in the province or only certain category of municipalities in the province. Read s 9(2)(a)-(b) of the Act. What is regarded as a reasonable time for purposes of ss 9(1)(a) and 9(2)(a) is, however, unclear.

⁷⁰ See s 9(3)(a)-(b) of the Systems Act.

⁷¹ See the Systems Act s 10 as substituted by Act 44 of 2003 s 3.

⁷² Read s 10A of the Systems Act as inserted by Act 44 of 2003 s 4.

14.4 Executive and legislative functioning

In support of and in compliance with the Constitution, the Systems Act confirms that both the legislative and executive authority of a municipality are exercised by the council of a municipality and that the council takes all decisions of the municipality subject only to section 59 of the Systems Act, which deals with the delegation of powers and functions to other functionaries within the municipality.⁷³

Similar to other instances where executive or legislative authority is exercised or performed, there are various requirements and determinations that must be adhered to. In this regard, it is a common principle that a legislature or executive organ can lawfully exercise only such authority that has been given to it and can do so only within a specific area. In this respect, a municipality is authorised in general to exercise executive and legislative authority within its boundaries only.⁷⁴ However, it is possible for a municipality to exercise executive authority in the area of that other municipality by agreement with another municipality and subject to chapter 5 of the Municipal Structures Act and other applicable national legislation.⁷⁵

In order for a municipality to exercise its executive and legislative authority, it must obviously comply with constitutional and other legislative requirements. Many of these requirements have been identified and discussed above. In respect of the exercise of executive authority, it is very important to look at the legislation dealing with the internal procedures and functioning of local governments. Again, the Constitution and other national legislation are prescriptive in this regard and will be discussed in a following chapter. Apart from those requirements, the Systems Act in general determines that a municipality exercises its legislative or executive authority in various ways, and more particularly by doing the following:⁷⁶

⁷³ Although the Constitution confirms that executive and legislative authority of a municipality is vested in the municipal council, the Systems Act also confirms that it is the responsibility of a council to take all the executive and legislative decisions and accordingly also the responsibility for such authority. See the Constitution s 151(2) and the Systems Act s 11. Delegated powers or functions are exercised or performed by the delegated functionary, but the municipal council still retains final responsibility. See the Systems Act s 59(2)(e).

⁷⁴ Again the boundary determinations and the role of the Demarcation Board should be emphasised in this regard.

⁷⁵ See the Systems Act s 11(2). Note that this exception refers only to the exercise of executive authority and is somewhat unclear about the exercise of legislative authority. According to the Constitution, the authority to exercise legislative authority follows from the authority to exercise executive authority. It could thus be argued that even legislative authority can be exercised by one municipality in the jurisdiction of the other.

⁷⁶ The Systems Act s 11(3)(a)-(n).

- (a) Developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
- (b) Promoting and undertaking development;
- (c) Establishing and maintaining an administration;
- (d) Administering and regulating its internal affairs and the local government affairs of the local community;
- (e) Implementing applicable national and provincial legislation and its by-laws;
- (f) Providing municipal services to the local community, or appointing appropriate service providers in accordance with the criteria and process set out in section 78;
- (g) Monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;
- (h) Preparing, approving and implementing its budgets;
- (i) Imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees including setting and implementing tariff, rates and tax and debt collection policies;
- (j) Monitoring the impact and effectiveness of any services, policies, programmes or plans;
- (k) Establishing and implementing performance management systems;
- (l) Promoting a safe and healthy environment;
- (m) Passing by-laws and taking decisions on any of the above mentioned matters; and
- (n) Doing anything else within its legislative and executive competence.

Lastly, it is important to note that a decision taken by a municipal council or any other political structure of the municipality must be recorded in writing.⁷⁷

14.5 Legislative procedures and requirements

In the preceding paragraphs of this chapter it was mentioned that municipalities have both executive and legislative powers and functions. Municipal legislative powers or functions are restricted to such matters that are necessary for municipalities to ensure an effective administration.⁷⁸

⁷⁷ This requirement is directed more at executive decisions than legislative decisions, as legislative decisions are always in writing.

⁷⁸ Refer to the Constitution s 156(1) and (2). It is argued that such legislative authority, ie to make and administer by-laws, depends on the extent of municipality's executive authority and also

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Apart from determining the basis of a municipality's legislative authority, the Constitution also stipulates other procedural considerations that must be complied with when municipalities exercise their legislative powers or functions. The newly enacted national legislative framework gives further content to such requirements. The following constitutional requirements are of importance in this respect:

- Subject to section 151(4), a municipality should not enact by-laws that are in conflict with national or provincial legislation.⁷⁹
- It is the responsibility of the municipal council to make decisions concerning the exercise of all the powers and the performance of all the functions including legislative powers and functions. This responsibility is so important that the Constitution specifically forbids such functioning to be delegated to any other organ or functionary in that council.⁸⁰ In *Fedsure Life Assurance v Greater JHB TMC*⁸¹ the Constitutional Court held *inter alia* that [a] [municipal] council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate. Such decisions must, of course, be lawful, but the requirement of legality exists independently. The procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by "every person" affected by them. The court also stated that each member of a council is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on po-

whether it is required for the effective administration of its executive powers or functions. It would seem that the basis of municipal legislative authority is indirect and not original. The Constitution confirms this submission by stating that a municipality has executive authority and the right to administer the local government matters listed in the Constitution Schs 4 and 5 Part B or assigned to it in terms of national or provincial legislation.

⁷⁹ The Constitution s 156(3).

⁸⁰ See the Constitution ss 160(1)(a) and (2)(a). The passing of by-laws is a function that may not be delegated by a municipal council. This requirement is seen to protect representative and accountable democratic government. Only the properly elected municipal council should have the authority to perform or exercise legislative competencies.

⁸¹ 1999 (1) SA 374 (CC).

litical grounds. It is for the members and not the courts to judge what is relevant in such circumstances.⁸²

- A majority of the members of a municipal council must be present before a vote may be taken on any matter. However, all questions concerning the passing of by-laws are determined by a decision taken by that council with the support of a majority of its members.⁸³
- The Constitution requires that no by-law may be passed by a municipal council unless all the members of the council have been given reasonable notice of the by-law and the proposed by-law has been published for public comment. Both these requirements must be met before a by-law can lawfully be enacted by a municipal council. What is regarded as reasonable notice is not altogether certain and depends on the circumstances of each case. It is submitted that national legislation should provide for such uncertainties and should, for instance, prescribe a minimum notice period.⁸⁴
- In order to enhance the notification of municipal by-laws, the Constitution requires that a municipal by-law may be enforced only after it has been published in the official gazette of the relevant province. Upon request by a municipality, an official *Provincial Gazette* must publish a municipal by-law. The Constitution also requires that municipal by-laws must be accessible to the public.⁸⁵

In an effort to further enhance the basic constitutional framework regarding the legislative powers and functions of municipalities, a specific chapter on municipal functions and powers was included in the Local Government: Municipal Systems Act.⁸⁶ The Act specifically addresses aspects such as legislative procedures, the publication of by-laws, standard draft by-laws and the municipal code.⁸⁷ Each of these aspects is discussed briefly below:

⁸² See paras 41-42 at 394-395.

⁸³ In this regard one should distinguish between a relative majority and an absolute majority. A relative majority/simple majority is the majority of 50% + 1 of the members present who formed a quorum. A quorum is often less than 50% of the total number of members of a particular council. An absolute majority, on the other hand, is a majority of 50% + 1 of the total number of members of a council. If a council thus has 200 members, at least the support of 101 of the members is required to obtain an absolute majority. See the Constitution s 160(3)(a) and (b). See also Rautenach and Malherbe (1999) 159.

⁸⁴ Neither national nor provincial legislation seem to address such an important aspect. See the Constitution s 160(4)(a) and (b).

⁸⁵ See the Constitution s 162.

⁸⁶ See the Systems Act ch 3.

⁸⁷ Refer to the Systems Act ss 12-15.

- *Legislative procedures* In respect of legislative procedures, it is legally required that only a member or a committee of a municipal council may introduce a draft by-law in the council.⁸⁸

Furthermore, a by-law must be enacted by a decision taken by a municipal council

(a) in accordance with the rules and orders of the council and

(b) with a supporting vote of a majority of its members.⁸⁹

No by-law may be passed by a municipal council unless

(a) all members have been given reasonable notice and

(b) the proposed by-law has been published for public comment in a manner that allows the public an opportunity to make representations with regard to the proposed by-law.⁹⁰

The legislative procedures mentioned above also apply when a municipal council incorporates by reference, as by-laws, provisions of either legislation passed by another legislative organ of state or standard draft by-laws made in terms of section 14 of the Systems Act.⁹¹

- *Publication by by-laws* According to the Systems Act, a by-law passed by a municipal council
 - (a) must be published promptly in the relevant *Provincial Gazette* and, when feasible, also in a local newspaper or in any other practical way in order to bring the contents of the by-law to the attention of the local community and
 - (b) takes effect when published or on a future date determined in the by-law.⁹²

⁸⁸ This position is similar to provincial legislatures, where only members of the executive council of a province or a committee of the legislature or a member of the provincial legislature may introduce a bill in the legislature. Only the MEC for finance may introduce a money bill. See the Constitution s 119. Because a municipal council is vested with both executive and legislative authority, the functionary that may introduce a by-law in the council is not comparable with the position in provincial legislatures. See also the Systems Act s 12(1).

⁸⁹ Thus referring to an absolute majority.

⁹⁰ These requirements are directed to ensure compliance with the Constitution ss 160(3) and (4) and 162 (1)-(3). It is also submitted that municipal rules and orders should address issues such as "reasonable notice" and "a manner to allow for public opportunity to make representations". The Constitution allows specifically for the making of by-laws which prescribe rules and orders for the internal arrangements, business and proceedings and aspects concerning committees of a municipal council. See the Constitution s 160(6)(a)-(c) and the Systems Act s 12(2) and (3).

⁹¹ See the Systems Act s 12(4)(a)-(b).

⁹² "Promptly" is generally regarded to mean "as soon as possible". Unfounded delays should not be acceptable. One should also take note that other practical ways to inform local residents or community members includes reports by local radio stations, advertisements in local newspapers, community newspapers and leaflets that are sent out by post with each resident's rates and taxes account.

Similar to national or provincial legislation, municipal by-laws take effect either when published or on a date as is determined by the by-law self.

- *Standard draft by-laws* According to section 14 of the Systems Act, at the request of OLG representing LG nationally or after consulting the MECs for local government and OLG and by notice in the national gazette:

(a) The minister of local government may make standard draft by-laws concerning any matter for which a municipal council may make by-laws. This includes aspects mentioned in section 160(6) of the Constitution.

(b) The minister of local government may amend any such standard draft by-laws. Before the minister is to make or amend a standard draft by-law he/she must publish the proposed by-law or amendment in the national gazette for public comment and consult the cabinet member concerned if the by-law or amendment is to affect a particular area of responsibility.⁹³ As with the national minister, an MEC for local government may make standard draft by-laws or amend such by-laws concerning any matter for which municipal councils in that province may make by-laws, on request by OLG in the province or after consulting the minister of local government and by notice in the *Provincial Gazette*.⁹⁴ Again proper publication of the by-laws or amendments and consultation with other MECs in the province is required.⁹⁵ In order to protect the constitutionally granted legislative authority, the Systems Act states that a standard draft by-law or an amendment is applicable in a municipality only if, to the extent that, and subject to any modifications and qualifications have been adopted by the council of that municipality.⁹⁶

A somewhat uncertain aspect of the Act is whether a standard draft by-law which is repealed by the national government after it has been adopted by a municipality still applies in the relevant municipal jurisdiction. The intention of the drafters of the Act is uncertain in this regard, and it seems that they intended that it would not be possible to repeal a draft standard by-law once it had been adopted by a mu

⁹³ See the Systems Act s 14(1)(b).

⁹⁴ This will normally refer to such matters that have been assigned to municipal councils in terms of a provincial legislation and over which that municipality can subsequently exercise legislative authority.

⁹⁵ See the Systems Act s 14(2)(a) and (b).

⁹⁶ The Act s 14(3)(a). The standard draft by-law can thus not be enforced on a municipal council and only serves as a concept on which a municipality can finalise its own more detailed by-laws, if it so wishes.

municipal council. This would mean that such a standard draft by-law cannot be amended by the council itself and may be amended by only the Minister or MEC as set out in section 14(1) and (2) of the Act. The constitutionality of this section of the Act is somewhat in doubt, as it seems that the Act limits the legislative authority of municipalities, which would also mean the amendment of municipal legislative actions. Nowhere does the Constitution allow for such a restriction; on the contrary, the Constitution specifically requires that neither the national or a provincial government may compromise or impede a municipality's ability or right to exercise its powers or perform its functions.⁹⁷ In the last instance, if a municipal council intends to adopt a standard draft by-law with or without modifications or qualifications, the council must follow the same procedure set out in section 12(3) of the Systems Act and also publish the by-law in accordance with section 13 of the Act.⁹⁸

Municipal code According to the Systems Act, a municipality must compile and maintain in bound or loose-leaf form or, when feasible also in electronic format, a compilation of all its by-laws and the provisions incorporated by reference as by-laws. This compilation is known as the "municipal code" and must constantly be updated and annotated. Furthermore, the code must be kept at the municipality's head office as its official record of all applicable by-laws. At the request of a member of the public, the municipality must provide that person with a copy or extract from its municipal code against payment of a reasonable fee as determined by the council.⁹⁹

14.6 Municipal financial powers

Apart from the powers and functions mentioned above, municipal governments also have some limited financial powers. Again, it is important in this regard to refer to the Constitution, which provides the following foundation regarding municipal fiscal powers and functions:¹⁰⁰

- (1) Subject to subsections (2), (3) and (4), a municipality may impose

⁹⁷ The restrictions set out in the Systems Act s 14(3)(b) thus seem to be contrary to the provisions of the Constitution, and more specifically the Constitution s 151(4).

⁹⁸ These requirements are confirmed in the Systems Act ss 14(4) and 12(4).

⁹⁹ Refer to s 15(1)-(3) of the Systems Act.

¹⁰⁰ See the Constitution s 229.

- (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
 - (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
- (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties
- (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
 - (b) may be regulated by national legislation.
- (3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:
- (a) The need to comply with sound principles of taxation.
 - (b) The powers and functions performed by each municipality.
 - (c) The fiscal capacity of each municipality.
 - (d) The effectiveness and efficiency of raising taxes, levies and duties.
 - (e) Equity.
- (4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.
- (5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

From the text of the Constitution it is apparent that local governments have been vested with significant fiscal powers and functions and that national legislation may regulate such powers more extensively. Apart from quite a wide range of fiscal pow-

ers, the Constitution specifically excludes municipalities from imposing income tax, value-added tax, general sales tax or customs duty.¹⁰¹ Only a constitutional amendment would allow for such powers to be extended to municipalities as well. Municipal financial powers such as the power to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality or other taxes, levies or duties as provided for in national legislation are constitutionally curtailed in two ways:

- Such powers may not be exercised in a way that materially and unreasonably prejudice national economic policies, economic activities across the municipal boundaries or the national mobility of goods, services, capital or labour¹⁰²
- The powers or functions may be regulated by national legislation.¹⁰³

The Constitution further allows for the division of fiscal powers and functions between two municipalities. Again regulation through national legislation is significant after the criteria set out in section 229(3)(a)-(e) of the Constitution has been taken into account. In order to facilitate cooperation and involvement, the national legislation that the Constitution envisages may be enacted only after OLG and the FFC have been consulted and any of the recommendations of the Commission have been considered. For more detail regarding matters concerning municipal finance, such as the raising of loans and the sharing of revenue, see the chapter on finance in this work.

14.7 Municipal powers and functions regarding municipal law enforcement

In the new local government dispensation municipalities have also been allocated stronger powers and functions regarding municipal law enforcement. Such powers already existed under the LGTA and have been included in the final municipal legal framework.¹⁰⁴ According to the final structure of local government, no direct reference is made to the power or functions regarding municipal law enforcement. Neither Part B of Schedule 4 nor Part B of Schedule 5 of the Constitution refers to the func-

¹⁰¹ See the Constitution s 229(1)(b).

¹⁰² This provision is again directed at ensuring uniformity throughout the country and emphasises the importance of cooperation between all spheres of government. The criteria mentioned above are also similar to the provisions employed by the Constitution to determine if national legislation should prevail over provincial legislation in cases of disputes between such legislative enactments. See the Constitution s 146(2) and see also s 44(2).

¹⁰³ See the Constitution s 229(2)(a)-(b).

¹⁰⁴ In terms of the LGTA Schs 2 and 2A, certain powers were given to transitional metro councils and transitional local councils in order to establish and control municipal law enforcement agencies. However, such powers were subject to the South African Police Service Act 69 of 1995, as amended.

tional area of municipal law enforcement. The only reference to law enforcement is dealt with under Schedule 4 Part A dealing with police, to the extent that the provisions of chapter 11 of the Constitution confer any competence upon the provincial legislatures. One can conclude, therefore, that municipal law enforcement is not a direct executive, and thus legislative, competence of municipalities and can be exercised by municipalities only if assigned to them in terms of national or provincial legislation.¹⁰⁵

In order to allow for municipal law enforcement, the South African Police Services Act was amended in 1998¹⁰⁶ and provided for the establishment of a municipal police service.¹⁰⁷ According to section 64A of the Act and in the prescribed manner, any municipality may apply to the MEC for safety and security of a province for the establishment of a municipal police service for its area of jurisdiction. Subject to certain conditions, the MEC may approve an application for the establishment of such a municipal police service if:

- the application complies with the prescribed requirements
- the municipality has the resources at its disposal to provide for a municipal police services which complies with national standards on a 24-hour basis
- traffic policing services by the municipality will not prejudicially be affected by the establishment of a municipal police service
- proper provision has been made by the municipality to ensure civilian supervision of the municipal police service and
- the establishment of the municipal police service will improve effective policing in that part of the province.

The MEC may approve an application only after consultation with the national police commissioner; after consultation with the metro council if the municipality falls in the area of a metropolitan council and with approval of the member or members of the executive council responsible for local government, finance, transport and traffic

¹⁰⁵ Refer again to the Constitution s 156(1)(a)-(b). One can possibly also argue that limited municipal law enforcement is necessary for all municipalities to ensure the effective performance of their functions. Without a measure of law enforcement powers, municipalities will be toothless to enforce their own or other applicable legal rules and regulations and would thus be severely undermined in respect of their own functions and responsibilities. See also the Constitution s 156(5).

¹⁰⁶ See Act 83 of 1998.

¹⁰⁷ Reference to only a metropolitan police services was deleted by Act 83 of 1998 s 1(a). A "municipal police service" now refers to a municipal police service established under Act 83 of 1998 s 64A. See the Act s 1 definitions.

matters or the premier or member to whom such responsibilities have been assigned. Once an application has been approved, the MEC can establish the municipal police services by notice in the *Gazette*. All expenditure incurred by or in connection with the establishment, maintenance and functioning of a municipal police service shall be for the account of the municipality.¹⁰⁸

The chief executive officer of a municipality is responsible to the municipal council for the functioning of the municipal police service (MPS). It is the council that incurs final responsibility, however. Once an MPS has been established, a municipal council appoints a member of the MPS as the executive head thereof. This person is required to be a fit and proper person.¹⁰⁹ Subject to the Act, the national standards and the directives of the CEO of the municipality, the executive head of the MPS exercises control over the municipal police service. More specifically, such control includes the following:

- being responsible for maintaining an impartial, accountable, transparent and efficient municipal police service
- being responsible for the recruitment, appointment, promotion and transfer of members of the municipal police service, subject to the applicable laws
- ensuring that traffic policing services by the municipality are not prejudicially affected by the establishment of the municipal police service
- being responsible for the discipline of the municipal police service
- representing the municipal police service on every local policing coordination committee established in terms of section 64k within the area of jurisdiction of the municipality, either personally or through a member or members of the municipal police service designated by him or her for that purpose
- representing the municipal police service on every community police forum or sub-forum established in terms of section 19 within the area of jurisdiction of the municipality, either personally or through a member or members of the municipal police service designated by him or her for that purpose
- developing before the end of each financial year a plan which sets out the priorities and objectives of the municipal police service for the following financial year,

¹⁰⁸ See the Police Service Act s 64A(3)-(6), as amended.

¹⁰⁹ The Act s 64C and D. It is submitted that such a person should at least have expertise in law enforcement tasks and responsibilities.

provided that such plan, insofar as it relates to the prevention of crime, shall be developed in cooperation with the service

- performing such duties as may from time to time be imposed upon him or her by the chief executive officer of the municipality.

According to the Act, the functions of an MPS are threefold:

- traffic policing, subject to any legislation relating to road traffic
- policing of municipal by-laws and regulations which are the responsibility of the municipality
- prevention of crime.¹¹⁰

Furthermore, it is stated that, subject to the Constitution, a member of a municipal police service may exercise such powers and perform such duties as are by law conferred upon or assigned to that member. In this regard the minister of safety and security is empowered to prescribe that any power conferred upon a member of the Police Service may be exercised by a member of the MPS.¹¹¹ The Act also confirms that every member of an MPS is an officer of the peace and may exercise the powers conferred upon a peace officer in terms of the law within the area of jurisdiction of the municipality in question. In special circumstances a member may exercise such powers outside the area of jurisdiction if it is done:

- in pursuit of a person whom the member reasonably suspects of having committed an offence, and if the pursuit commenced within the area of jurisdiction of the municipality, and
- in terms of an agreement between municipalities.¹¹²

When a person is arrested, either with or without a warrant, by a member of an MPS, such person shall be brought as soon as possible to a South African Police station or to the place mentioned in the warrant of arrest, if applicable. Furthermore, any legal proceedings against an MPS or member of such service shall be instituted against the municipal council in question.¹¹³

¹¹⁰ See the Act s 64E.

¹¹¹ The Act s 64F(1)-(2).

¹¹² See the Act s 64F(3)(a)-(b). It appears that both requirements must be met before an extra territorial pursuit will be lawful.

¹¹³ This again confirms the final responsibility of the municipal council. The Limitation of Legal Proceedings Act 94 of 1970 are applicable to disputes involving MPS actions, however. See the Act s 64I(2).

In order to ensure proper control over an MPS, it is required that a municipal council shall appoint a committee consisting of members of the council and such other civilian persons as determined by the council to oversee the MPS. The committee has various functions and shall do the following:

- advise the council on matters relating to the municipal police service, at the request of the municipal council in question
- advise the chief executive officer with regard to the performance of his or her functions in respect of the municipal police service
- perform such functions as the member of the executive council, the municipal council or the chief executive officer may consider necessary or expedient to ensure civilian oversight of the municipal police service
- promote accountability and transparency in the municipal police service
- monitor the implementation of policy and directives issued by the chief executive officer and report to the municipal council or chief executive officer thereon
- perform such functions as may from time to time be assigned to the committee by the municipal council or the chief executive officer and
- evaluate the functioning of the municipal police service and report to the municipal council or chief executive officer thereon.

Both the National Police Commissioner and the Minister of Safety and Security have various powers in respect of the MPS. For example, the National Commissioner may determine national standards of policing for the MPS and in addition to the training prescribed for traffic officers in terms of the Road Traffic Act¹¹⁴, may determine national standards with regard to the training of members of a MPS. Failure by an MPS to maintain national standards shall be reported by the commissioner to the minister.¹¹⁵ Upon receipt of a failure report, the minister may request the MEC concerned to intervene in terms of section 139 of the Constitution and, upon failure of the MEC to intervene as requested, the minister may intervene in terms of section 100 of the Constitution. In such circumstances the national executive authority shall have the same powers as its provincial counterparts in this regard.¹¹⁶ The MEC for safety and

¹¹⁴ 29 of 1989.

¹¹⁵ Refer to the Act s 64L.

¹¹⁶ The Act s 64M(1)-(2).

security also has important powers in respect of an MPS and should ensure compliance with national standards.¹¹⁷

The Act also provides that the minister may prescribe which other provisions of the Act shall apply to an MPS, and to what extent. The minister is also authorised to make regulations regarding the effective functioning of an MPS.

When the South African Police Service Amendment Act took effect,¹¹⁸ only one previously established municipal police service had been established, namely the Durban City Police, established under section 83 of the Durban Extended Powers Consolidated Ordinance, 1976.¹¹⁹ The amendment Act now provides that such a former MPS is deemed to have been established in terms of the Act and shall continue to exist subject to certain requirements.¹²⁰ The Act also provides that every person who, on the date of the establishment of an MPS, is registered as a traffic officer and who is employed by that municipality may be appointed as a member of that MPS even though the person may not comply with the training requirements for appointment.¹²¹ However, the Act determines that a member appointed to an MPS shall cease to be a member of that MPS unless before 1 October 2003 he/she has successfully completed a training course which complies with the requirements determined by the National Commissioner.¹²² Since the Act took effect, no municipal service has been permitted to include the word "police" in its name unless the service was established as an MPS under the Act.¹²³

14.8 Conclusion

From the legal principles and requirements mentioned above, it is evident that the new constitutional framework has a significant impact on the powers and functions of all local governments throughout South Africa. All municipalities have both executive and legislative authority, which authority may be lawfully exercised or performed only within the broader constitutional setting.¹²⁴ According to the new system, municipal

¹¹⁷ For more details on such powers see the Act s 64N(1)-(7).

¹¹⁸ 83 of 1998.

¹¹⁹ Natal Ordinance 18 of 1976.

¹²⁰ See the Act s 64Q(1)(a)-(e).

¹²¹ This provision has been included to incorporate traffic officers of relevant municipalities into its MPS.

¹²² See the Act s 64Q(2)(a)-(b).

¹²³ The Act s 64Q(3).

¹²⁴ See the case of *Aussenkehr Farms (Pty) Ltd v Walvis Bay Municipality* 1996 (1) SA 180 (C). In the case the applicant had erected a tent on a site in Walvis Bay in order to sell fresh fish and vegetables to the public. It did so with the apparent approval of an official of the respondent municipi-

continued on next page

by-laws are no longer regarded as subordinate legislation, but as original and direct constitutionally entrenched legislative powers and functions. These newly entrenched legislative powers have important impact in cases where by-laws are part of a legal dispute.¹²⁵

One of the most important and difficult dilemmas faced by local governments in the new dispensation is how to restructure so-called “old order” legislation and substitute such legislation with newly redrafted and constitutionally accepted municipal legislative enactments.¹²⁶ During the restructuring of the old local government system and even after the new system was established, many former by-laws and executive decisions were, and still are, applicable in certain areas and are in need of urgent clarification and transformation. It would have been impractical and severely disruptive if all old order legislation were revoked without new legislation’s being put in place simultaneously. In this regard the Constitution provides that all law that was in force when the Constitution took effect continues to be in force subject, however, to any amendments or repeals and consistency with the Constitution. Any old order legislation that continues to be in force does not have a wider application, territorially or otherwise, unless subsequently amended to have a wider application and continues to be administered by the authorities that administered it when the Constitution took effect, subject only to the Constitution.¹²⁷ Within this legal framework many old order laws are still applicable within local governments jurisdictions today.¹²⁸ Because of the restructuring of provincial boundaries under the interim Constitution of 1993, many difficulties regarding the application and authority of certain legislation

pality. The applicant was then told to vacate the site. The court held that the applicant was entitled to an interdict against being deprived unlawfully of its *de facto* possession, even if his possession was itself unlawful. See paras B-D at 190.

¹²⁵ Eg, under the previous local government dispensation, magistrate courts had the authority to pronounce on the validity of a by-law. By-laws are now constitutionally authorised, however, and their validity must be determined with reference to the Constitution in general. In this regard it is important to note that not all courts have the jurisdiction to rule on constitutional issues. The Constitution itself proclaims that magistrates courts and all other courts may decide any matter determined by an Act of parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of *any legislation*, (including municipal legislation) or any conduct of the president. See the Constitution s 170. Disputes regarding by-laws, which are not of a constitutional nature or that are not based on a constitutional issue should be determined by a court which has been empowered to do so in terms of an Act of parliament. The relevant Acts of parliament are the Magistrates Court Act 32 of 1944 and the Supreme Court Act 59 of 1959.

¹²⁶ “Old order legislation” is defined by the Constitution as legislation that was enacted before the interim Constitution Act 200 of 1993 took effect, which was 27 April 1994.

¹²⁷ See the Constitution Sch 6(2)(1) and (2).

¹²⁸ See, eg, the Transvaal Ordinance on Municipal Administration Ordinance 17 of 1939.

have been experienced. It is proposed that especially provincial and local authorities should work proactively towards a complete overhaul of all legislative enactments applicable in each province and each municipal jurisdiction. Any law or conduct inconsistent with the Constitution, including of the Bill of Rights, will be invalid.¹²⁹

Finally it is submitted that the new framework regarding the executive powers and functions of all municipalities and the overall constitutional protection of such powers and functions should be sufficient to ensure that municipalities can perform their functions effectively and comply with their constitutional obligations and duties. There are, however, significant challenges that must be overcome. For example, local government functions are expected to take responsibility for a set of functions that is growing in complexity and scope. An increasing number of new responsibilities are being added through the processes of assignments and delegations and also through new responsibilities identified in new legislation. Some examples and key issues relating to the way in which municipal functions are undertaken are:

- the establishment of sound relationships between councillors and senior officials
- the implementation of new land reform legislation;
- the integration of health services which are statutorily divided between the national and provincial spheres of government;
- the provision of housing, water and electricity services
- the provisions of functions such as roads and transport, environmental management, community and security services and municipal economic development.

Only a committed municipal corps and administration functioning within an environment of cooperative government would ensure proper fulfilment of the new powers and functions of South African municipalities.

¹²⁹ The Constitution s 2.