

Basic legal matters relevant to local government structures

21.1 Introduction

In light of the various aims and responsibilities of local governments, it is generally accepted that such governments are confronted with almost all aspects of the law. It was explained in chapter 10 that municipalities have been established throughout the whole territory of South Africa, and therefore there is no area that does not fall under the direct authority of a particular municipal council. The importance of legal knowledge regarding not only the composition and functioning of municipalities, but also other fields of law is of significant importance. No legal practitioner can practise law in a particular area in our country without a sound knowledge of the legal rules that are applicable to local governments. Every now and then a practitioner will be confronted with legal disputes that concern the particular local authority either directly or indirectly. In many areas, the local municipality is often the largest employer organisation and also the largest economically active entity. In short, one can say that a legal adviser for a local government or a practitioner advising clients on local government matters should have a sound legal knowledge of almost all the different fields of the South African law.

In order to be able to handle and address legal problems, it is important to know the law and where to find the law. As the law is constantly changing and developing, it is obvious that all role players in local government should be able to access and then apply the relevant legal rules that encompass the new local government dispensation. All role players must have a sound knowledge of the different sources of local government law. These sources are mentioned briefly below.

21.2 Sources of local government law

In principle, there are three main sources of local government law. They are :

- legislation
- a combination of common law and customary law

- legal precedents.

It is only legislation and case law that are of importance to local government practitioners and legal scholars, however. Since local government law is part of the broader constitutional system of South Africa, customary and common law rules have very little or no influence or impact as a source of local government law.¹

21.2.1 Legislation as a source of local government law

Legislation is without a doubt the most important and influential source of local government law. It was discussed and explained above that the new local government dispensation was not only created in terms of legislation but that it also functions and operates according to various pieces of legislation. Such legislative requirements can be from either the national or a provincial government.² It should be pointed out that the term “legislation “ as referred to here, is a wide term and includes both national and provincial laws, as well as proclamations and regulations made by ministers or MECs.³

Within the ambit of legislation, it should be obvious and self-explanatory that the Constitution of the Republic of South Africa, which is a very unique and important legislative source of the country’s legal system, forms the basic legal framework on which the new local government system has been founded. The Constitution defines mainly the powers and functions of all three spheres of government and, in particular, the powers and functions of all local governments.⁴

Apart from the constitutional text itself, the Constitution further mandates the enactment of various other national and provincial laws, with the purpose of giving body to the basic legal framework of local governments. Such Acts, as was mentioned and discussed in the previous chapters of this work, then complete the legal framework within which local governments are operating.⁵

¹ For more on this point see the cases of *In re: Certification of the Constitution of the RSA 1998*, 1996 (4) SA 744 (CC) and also *President of the RSA v Hugo* 1997 (4) SA 1 (CC).

² Because of the ever-changing needs of society, local government law is contained and regulated mainly by legislation.

³ See the Constitution s 239 for a more exact definition of the term “legislation”.

⁴ As the supreme law of the state, the provisions and requirements of the Constitution are non-negotiable. Non-compliance with the Constitution would result in invalidation. See the Constitution s 2.

⁵ It was mentioned above that local government *per se* is not a concurrent legislative competence or exclusive legislative competence in terms of the Constitution Sch 4 and 5. This position seems to indicate that it is left for mostly the national government to legislate on local government matters, if so allowed by the Constitution. See the Constitution s 163. Only when the Constitution allows provincial laws over certain matters will it be possible for provincial governments to legislate

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21.2.2 The importance of customary and common law principles

Basically there are two main reasons for both the common law and customary law not featuring as important sources of local government law. In the first instance, the new local government system is a totally new legal system which had its origins within the new constitutional legal foundation. The new system was totally overhauled to such an extent that common law rules are no longer of any importance. Secondly, the Constitution also does not contain a provision to the extent that the former common law or customary law principles still continue.⁶ Apart from this position, the former local government system was regulated mainly by legislation under the then government of South Africa. The influence of common law or customary law under the former system was largely non-existent. Finally, it was held by the highest judicial authority in South Africa that even from a constitutional viewpoint there are no common law powers left that were derived from the former royal prerogatives. All such powers have now been enumerated within the text of the Constitution or other legislation.⁷

21.2.3 Judicial precedent as a source of local government law

Apart from legislation, judicial precedents, or what are commonly referred to as “case law”, are the second most important source of local government law. The importance of legal jurisprudence is founded on two issues in particular. Firstly, South Africa follows the legal doctrine of *stare decisis*, which means that the lower courts in the hierarchy of judicial bodies are compelled to follow the decisions, in similar cases, handed down by the higher courts. Secondly, the Constitution clearly spells out the importance and role of the judicial authority in our legal system. According to the Constitution, the judicial authority of the Republic of South Africa is vested in the courts and the courts are subject to the Constitution and the law only. Any order or decision by a court binds all persons to whom it applies, including the state.⁸ The importance of judicial precedents is therefore self-evident, and local government

over such matters. See, eg, the Constitution s 139. Provincial laws relevant to local governments are therefore much less important than their national counterparts.

⁶ Under the 1983 Constitution s 88 such conventions still continued to be in force. The 1996 Constitution does not provide for such continuation.

⁷ See the *First Certification Judgment* 1996 1996 (1) SA 1 (CC); *President of the RSA v Hugo* 1997 (4) SA 1 (CC) and *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

⁸ See the Constitution s 165(1)-(5).

practitioners and scholars must ensure that they keep up to date with decisions of our courts regarding local government legal matters.

Apart from the sources mentioned above, there are no other real sources of local government law. Although the works and writings of legal scholars, the discussion and deliberations of politicians and the submissions of the concerned public at large are of importance to legal development, such aspects are not sources of local government law and should be regarded only as primary information sources from which the content of the law can sometimes be determined.

21.3 Important fields of law relevant to local government law

It was mentioned above that local government administrations often face a large variety of legal issues. In order to cope with such issues, most municipal councils that can afford to do so have a specific legal section that advises and handles legal problems for both the political and administrative branches of the local authority. Municipal legal advisors are therefore responsible for both internal and external legal matters. Such a situation often demands broad legal and paralegal expertise. Local government matters are important not only to the political office bearers and administrative personnel, however. Such matters are also regularly of importance to the relevant local community. Of the three spheres of government, citizens of a state are most likely, at some stage, to be involved in a legal dispute with their local authority. Against this background it is obvious that local community members are in need of professional and expert legal advice and assistance regarding local government legal matters.

It falls way beyond the scope of this work to discuss or even try to explain the various legal fields that are of importance in municipal matters. What is of interest, however, is to highlight briefly some of the most common areas of legal dispute that involve local governments. While it is the task of lawyers and legal advisors to keep knowledgeable about the law in general, some of the specialised legal issues are also of value for both the political and administrative components of a municipality in order for them successfully to fulfil and maintain their duties and responsibilities.

21.3.1 Common legal issues relevant to local governments

- *The law of contract* The law of contract is particularly important to local government legal advisors. All municipalities are involved in various legal contractual re-

relationships on a regular basis. As a sphere of government and a legal entity, municipalities are legally empowered to enter and conclude contracts.⁹

- *Property law* The law concerning property and other related issues is also of regular importance to local governments. Property is regarded as of such importance in our modern democracy that it has been afforded direct protection under the Constitution.¹⁰ Property law also includes issues regarding
 - (a) expropriation
 - (b) property leasing
 - (c) purchase, sale and acquisition
 - (d) transfer of property ownership
 - (e) other related land use rights such as the restitution of land rights, land reform measures, communal property associations, informal land rights issues and eviction requirements and procedures.¹¹

⁹ See also *Keyser v Orkney Town Council* 2003 (4) SA 131 (T) with reference to lease agreements. In *Gordon v Pietermaritzburg-Msunduzi: TLC and Another* 2001 (4) SA 972 (N) it was mentioned that with the advent of SA's new constitutional dispensation, momentous changes were brought about to local government. The court held that the contract concluded between the parties was impossible to perform and, although it was true that the state was bound by ordinary commercial contracts concluded by it, in cases of impossible performance, the law of contract allows for the cancellation of the agreement. In the case certain regulations, which formed the basis of the contractual relationship between the parties, were repealed in the context of an entirely new constitutional dispensation, which included local government. See paras B-D at 978.

¹⁰ According to the Constitution s 25, no *person* may be deprived of property except in terms of a law of general application. Arbitrary deprivation of property is specifically outlawed. Although property may be expropriated, there are specified requirements under which such expropriation must be done. Refer also to the case of *Modderfontein Squatters, Greater Benoni City Council v Modderklip boerdery (Pty) Ltd (Agri SA and Legal Resources Centre as amici curiae)*, also referred to as *President of the RSA v Modderklip boerdery* 2004 (6) SA 40 (SCA).

¹¹ Most of these issues are regulated in terms of specific Acts of parliament. For more on municipal property-related issues, refer to Nonyana MR "Communal Property Associations for convenience v townships for services and maintenance" *Property Law Digest* August 2000 Butterworths at 3. The writer refers to the Communal Property Association Act 28 of 1996 which has improved communal land ownership. See also the following cases: *De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander* 1995 (4) SA 347 (T) dealing with expropriation under the Expropriation Act 63 of 1975. See also *Cape Town Municipality v Table Mountain Aerial Cableway Co Ltd* 1996 (1) SA 909 (C). In *Southern Metropolitan Substructure v Thompson and Others* 1997 (2) SA 799 (W) it was held that a local authority's duty to provide and allocate housing cannot lawfully be fettered by contractual undertakings not to evict illegal occupiers of land. When land/property is sold, it must be described sufficiently in accordance with the Alienation of Land Act 68 of 1981. Faultless description is not required. See *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA). See also *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 (4) SA 427 (SCA), and *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) dealing with expropriation issues. Refer also to *Skinberg v South Peninsula Municipality* 2001 (4) SA 1144 (C). It was stated as a *semble* to the case that despite the clear distinction made in the Constitution s 25 between deprivation and expropriation of property, there may be room for the development of a doctrine akin to constructive expropriation in South Africa, particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of prop-

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An interesting aspect regarding land is the Subdivision of Agricultural Land Act,¹² which requires that agricultural land may not be subdivided unless the Minister of Agriculture has given his written consent thereto.¹³ Section 12 of the Local Government: Municipal Structures Act¹⁴ allowed for the establishment of new municipalities for the entire territory of South Africa, however.¹⁵ Accordingly, it is argued by some that all land now falls within the jurisdiction of a municipality.¹⁶ Since agricultural land also falls within the jurisdiction of a municipal council, it seems that section 3 of the Subdivision of Agricultural Land Act no longer has application.

- *The law of delict* The law of delict is an equally important field of law within the local government domain. All municipalities face delictual accountability on a daily basis. Delictual liability is confined not only to general delictual claims but also more specialised claims under the legal protection of vicarious liability, defamation and other unique forms of delictual accountability. The law of delict is a vast and often complex field of the law and should be studied carefully.¹⁷

erty rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body. Other issues dealing with property-related matters were decided in *Bailes v Town and Regional Planning Commission* 2002 (2) SA 589 (N), *Kotzé v Minister of Landbou en Andere* 2003 (1) SA 445 (T), *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn* 2003 (6) SA 140 (C) and *Baartman and Others v Port Elizabeth Municipality* 2003 (3) SA 560 (SCA). Refer also to Griffiths G "Not so fast – that's municipal land: A discourse on the acquisition of municipal property under the Cape Municipal Ordinance 20 of 1974" *Property Law Digest* (1999) Butterworths at 11.

¹² 70 of 1970.

¹³ Refer to the Act s 3.

¹⁴ 117 of 1998.

¹⁵ Read also the Constitution s 151(1), which states that the local sphere of government consists of municipalities which must be established for the whole territory of the Republic.

¹⁶ See the letter of MJ Meyer "Is Act 70 of 1970 still necessary?" *DR* December 2001 at 5.

¹⁷ Judicial examples of recent delictual cases concerning local authorities are the following: *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 (4) SA 745 (O), dealing with the responsibility of a municipal airstrip; *Gardner v Whitaker* 1995 (2) SA 672 (E), dealing with issues of defamation; *Cape Town Municipality v Butters* 1996 (1) SA 473 (C), dealing with public liability; *Cape Town Municipality v Bakkerud* 1997 (4) SA 356 (C), concerning municipal liability for damages resulting from an omission to repair streets and pavements; *Welkom Municipality v Masureik and Herman t/a Lotus Corp* 1997 (3) SA 363 (SCA); *Pretoria City Council v De Jager* 1997 (2) SA 46 (SCA), dealing with the liability when failing to take reasonable precautions to prevent foreseeable harm on municipal sidewalks; *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C); *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA); *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA), concerning liability for municipal council's water main bursting and *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) relevant to municipal security/police services. See also the following academic research: Scott J "Grootboom v Graaff-Reinet Municipality" *De Jure* 2002 at 635; Scott J "Re-affirmation of the doctrine of immunity of municipalities against liability for wrongful omissions assessed and rejected – Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) *THRHR* 2001 (64) at 502; Scott J "The Cape Metropolitan Council v Noel Raymond Graham case no 157/99 (C)" *De Jure* (2001) at 198; Scott J "Cape Town Municipality v Butters 1996 (1) SA 473 (C)" *De Jure* (1996) at 379 and Smith A "Mu-

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- *Constitutional law and administrative law* The importance of constitutional law, which includes not only formal constitutional law but also aspects of fundamental rights law, administrative law, environmental law, legal interpretation and even some aspects of public international law have been highlighted above. Apart from the obvious importance of the Constitution and its Bill of Rights, the legal rules regulating the field of administrative law are also of particular importance to all local government bodies. Many municipal actions form part of the executive authority of the state and therefore fall under the rules of administrative law. The importance of administrative law was specifically highlighted in the case of *Fed-sure Life Assurance v Greater Johannesburg TMC*.¹⁸ In this case it was mentioned that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates or determines appropriations to be made out of public funds, such a power is peculiar to elected legislative bodies. Such powers are exercised by democratically elected representatives after due deliberation of the circumstances and cannot be classed as administrative action.¹⁹ Not only the legal advisors of a municipality, but all municipal administrators, should have a basic understanding and knowledge of administrative law and its various related legal rules.²⁰
- *Criminal law* Municipalities are also often involved within the ambit of criminal law. Such issues are confined not only to incidents where municipal personnel are implicated in criminal activity but can also relate to incidents where municipal employees or even councillors are held criminally liable for activities within a particular municipality. So, for example, is it possible for a municipal official, mostly the municipal manager, to be held liable for non-compliance with certain

municipalities mend your ways" *The Quarterly Law Review* for people in business vol 8 part 2 (2000) at 40.

¹⁸ 1999 (1) SA 374 (CC).

¹⁹ Refer to para 45 at 396-397.

²⁰ For more on constitutional and administrative law see the cases of *Claude Neon Ltd v Germiston City Council and Another* 1995 (3) SA 710 (W), where the court held that an undertaking by a local authority official to notify a person is an administrative act that gives rise to a legitimate or reasonable expectation. See also *Tony Rahme Marketing Agencies SA (Pty) Ltd and another v Greater JHB TMC* 1997 (4) SA 213 (W); *Gencor SA Ltd v TC for Rustenburg and Environs and another* 1998 (2) SA 1052 (T); *Erf one six seven Orchards CC v Greater JHB Metro Council and Another* 1999 (1) SA 104 (SCA) and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). See *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (CPD) regarding a housing dispute under s 26 of the Constitution.

legislative requirements.²¹ The importance of criminal law within the new local government dispensation should not be underestimated, therefore.

- *Labour law* The importance of labour law for municipal governments is particularly highlighted by the fact that municipalities are often one of the larger employer organisations within a particular municipal area. Depending on the size of the municipality, municipal councils employ hundreds or even thousands of personnel. Labour law issues are thus part and parcel of a municipal administration, and a sound knowledge of labour law is essential. Apart from normal labour issues such as wage negotiations, promotions and disciplinary action against employees, local government administration also encounter more specialised labour issues such as disputes within essential services areas. Because of the importance of labour law in local government, most municipalities have established personnel and labour relations departments to handle such matters. There is even a specific bargaining council that was established to resolve and deal with municipal labour issues between municipalities as employers, and labour unions as representatives of municipal employees.²²
- *Building regulations and town and regional planning law* All municipalities are required to be involved in local planning processes and developmental programmes. Each municipal government is therefore regularly involved in town planning activities, and municipalities must also ensure that minimum building standards are complied with.²³

²¹ See the Occupational Health and Safety Act 85 of 1993 as an example.

²² For typical examples of labour-related issues in local authorities see *Cape Local Authorities Employers Organisation v IMATU* 1997 (1) SA 656 (C) and *Mhlambi v Matjhabeng Municipality and another* 2003 (5) SA 89 (O). In the latter case the court held *inter alia* that a reasonable request for further particulars in a disciplinary action is an ingredient of the right to a fair hearing and that the principles of natural justice demanded that such information be furnished.

²³ For more on town planning and building requirements see the National Building Regulations and Building Standards Act 103 of 1977. Refer also to cases such as: *Sandton Town Council v Gourmet Property Investments CC* 1994 (4) SA 569 (A) dealing with national building regulations; *Diepsloot Residents and Landowners Association and Another v Administrator Tvl* 1994 (3) SA 336 (A); *Schapenrome Investments (Edms) Bpk v Sandtonse Stadsraad* 1994 (2) SA 34 (A); *Stands 5/1 Wierda Valley (Pty) Ltd and Another v Sandton Town Council* 1994 (1) SA 333 (A); *Knop v JHB City council* 1995 (2) SA 1 (A); *Huisman v Minister of Local Government, Housing and Works* 1996 (1) SA 836 (A); *East Zulu Motors v Empangeni/Ngwelezane TLC* 1998 (2) SA 61 (CC) and also *Paola v Jeeva and others* 2004 (1) SA 396 (SCA), concerning the value of a view of a property. Refer also to Van Wyk J and Van Wyk D "Planning law, administrative justice and the Constitution: *Van Juyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C)" *THRHR* 1996 (59) at 675 *et seq*; *Gildenhuys A "Omgewingsbewaring beperkings op grondgebruiksveranderingen"* *Butterworths Property Law Digest* (2000) at 13 and Van Wyk J "Planning Law – Will Cinderella emerge a princess?" *THRHR* 1996 (59) at 1. See also the case of *Humphrys NO v Barnes* 2004 (2) SA 577

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- *Environmental law* It was mentioned above that all three spheres of government must comply with the new constitutional requirements. One such requirement is the provision of a clean and healthy environment. Environmental laws are therefore of significant importance for all local authorities. It is essential for municipalities to determine their responsibilities under current legislative provisions and to ensure compliance with their obligations in that regard.²⁴

21.4 Special legal matters pertaining to local government

Apart from the general legal fields that have an impact on local governments, the new local government legal framework also provides for specific legal matters that are of particular importance to local authorities.²⁵ These special provisions regarding municipal legal matters must be read in conjunction with the general provisions of the law.

21.4.1 Legal proceedings

According to the Systems Act, all municipalities are authorised to compromise or compound any action, claim or proceedings and may submit to arbitration any matter other than a matter involving a decision on its status, powers, duties or the validity of its actions or by-laws.²⁶ The particular subsection is somewhat dubious and unclear. As a legal person all municipalities have legal standing and may thus institute or defend any legal action in which they have a direct, or sometimes indirect, interest. However, this position is conditional to the extent that the particular legal action is indeed permissible under the law in general.

21.4.2 Legal representation for employees or councillors of a municipality

Under the new legal framework, it is permissible for a municipality, subject to such terms and conditions as it may determine, to provide an employee or a councillor of

(CPD) regarding the collapsing of a boundary wall between two private property owners. Refer also to *Botha v White* 2004 (3) SA 184 (TPD) regarding the use of a property contrary to the applicable zoning. See also *Clark v Faraday and Another* 2004 (4) SA 564 (CPD) regarding the approval of building plans and a neighbour's view. The court held *inter alia* that an owner of land who uses his/her property in an ordinary and natural manner is not guilty of committing an *injuria* to other property owners.

²⁴ For more on environmental aspects see *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D), the Environmental Conservation Act 73 of 1989 and Witbooi E "Obligations on property owners to control alien invasive vegetation on their land" *Butterworths Property Law Digest* March 2003 at 3.

²⁵ Refer to the Local Government: Municipal Systems Act 32 of 2000 ch 11 as amended by Act 40 of 2002 s 2(1).

²⁶ See the Systems Act s 109(2).

the municipality with legal representation where applicable. Such legal representation is limited to only two instances, however.²⁷

- where legal proceedings have been instituted against the employee or councillor as a result of any act or omission by that person in the exercise of his or her powers or the performance of his or her duties or
- where the employee or councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties.

It should be noted that employees or councillors are not automatically entitled to the legal representation mentioned above. The decision to provide for such representation lies with the municipal council. All legal assistance not addressed in the two instances above should be for the employee's or councillor's own account and should not be funded from the municipal/public purse.

21.4.3 Issues concerning evidence

The Systems Act specifically provides that in legal proceedings against a municipality a certificate which purports to be signed by a staff member of the municipality and which claims that the municipality used the best known or only or most practicable and available methods in exercising any of its powers or performing its functions must, on its mere production by any person, be accepted by a court as evidence of that fact.²⁸ It is further provided that a copy of the *Provincial Gazette* in which a by-law was published may, on its mere production in a court by any person, be used as evidence that that by-law was passed by a municipality concerned.²⁹

21.4.4 Fines, bail and the prosecution of offences

Under the new legal framework, a staff member of a municipality so authorised may institute criminal proceedings and conduct the prosecution in respect of a contravention of or failure to comply with a provision of

- a by-law or regulation of the municipality
- other legislation administered by the municipality or

²⁷ See the Systems Act s 109A(a)-(b).

²⁸ The Systems Act s 110.

²⁹ Refer to the Systems Act s 111. It is submitted, however, that such a situation should prevail only in instances where no contrary evidence is presented to a particular court.

- other legislation as determined by the National Director of Public Prosecutions in terms of section 22(8)(b) of the National Prosecuting Act of 1998.³⁰

It is also provided that fines and bails that were recovered in respect of offences or alleged offences referred to in item 2 of Schedule 4 to the Public Finance Management Act³¹ must be paid into the revenue fund of the municipality concerned.³²

21.4.5 Time of notices, payments and the service of documents and process

A payment may be made at a municipality only during the normal or extended office hours of a municipality, except when payment is made by electronic transfer or at an agency pay-point. These times also apply to when any notice or other document may be served on the municipality, including its council, other structures, functionaries or staff members in an official capacity. There are exceptions to this rule in urgent matters, however.³³ Any notice or other document that is served on a person in terms of the Systems Act or by a municipality in terms of any legislation is regarded as having been served when:

- it has been delivered to that person
- it has been left at that person's place of residence or business in the Republic of South Africa with a person apparently over the age of sixteen years
- it has been posted by registered or certified mail to that person's last known residential or business address in the Republic of South Africa and an acknowledgement of the posting thereof is obtained from the relevant postal service
- it has been served on a person's agent or representative in the Republic of South Africa in a manner provided for above if that person's address in the RSA is unknown
- it has been posted in a conspicuous place on the property or premises of the person to which it relates if that person's address or agent in the Republic of South Africa is unknown.³⁴

It is also provided that when any notice or other document must be authorised or served on the owner, occupier or holder of any property or right in any property, that it is sufficient if that person is described in the notice or document as the owner,

³⁰ A staff member may prosecute or conduct criminal proceedings only if so authorised in terms of the National Prosecuting Authority Act 32 of 1998 s 22(8)(f).

³¹ 1 of 1999.

³² See the Systems Act s 113.

³³ See the Systems Act s 114(a)-(b).

³⁴ See the Systems Act s 115(a)-(e) as amended by Act 6 of 2004 see 94.

occupier or holder of the property. In such cases it is not necessary to name the person specifically. Finally, any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office. Outside parties thus seeking to serve on a municipality documents of whatever nature should serve such documents on the office of the municipal manager.³⁵

A further important practical aspect concerning the institution of legal proceedings against a municipal council is the provision of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act³⁶. According to this Act a notice must be sent to a municipality informing it of a claim against the municipality. According to section 2 of the Act such a notice/letter of demand must be sent to the council within 90 days of the date of the cause of action. After such notice, no formal summons may be issued against the municipality concerned, unless the claim has been rejected or a further 90 day period has lapsed. It must also be noted that the Act also requires that a claim prescribes against a council unless summons has been issued within 24 months since the occurrence of liability. Several case law precedents have been developed over such matters. See for example *Ntanga v Butterworth Municipality and another*³⁷ and also *East London Municipality v Abrahamse*.³⁸ In many instances the requirements of the Act were strictly enforced. Refer to *De Klerk en 'n ander v Groter Kroonstad Plaaslike Oorgangsraad*.³⁹ In *Provinsie van die Vrystaat v Williams No*⁴⁰ the Appellate Division confirmed that the term/word "liability" in the context of the Act has a wide meaning. Finally, the Constitutional Court in 2001 held that the Limitation of Legal Proceedings Act, which requires the specific notice within a short period of time and with limited scope for condonation for non-compliance, constitutes a material limitation of an individual's right of access to a court under section 34 of the Constitution and that such limitation could not be justified under section 36 of the Constitution. Accordingly, the court held that section 2(1)(a) of the Act was unconstitutional and invalid. See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre*

³⁵ Refer to the Systems Act s 115(2)-(3).

³⁶ 94 of 1970.

³⁷ 1995 (4) SA 437 (Tks).

³⁸ 1997 (4) SA 613 (SCA).

³⁹ 1999 (2) SA 870 (O).

⁴⁰ 2000 (3) SA 65 (SCA).

as *Amicus Curiae*).⁴¹ In a follow-up case, the Constitutional Court further held that the invalidation of section 2(1)(a) of the Act operated retrospectively to the moment the Constitution came into effect. Since the Constitution came into effect, the inconsistency of the Act has become evident and, as a matter of law, the provision of the Act has been a nullity since that date.⁴²

21.4.6 Public servitudes and the custody of documents

Similar to the situation under some of the former ordinances that affected local governments, the Systems Act now confirms that all public servitudes in favour of a municipality are under the control of the municipality. A municipality must further protect and enforce the rights of the local community arising from those servitudes.⁴³ It is also the responsibility of the municipal manager to take custody and control of all of a municipality's records and documents, unless where otherwise provided.⁴⁴

21.4.7 Restraint on transfer of property

All municipalities are directly involved in the process of transferring property (land) from one person or institution to another. Similarly to the South African Revenue Service, a municipality must provide a clearance certificate stating that all levies, duties or taxes payable to the municipality have been paid up to date before a particular property can be transferred. In order to protect a municipality, and thus also its public community, from losing valuable revenue for service already rendered, the Systems Act determines that a registrar of deeds may not register the transfer of property except on production to that Registrar of Deeds of a prescribed certificate which :

- was issued by the municipality or municipalities in which that property is situated and
- certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.⁴⁵

⁴¹ 2001 (4) SA 491 (CC).

⁴² Refer to *Ex parte Women's Legal Centre v Greater Germiston TLC* 2001 (4) SA 1288 (CC).

⁴³ See the Systems Act s 116.

⁴⁴ The Systems Act s 117.

⁴⁵ See the Systems Act s 118(1)(a)-(b). The certificate is valid for a period of 120 days from the date it was issued. The Act s 118(1A). This was also the position under some of the former provincial ordinance. Refer also to *Venter NO v Eastern Metro Substructure, Greater JHB TC* 1998 (3) SA

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In the case of a transfer of property by a trustee of an insolvent estate, the transfer and recovery of monies are subject to section 89 of the Insolvency Act.⁴⁶ To help secure municipal funds even more efficiently, it is specifically provided that an amount due for

- municipal service fees
- surcharges on fees
- property rates and other municipal taxes
- levies or duties

is a charge upon the property in connection with which the amount is owing and that such a claim enjoys preference over any mortgage bond registered against the property.⁴⁷ The requirement of a clearance certificate does not apply to a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by any of the three spheres of government, and when the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of the Upgrading of Land Tenure Rights Act of 1991.⁴⁸ However, municipalities are not precluded from collecting any amounts owed to them in respect of such a property at the time of the transfer or conversion.⁴⁹ Finally, the preference that is enjoyed over any mortgage bond does not apply to any amount referred to which became due before a transfer of a residential property or a conversion of land tenure rights into ownership.⁵⁰

Although the protection of municipal service fees, surcharges, property rates and other taxes or levies is not something new, its new statutory protection has been the

1076 (W). For an example of a certificate under s 118 see GN 686 as published in GG 24886 of 23 May 2003.

⁴⁶ 24 of 1936. S 89(4) provides that notwithstanding the provisions of any law which prohibited the transfer of any immovable property, unless any tax as defined in ss (5) due thereon had been paid, that law would not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate if he had paid the tax which might have been due on that property in respect of the periods mentioned in ss (1) and that no other preference would be accorded to any claim for such tax in respect of any other period. S 89(5) provided that, for the purposes of subss (1) and (4), 'tax' in relation to immovable property meant any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established under the authority of any law in discharge of a liability to make such periodical payments if that liability was an incident of the ownership of that property.

⁴⁷ See the Systems Act s 118(3).

⁴⁸ See Act 112 of 1991.

⁴⁹ The Systems Act s 118(4)(a)-(b).

⁵⁰ The Systems Act s 118(5).

focus of legal debate and even strong judicial challenge. In the matter between *Greater Johannesburg TMC v Galloway No and Others*⁵¹ the first respondent, a liquidator of a company, had sold immovable property belonging to the company to the second respondent. In order to proceed with the transfer of the property, the first respondent applied to the municipality/applicant for clearance figures in order to pay such and to obtain a clearance certificate in accordance with section 50 of the Local Government Ordinance.⁵² Upon receipt of the figures, the first respondent disputed certain amounts claimed by the council. The respondent also took the view that he was not required to pay the disputed levies/taxes by reason of section 89 of the Insolvency Act.⁵³ The court held that section 89(4) overrode the provisions of any other law which prohibited the transfer of any immovable property unless any tax defined under section 89(5) due on the property in question had been paid. The liquidator thus had to pay certain taxes. Any items prescribed by section 50 of the Ordinance which fell outside the definition of a tax set out in section 89(5) were not payable by the liquidator in order to obtain the clearance certificate.⁵⁴ The court further held that section 89(4) did not extend to water, electricity and refuse removal charges. Such items were not in respect of the property but were in respect of the agreements which had been entered into for the provision of such services and therefore in respect of the services themselves. Charges in respect of electricity, water and refuse removal were not in respect of the property and could not be recovered as a prerequisite before the clearance certificate was issued. The application by the council was accordingly dismissed.⁵⁵ A similar issue was decided in *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO*.⁵⁶ The case concerned a liquidator of a close corporation who had paid to the local authority under protest certain amounts for basic water and sewerage charges. The respondent argued that such charges did not constitute taxes under section 89(1) and 89(5) of the Insolvency Act and that he was not obligated to pay such amounts in order to obtain a clearance certificate under section 50 of Ordi-

⁵¹ 1997 (1) SA 348 (W).

⁵² O 17 of 1939 (T) which provided that the transfer of land was not to be effected unless certain amounts due to the council had been paid.

⁵³ 24 of 1936.

⁵⁴ At 355-356.

⁵⁵ Refer to paras C-D at 360.

⁵⁶ 2001 (1) SA 360 (SCA).

nance 17 of 1939 (T). Rezoning fees under sections 48 and 63 of the Town Planning and Townships Ordinance 15 of 1986 (T) were also in issue. Contrary to the decision in *Greater JHB TMC v Galloway NO* above, the Supreme Court of Appeal held that there was no basis on which it could be contended that amounts not constituting taxes listed in section 50(1) of the Ordinance did not have to be paid by the respondent in order to obtain a clearance certificate. Although the amounts were not taxes, the council was entitled to withhold the clearance certificate until they were paid.⁵⁷ The court further held that once it had been accepted that the amounts were due and owing in terms of section 50, there was no legal basis for the amounts to be repaid to the respondent. Since the respondent wished to transfer the properties, he had to pay the amounts due in respect of the rezoning fee, and the basic water and sewerage charges so as to have the embargo created by section 50 lifted.⁵⁸ Section 118 of the Systems Act was also subjected to constitutional challenge. In *Geyser and another v Msunduzi Municipality and others*⁵⁹ it was argued by the applicant/owner of a property who was held liable by the respondent municipality for municipal service fees due on the property which the applicant leased to a tenant, that the charges were unconstitutional since they resulted in arbitrary destruction and deprivation of the property owner's rights under section 25 of the Constitution. The court held that although section 118 of the Act clearly envisaged deprivation of the property, the purpose of the deprivation was to facilitate debt recovery, which was a legitimate and important purpose essential for the economic viability and sustainability of municipalities in South Africa. There was thus a rational connection between the means employed and the desired result. The limitation on property owners' rights was reasonable and reflected a fair balance between public interest and the property owner's interest. Section 118 is thus not arbitrary and not inconsistent with the Constitution.⁶⁰ The court also held that municipal service fees were based on consumption and thus could not refer to rates on property. Such fees included charges for electricity and water consumption supplied to the owner/occupier of the property. The section also applied to all municipalities in the Republic, thus excluding incapacity in application. Notwithstanding the court's decision, some commentators have

⁵⁷ See paras D-F at 369.

⁵⁸ At paras B-C at 370.

⁵⁹ 2003 (5) SA 18 (N).

⁶⁰ Refer to paras A-D at 38-39.

argued that the obligation on owners to pay all outstanding arrears is contrary to the Constitution.⁶¹

21.4.8 Miscellaneous provisions

The Systems Act also provides for a few miscellaneous legal aspects.⁶² In the first place it is provided that a councillor who attempts to influence the municipal manager or any other staff member or even agent of a municipality not to enforce an obligation in terms of the law or a decision of the council is guilty of an offence and is on conviction liable to a fine or to imprisonment for a period not exceeding two years.⁶³ A person acceding to such an attempt is also guilty of an offence punishable with the same sanction. If a person is convicted of an offence and is subsequently sentenced to more than 12 months' imprisonment without the option of a fine, he/she is disqualified from remaining a councillor and cannot become a councillor of any municipality during a period of five years from the date of the conviction.⁶⁴

The minister concerned with local government is also authorised to make regulations on certain matters and to issue guidelines that are not inconsistent with the Act.⁶⁵

Finally, the Systems Act provides for certain transitional arrangements and the phasing in of the provisions of the Act itself. Under transitional arrangements, it is provided that any written agreement on the exercise of executive authority in an area of another municipality, which agreement existed immediately before the Act took effect, must be regarded as having been concluded in terms of the relevant provisions of the Systems Act.⁶⁶ The minister must also initiate steps for the rationalisation of existing national and provincial planning legislation applicable to municipalities in order to facilitate local development planning as an integrated concept within the system of co-operative government as is envisaged in section 41 of the Constitution. Mechanisms for facilitating co-ordination between sectoral regulation of local government matters must also be established.⁶⁷ In order to facilitate a smooth transition,

⁶¹ Refer to Kidson J "Rights of local government to collect service arrears" March (2002) *DR* at 8-9. The writer submits various arguments to explain why outstanding arrears are not payable.

⁶² See the Systems Act ch 12.

⁶³ The Systems Act s 119.

⁶⁴ The Systems Act s 119(4).

⁶⁵ See the Act s 120(1)-(7) as amended for more full particulars on the procedures and requirements relevant to the making of regulations and guidelines.

⁶⁶ See the Systems Act s 122(1) read with s 11(2).

⁶⁷ See the Systems Act s 122(2)(a)-(b).

the minister is authorised to phase in the various applications of the provisions of the Systems Act which place a financial or administrative burden on municipalities.⁶⁸

21.5 Conclusion

It seems obvious that the application of the law is of significant importance to all local government structures. The law in general and, more particularly, the law relating to municipal affairs form not only the basis on which all municipalities must function, but also set the scene within which municipalities are to fulfil and perform their new constitutional role and obligations. It is clear in this respect that a sound knowledge of all the relevant legal principles relating to local government matters is an essential requirement for legal advisors, private practitioners, local administrators and political office bearers alike.

⁶⁸ The Systems Act s 123.