

Municipal services and service delivery and the basic functional activities of municipal governments

16.1 Introduction

In their capacity as the third and lowest sphere of government and the one that functions closest to local communities, municipal governments have often been described as comprising the sphere of government that is tasked mainly with the development and provision of services to communities. Some writers have even commented that if a municipality cannot or does not perform its service provision obligations, it should forfeit its right to exist.¹ This idealism is strongly entrenched in the new constitutional framework that has been devised for local government.²

Although all municipalities have been constitutionally tasked with providing sustainable and effective services, such a realisation is not as easy as it may seem. There are many different aspects that must integrate with one another before a municipality will be able to succeed in this mammoth task. One should therefore look not only at the different services that should be provided by local governments but also to the various obstacles and problems to their fulfilling their mandate. Factors that influence services and service delivery change drastically from one municipal term to the next, and continuous and long term planning is of the order of the day.³

¹ See Craythorne (1997) 391.

² According to the Constitution s 152(b), one of the main objectives of local government is to ensure the provision of services to communities in a sustainable manner. The provision of services is thus a cardinal function, if not the most important function, of every municipal government.

³ New demands on services and service provisions are especially relevant in many formerly underdeveloped areas and also in areas where drastic urbanisation is taking place. Without proper planning, future service delivery objectives will most definitely be jeopardised.

16.2 The new vision of local government service delivery

16.2.1 *Assessing basic needs*

It has been mentioned above that local government administrations have been undergoing radical changes under the new constitutional dispensation of South Africa. Unfortunately many of such changes have not been driven by clear and precise visions of the role and responsibilities that all municipalities should play. A practice that was introduced during the process of amalgamating and restructuring municipal administrations and which was subsequently proceeded with in the new local government system was to adopt and extent the structures and functioning of the former established municipal administrations without significant changes.⁴

On the contrary, it must be said that many municipalities indeed used the amalgamation process to initiate processes of review of their administrative organisation. This is how many innovative approaches to especially strategic management procedures were introduced, for example. Such approaches focussed mainly on technical problems, however, and little attention was given to rethinking the basic principles on which the administrations were organised. For the transformation and new local government system to be successful, a process of administrative reorganisation is required. This is particularly essential if all municipalities are to achieve the new constitutional obligations.⁵ In order to enhance service delivery, almost all municipalities have wide-ranging options. Most prominent, however, is the need to assess and plan strategically for the most appropriate and effective forms of service delivery mechanisms within each particular municipal area. Municipal administrations must choose those delivery options that would ensure maximum benefit and efficiency.

⁴ In order to minimise administrative disruption, minimal changes were made to many municipality's organisational structures. This aspect was, and still is, not absolutely favoured by the ruling government, as it perceives the old structures as ineffective and disruptive to the new local government vision. See the White Paper on Local Government (1998) at 111.

⁵ Again, emphasis should be placed on the fact that the central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all South African communities. The provision of basic services enhances the quality of life of all citizens, and it increases many new economic opportunities and productive initiatives.

16.2.2 *Basic principles and approaches on service delivery*

In order to achieve optimal service delivery, each municipal government should choose a delivery system that is best suited to the type of municipality concerned and after taking into account all the special needs of the local communities. When municipalities are deciding on the particular delivery options for their areas, they should be guided by certain basic principles.⁶ The principles can be summarised as follows:

- *Accessibility* All communities should have access to at least a minimum level of services. This is not a goal, but a constitutional obligation. The many imbalances that still exist regarding equal access to services should be addressed through the development of new infrastructure and the rehabilitation and upgrading of existing infrastructure.
- *Simplicity* Municipal services should not only be accessible, they should also be easy and convenient to use. In this regard it is of special importance that municipalities should aim to ensure that people with disabilities or that are illiterate should be able to access and use municipal services with ease.
- *Affordability* It is a given that many services remain unaffordable for many South African residents. In order to enhance quality of life, municipalities should strive to make services as affordable as possible. This is not an easy task, as many factors have an impact on the pricing of services.⁷
- *Quality* Services should not be rendered below a certain determined quality. In this regard, services should be suitable for their purpose, should be timeously provided, should be safe and should be accessible on a continuous basis. Service users will not pay and support their municipal service providers promptly if services are sub-standard and of a poor quality. Not only the services themselves but also back up maintenance and support should comply with the minimum quality standard.

⁶ See the White Paper on Local Government (1998) at 113-114. The principles mentioned in the White Paper should not be regarded as a *numerus clausus*, but should serve as a basic point of departure.

⁷ Again one must remember that municipalities have a constitutional obligation to provide at least certain minimum services to people, even though they cannot pay for such services. See, eg, the socio-economic rights set out in the Constitution ch 2, as well as ch 7 ss 152 and 153. In compliance with these requirements, many municipalities have introduced so-called "sliding scale payment schemes", where all residents are provided with a predetermined quantity of water and electricity free of charge.

- *Accountability* The new South African state, which includes local governments, is founded on, *inter alia*, the values of a democratic government, which includes principles of accountability and responsiveness.⁸ Whenever a delivery system is adopted by a particular municipal government, therefore, it remains the responsibility of that municipality to be accountable for all its activities, which includes the assurance of service provision of an acceptable quality.
- *Integration* All municipalities should adopt an integrated approach to planning and ensuring municipal service provision. The integration of municipal services requires specifically that each municipality take into account the economic and social impact of service provision in relation to overall municipal policy objectives such as poverty eradication and job creation.
- *Sustainability* The provision of services to local communities in a sustainable manner is also a constitutional imperative for all municipal governments.⁹ In light of this constitutional requirement, service provision is an ongoing process. However, ongoing service provision depends on municipal institutions that are properly managed both financially and administratively.
- *Value for money* Municipal services should account for value for money. Municipalities should strive to provide not only sustainable services but services that provide value for money for all services users. In this respect, value for money and affordability goes hand in hand.
- *Promotion of competitiveness* All municipalities should take cognisance of the fact that job generation and the competitive nature of local commerce and industry could be adversely affected by imposing higher rates and service charges on such industries in order to subsidise domestic users. Such practices could have a negative impact on local economic development, as many potential investors or businesses could be scared or lured away to other jurisdictions. In this regard, sufficient transparency is needed to ensure that all investors are aware of the costs of doing business in a particular local area.

⁸ See the Constitution s 1(d).

⁹ Refer to the Constitution s 152(1)(b).

- *Promotion of the new constitutional values* Lastly, it is not only a legal prerequisite for all municipalities to comply and adhere to the new constitutional values and requirements, it is also an essential recipe for all local governments to achieve optimal sufficiency and support. Municipal administrations must therefore fulfil and promote the democratic and other administrative values and principles that are enshrined in the Constitution.

After the abovementioned criteria have been taken into account, a municipality should be in a good position to determine which service delivery options would be best for its particular area of jurisdiction. In appropriate circumstances, a special mixture of different delivery options can be implemented. Apart from the delivery option or options, most municipalities can further enhance service delivery through the implementation of specific delivery mechanisms. Such mechanisms include the following:¹⁰

- *Building on existing capacity* It is a known fact that municipal governments throughout South Africa have different levels of administrative capacity. Many municipalities have however a sound existing infrastructure and established municipal capacity. Without ignoring new initiatives, it is very important for all municipal governments to build on their already existing capacity and potential. Reinvention of the wheel so to speak will only result in poor service delivery and unnecessary expenditure. Not all existing capacities are however suitable for expansion. In many instances drastic reform measures should be introduced as a matter of urgency. Such measures could include the introduction of performance-based contracts for senior staff members, the development of new codes of conduct, the implementation of reform policies such as affirmative action programmes, training and empowering the skills of frontline workers to interact with the communities, the decentralisation of operational management responsibilities and, lastly, the development of new strategies through consultation and communication.
- *Corporatisation* In essence the term corporatisation refers to the separation of service delivery units from the specific municipal council. This in turn should enable a council to determine specific policy goals and to set

¹⁰ See the White Paper on Local Government (1998) at 115-121.

service standards to which corporate units can be held responsible. Corporatisation also offers greater autonomy and flexibility to the management of the different service units which could allow for commercial management practices to be introduced.¹¹

- *Establishment of public-public partnerships* The establishment of public-public partnerships or so-called public joint ventures can allow for horizontal co-operation between municipalities. Such partnerships are often common in other countries especially in areas such as joint purchasing, training initiatives and technical support.¹² Within the new local government scheme of South Africa, municipalities should begin to explore these innovative partnership agreements with other state institutions or parastatals such as the Post Office for the collection of municipal revenue. Obvious benefits can be derived from such partnerships, not only for the municipalities concerned, but also for the benefit of local residents.
- *Establishment of partnerships with community-based organisations and non-governmental organisations* Partnerships with community-based organisations (CBOs) and non-governmental organisations (NGOs) can be very effective in involving local communities and also to stimulate local economic development. Often such organisations have particular skills that could enhance and facilitate new development initiatives and serve as an effective intermediary in local initiatives. In the new area of local government development, municipalities should consider involving CBOs and NGOs in partnerships with other public or private institutions. Even so-called three-way-partnerships between a public, a private and a CBO/NGO can be very effective.¹³
- *Public-private partnerships* Municipalities should also explore the possibilities of entering into partnerships with local businesses. Apart from

¹¹ Corporatisation can take a number of forms, from public institutions such as Water Boards or Town Planning Boards to joint ventures between municipalities. Corporatisation is of particular value in large municipal jurisdictions.

¹² Refer to the White Paper on Local Government (1998) at 117.

¹³ In such a partnership a municipality can, eg, provide funding for a project, a private contractor can provide skills and equipment, whilst a CBO can facilitate the recruitment and management of local labour and community support. The advantage of such a partnership is that skills are effectively transferred, employment is created and effective services are provided without exhausting municipal capacity.

stimulating the local economy, such partnerships should also ensure effective services and less financial expenditure for the local authority.

- *Out sourcing/out contracting* For many years already, many municipalities have benefited from the practice to contract certain services out to specialist private companies. Such specialist companies can often provide such services more effectively than in-house municipal departments can. It is however important for municipalities that when services are contracted out the municipality should protect and ensure minimum standards, contract specifications and an overall control and monitoring capacity. The modern trend in local government seems to be that services are outsourced by way of tender procedures and not by subjective unilateral decision making, or even auction procedures. During a tender process, the lowest bidder is not always the best contractor. Various factors such as the financial standing of the contractor, the inclusion of local labour and technical capacity and quality control should be taken into account. Municipalities must ensure that all legal requirements are adhered to in this regard. Contracting out should be most effective when municipalities are clear about the services they are seeking from a private contractor, and when they have the capacity to manage the tender process and monitor the rendering of the services to ensure that municipal objectives are met.
- *Leases and concessions* A further approach to service delivery is the conclusion of either lease or concession agreements. Such agreements are forms of public-private partnerships that are most common for services where large-scale capital investment is required. The agreements are characterised by an often long contractual period extending over many years, a contractor that is required to take charge of the assets and infrastructure associated with the service for the duration of the contract, which requires substantial investment from the contractor's side. Because the contractor is taking on more risk, it normally demands the transfer of the responsibility for revenue collection in order to minimise financial losses. The long contract period is usually long enough to allow the contractor to recover its initial investment through the revenue that is generated from the provision of the services. In almost all instances the contractor will require ownership of the assets for the duration of the

contract period. When the contract lapses, ownership and infrastructure is then transferred to the municipality.¹⁴ Lease and concession agreements can be concluded in various formats. There are so-called build-operate-transfer (BOT) agreements, where a contractor builds an asset, operates it for a period of time and then transfers it to a municipality. Then there is the build-own-operate-transfer (BOOT) agreement, which further gives ownership of the assets or infrastructure to the contractor for the length of the contract period. Lastly, there is also a build-operate-train-transfer (BOTT) variation which specifically provides for training for municipal employees during the contract period, which will then operate and manage the facilities and services, after the contract period has come to an end. Apart from the obvious benefits of such partnerships, there are high financial risks if such partnerships are managed or structured poorly. To avoid such negative possibilities, national government has put forward certain regulatory requirements to ensure public accountability and consumer protection. Some of these requirements will be discussed elsewhere in this chapter.

- *Privatisation/transfer of ownership* The last procedure to enhance service delivery refers to the transfer of ownership from municipalities to private or community-based entities. The transfer of ownership in this respect particularly refers to the sale of municipal assets, together with the transfer of responsibilities for the management of such services. Such a process is more generally referred to as privatisation. Although privatisation should not easily be considered with reference to primary/core municipal services such as water, electricity and solid waste disposal, it certainly could have positive outcomes in respect of secondary services such as municipal

¹⁴ Although this form of service provision is not entirely new to government institutions, it has only recently started to take effect. A good example of such a partnership is the partnership between the department of correctional services and private institutions to build and manage new correctional facilities. The private companies have agreed and contracted with government to build new prisons, which they will then manage for a certain period in lieu of payment for such services. After the contract period has lapsed, the prison and other assets will fall back on the government. There are many areas in local government service provision, where such partnerships can be very effective. One such example is the possible upgrading and management of old power stations in municipal areas. Private companies can reinvest in such stations and then sell the electricity to the local municipality. After a certain period, the power station and new infrastructure will again be owned by the municipality, to utilise to the benefit of its local communities.

maintenance, parks and recreation and even refuse removal services.¹⁵ All in all, the privatisation of non-core assets can boost municipal capacity and revenue in order for municipalities to focus on the delivery of strategic and core municipal services. Although there seems to be no clear consensus on which municipal services should be regarded as core or non-core services, national guidelines provide more clarity in this respect. It is, however, the final responsibility of each municipal council to make its own assessments in relation to what services are core services and what are not. In this regard, municipalities should be guided by the strategic policies put forward in each municipally integrated development plan.

16.2.3 Some basic administrative capacities that will enhance municipal development

In order to play and ensure a developmental role effectively and to improve performance in respect of service delivery, all municipalities will need to develop at least the following capacities:

- Municipalities will have to become more strategic in their orientation. They should be open and flexible to new or unforeseen demands.
- They will have to maximise integrated capacity, both inside and outside the municipal jurisdiction.¹⁶
- They will have to become much more community orientated.

Municipal councils need to develop mechanisms to interact with community groups and to identify service needs and priorities. Without the capacity to strategise, integrate and interface with non-municipal groups, many local governments are unlikely to be sustainable in the future. The implementation of new strategies and policies requires a strong municipal leadership, with the necessary support and belief of the municipal council. Continuous communication between all role players and regular oversight and training should be provided.¹⁷

¹⁵ With special emphasis on the central role that municipalities are constitutionally obligated to play in meeting the material, social and economic needs of communities, it is undesirable that ownership of core infrastructure and assets is removed from the municipal/public sphere.

¹⁶ The vertical integration of national and provincial programmes with municipal administrative systems may be a particularly effective way for rural municipalities to build their administrative capacity.

¹⁷ It should be noted that the training of municipal councillors falls under SALGA, which in turn should ensure that an intensive councillor training programme is provided for after

Suffice it to say that the approaches to improving service delivery efficiency and quality, which build on existing capacity, are more likely to succeed if they are structured as a partnership between council, management, labour and the community. Although labour protects particular interests, such interests should not prevent effective service delivery to communities. In this respect the South African Local Government Bargaining Council (SALGBC) will play a critical role in achieving new service delivery standards and development objectives. The SALGBC will have to look specifically at new measures to ensure more flexibility in the retraining and redeployment of municipal staff, the introduction of a more customer- and performance-orientated service system and the improvement of accountability and commitment to delivery within municipal administrations. Finally, one should remember that it is ultimately the responsibility of national and provincial governments to monitor and oversee the effective performance by municipalities of their functions.¹⁸

16.3 The new legislative requirements regarding municipal services and service provision

16.3.1 *The constitutional legal basis*

According to the new constitutional framework, all municipalities are obligated to provide certain services and to achieve certain objectives. In this regard there is a strong relationship between the functions that municipalities should fulfil and the services and objectives that they should achieve and provide. It is interesting to note that the Constitution itself does not go into much detail regarding all the services that a modern municipal government should provide. The Constitution merely states that all municipalities must strive, within their financial and administrative capacities, to achieve the objectives of:

- a democratic and accountable government
- the provision of services in a sustainable manner
- social and economic development
- safe and healthy environments

every election of new municipal councillors. See the White Paper on Local Government (1998) at 125.

¹⁸ See again the Constitution ss 154(1) and 155(6).

- community involvement in local government matters.¹⁹

The Constitution also mandates all municipalities to structure and manage their administrations, budgets and planning processes to give priority to the basic needs of their communities and to promote social and economic development.²⁰ What the basic needs of communities are is not altogether certain. Some core/basic needs are universal, however, and should take centre stage in any municipal service provision planning. Such basic services would normally include water and electricity provision, as well as solid waste disposal and general municipal infrastructure. These services must be provided in an equitable and sustainable manner.²¹ The Constitution again does not provide more guidance regarding specific services that should be rendered.

¹⁹ Refer again to the Constitution s 152(1)(a)-(e). It is self evident that without the necessary financial and administrative capacity the mentioned objectives will not be achieved. Various strategic programmes and initiatives should be implemented in order to enhance both financial and administrative capacities.

²⁰ See the Constitution s 153(a)-(b).

²¹ In terms of s 155(4) of the Constitution, national legislation must take into account the need of municipalities to provide municipal services in an equitable and sustainable manner.

Apart from the fact that municipalities are obligated to provide certain core services to their residents, a municipality must be legally authorised to provide such a service or to impose fees or tariffs for such services. Without legal authorisation, a municipal government will not be entitled to render particular services or to impose fees for such services.²²

In an effort to further enhance the achievement and fulfilment of their obligations towards service provision, the Constitution requires provincial governments to establish municipalities in a manner that will promote the development of local government capacity in each province so as to enable municipalities to perform their functions and manage their own affairs.²³ Only time will tell if the different types of municipality that have been established under provincial authorisation will indeed promote the development capacities as is required. On this point, it is also important to mention that both national and provincial governments, through their legislative and executive powers, should see to the effective performance by a municipality of its functions in relation to the matters listed in Schedules 4 and 5 of the Constitution.²⁴ Furthermore, a municipality, in the effective performance of its functions, has the right to exercise any power concerning a matter that is reasonably necessary for or incidental to the performance of its normal functions.²⁵ In this respect one should remember that it is the municipal council itself that makes decisions concerning the exercise of powers and the performance of all

²² See, eg, the case of *Kajee v Stanger Borough Town Council* 1994 (3) SA 9 (A). In this case the appellant's property was situated outside the municipal area and not connected to the respondent's electricity system. The respondent's main electricity cable, however, passed within 23 metres of appellant's property; accordingly, the respondent alleged, the appellant was liable in terms of the Local Authorities Ordinance 25 of 1974 (N) s 266(1)(f), which provides that the town council can make by-laws prescribing, *inter alia*, "an availability electricity charge in respect of properties ... which are not connected to the council's electricity scheme if such properties can reasonably be so connected". These charges were purportedly fixed and levied in terms of two municipal notices promulgated by a resolution of the council. However, on appeal the respondent was unable to produce a by-law authorising the council to impose such charges, but referred instead to s 268 of the ordinance (as it existed prior to its amendment in 1985), which, after dealing with the procedure to be followed for the making of valid by-laws, provided in ss (4) that "notwithstanding anything in s 266 contained, the council shall impose fees and frame tariffs of charges only by resolution". The court held that before the council could impose fees or frame tariffs it had to be properly empowered to do so. Because no valid by-law had been passed, the municipality had no power to prescribe or recover the particular tariff. See paras C-D at 14.

²³ See the Constitution s 155(6)(b). This establishment took place during the 2000 local government elections and with the beginning of the final phase of the restructuring process.

²⁴ See the Constitution s 155(7).

²⁵ This aspect is confirmed in the Constitution s 156(5).

functions of a municipality and also employing the necessary personnel to perform its functions effectively.²⁶

In light of the abovementioned, it seems acceptable to argue that the constitutional drafters did not want to address extensively all the various legal aspects and specific services that municipalities in the new legal scheme have to comply with. Basically they left it open for parliament to address these issues in more detail and with more certainty, and created only a broad framework wherein such services had to be identified and sufficiently provided for. In this respect the Municipal Systems Act contains numerous legal requirements relating to municipal service provision and fulfilment.

16.3.2 General provisions regarding municipal services according to national legislation

16.3.2.1 The general duty on municipalities in respect of municipal services and basic aspects concerning service tariffs

In compliance with the basic constitutional provisions and requirements in respect of municipal service provision, the Local Government: Municipal Systems Act²⁷ determines specific duties and requirements for all municipalities, which must be complied with. As a general duty, a (or all) municipality must give effect to the provisions of the Constitution and must:

- give priority to the basic needs of the local community
- promote the development of the local community
- ensure that all members of the local community have access to at least the minimum level of basic municipal services.²⁸

²⁶ The Constitution S 160(1)(a) and (d).

²⁷ 32 of 2000 as amended.

²⁸ See the Systems Act s 73. According to s 1 of the Act, the term “basic municipal services” is defined to mean a municipal service that is necessary to ensure an acceptable and reasonable quality of life and that, if not provided, would endanger public health or safety or the environment. Although the definition provides some guidance, an exact determination of what should be regarded as a basic municipal service is very open ended and will have to be determined on a case-to-case basis and after consideration of all relevant circumstances. See the case of *Manqele v Durban TMC* 2002 (6) SA 423 (D). The Water Services Act 108 of 1997 s 2(a) sets out that one of the main objectives of the Act is to provide for “the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being”. In terms of the Act s 3 everyone has “a right of access to basic water supply and basic sanitation”, and every water service institution must take reasonable measures to realise these rights. In terms of the definitions in the Act s 1, “basic water supply” means the “prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene”, whilst “prescribe” itself means “prescribe

The Systems Act furthermore identifies five specific requirements that municipal services must adhere to. These requirements are:²⁹

Municipal services must be:

- equitable and accessible
- provided in a manner that is conducive to prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time
- financially sustainable
- environmentally sustainable
- regularly reviewed with a view to upgrading, extension and improvement.³⁰

The Act is unfortunately silent on ways or mechanisms whereby municipalities are to achieve and adhere to the mentioned requirements. It seems that the main initiatives in this regard should come from individual municipalities themselves. All municipal councils should therefore take full cognisance of the listed requirements and put policies and programmes in place in order that they do not fall foul of the broad and more specific legal obligations. It is also submitted, however, that national and provincial governments should do more

by regulation". In the absence of regulations defining the extent of the right of access to a basic water supply, the court has no guidance from the legislature or the executive to enable it to interpret the content of the right to basic water supply embodied in the Act s 3. The applicant approached a Local Division after the discontinuation by the respondent of the water supply to the premises she occupied together with four of her own children and three other children, as a result of non-payment of the applicant's water account. The relief sought was predicated on the existence of the applicant's "right" to a basic water supply as referred to in the Act s 3. The court held that, in the absence of prescription of the minimum standard of water supply services necessary to constitute a basic water supply, the interpretation that the applicant wanted the court to place on the Act s 3 required it to pronounce upon and enforce upon the respondent, a local authority, the quantity of water that the applicant was entitled to have access to, the quality of such water and acceptable parameters for "access" to such basic water supply. Those were policy matters which fell outside the purview of the court's role and function and were inextricably linked to the availability of resources. See also *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T), where the court held *inter alia* that the attitude adopted by the respondents in their answering affidavits reflected a certain contempt for the plight of the people whose water supply had been cut off; a degree of unwillingness to co-operate that was unacceptable on the part of an organ of state.

²⁹ See the Systems Act s 73(2)(a)-(e).

³⁰ It is interesting to note that according to recent case law it was stated that there is no language anywhere in the Act which expressly requires one to confine the ordinary meaning of the wide expression "municipal services", where it appears in the Act, to municipal services which are charged for or which are notionally capable of being charged for and which have identifiable users. It cannot be accepted that throughout the whole of the Act any reference to municipal services must be taken to be confined to services which are chargeable to individual users. See *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA) para 8 at 550.

to assist and support municipalities in complying with their general service delivery duties. This can be achieved through the enactment of more detailed legislative or even executive guidelines.³¹

Apart from the basic duties and requirements on local governments in respect of municipal services, the Systems Act further determines that all municipal councils must adopt and implement a tariff policy on the levying of fees for municipal services that are provided by the municipality itself or by way of service delivery agreements. Such a tariff policy must then comply with the provisions of the Systems Act, the MFMA, as well as with any other applicable legislation.³² The Act then determines that the mentioned tariff policy must reflect at least a certain minimum principles. These minimum requirements are the following:³³

- (a) users of municipal services should be treated equitably in the application of tariffs;
- (b) the amount individual users pay for services should generally be in proportion to their use of that service;
- (c) poor households must have access to at least basic services. This can be achieved through tariffs that cover only operating and maintenance costs, by introducing special tariffs or life line tariffs for low levels of use or consumption or for basic levels of service, or by any other direct or indirect method of subsidisation of tariffs;
- (d) the tariff policy must reflect the costs reasonably associate with rendering the service, including capital, operating, maintenance, administration and replacement costs, and also interest charges;
- (e) tariffs must be set at levels that facilitate the financial sustainability of the service, taking into account the subsidisation from sources other than the particular service concerned;

³¹ In this regard, emphasis should again be placed on the constitutional obligations placed on national or provincial governments as set out in the Constitution ss 151(3) and (4), 154(1), 155(4), (6)(b) and (7). Even if such provisions are viewed to be inadequate, then s 164 should be helpful, which determines that any matter concerning local government that has not been dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

³² See the Systems Act s 74(1) as substituted by Act 44 of 2003 s 10.

³³ See the Systems Act s 74(2)(a)-(i).

- (f) provision may be made in appropriate circumstances for a surcharge on the tariff for a particular service;
- (g) provision may be made for the promotion of local economic development through special tariffs for certain categories of commercial and industrial users;
- (h) the policy must also encourage the economical, efficient and effective use of resources, the recycling of waste and other appropriate environmental objectives to be achieved;
- (i) the policy should also fully disclose the extent of subsidisation of tariffs for poor households and other categories of users.³⁴

Apart from the basic tariff policy principles mentioned above, special cognisance should be taken of the fact that a tariff policy may lawfully differentiate between various categories of service user, debtor, service provider, service, service standard, geographical area and other matter, as long as such differentiation does not amount to unfair discrimination.³⁵

When the tariff policy has been finalised, a municipal council must adopt by-laws to give effect to the implementation and enforcement of such a tariff policy. Again, such by-laws may differentiate between different categories of user, debtor, service provider, service, service standard and geographical area as long as such differentiation does not amount to unfair discrimination.³⁶

³⁴ It is submitted that this provision should have the positive support of the tariff policy in general. Many South African citizens do accept that there are enormous gaps between average households and very poor households, which in turn requires special measures in order to provide basic life-supporting services to such households. However, when municipalities are not clear and transparent about their policies and reasons for special measures to support such poor households, many other service users can feel that they are not being treated equally and fairly, and thus they object and do not support such initiatives.

³⁵ See the Systems Act s 74(3). This reasoning seems in line with the general principle of the rule of law which requires a legitimate governmental purpose to exist if people are treated differently as well as direct provisions set out in the Constitution. The Bill of Rights s 9 allows for the unequal treatment of people in certain circumstances. Such treatment would be constitutionally sanctioned and would not be unjustifiable and unreasonable in terms of the Constitution s 36. However, care must be taken not to exceed the constitutional provisions and thus allow for unconstitutional policies or conduct. When the provisions of the Constitution are breached, such conduct or actions would be invalid. Refer to the Constitution s 2.

³⁶ See the Systems Act s 75.

Apart from the tariff policy, municipalities are afforded a general power to levy and recover fees, charges and tariffs. Accordingly, the Systems Act determines that a municipality may

- levy and recover fees, charges or tariffs in respect of any function or service of the municipality
- recover collection charges and interest on any outstanding amount.

The mentioned fees, charges and tariffs are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.³⁷ After such a resolution has been passed, the municipal manager must do the following without delay:

- Conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access. Such other places may be determined by the municipal manager.
- Publish in a newspaper of general circulation in the municipal jurisdiction a notice stating that a resolution in respect of fees, charges or tariffs has been passed by the municipal council and that a copy thereof is available for public inspection during office hours at the main administrative office of the municipality and at other places specified in the notice. The notice must also indicate the date on which the determination will come into operation.
- Seek to convey the information of the notice to the local community by means of radio broadcasts covering the area of municipal jurisdiction.³⁸ As soon as the notice of any fees, charges or tariffs has been published in a newspaper, the municipal manager must forthwith send a copy of the notice to the MEC for local government in the province concerned.³⁹

16.3.2.2 National legislative requirements regarding the provisions of municipal services

According to the new national legislative framework for local government, a municipality may provide a municipal service in its area or a part of its area.

³⁷ See the Systems Act s 75A(1) and (2). It is submitted that the section refers to an absolute majority of 50% + 1 of the total number of members of the relevant municipal council.

³⁸ Refer to the Systems Act s 75A(3)(c).

³⁹ The Systems Act s 75A(4).

Such a service or services may be provided through an internal mechanism or external mechanism. *Internal mechanisms* include

- a department or other administrative unit within the municipal administration
- any business unit devised by the municipality, provided that such a unit operates within the municipality's administration and under the control of the municipal council in accordance with its operational and performance criteria
- any other component of the municipal administration.⁴⁰

On the other hand, an *external mechanism* refers to a service delivery agreement that has been entered into between a municipality and any of the following institutions:

- a municipal entity
- another municipality
- an organ of state, including a water services committee established in terms of the Water Services Act of 1997, a traditional authority or any other registered service provider registered or recognised in terms of national legislation
- a CBO or NGO that are legally competent to enter into such an agreement
- any other institution, entity or person legally competent to operate a business activity.

It is striking and rather unfortunate that the Act does not require the partners in an external service delivery agreement to be competent and able to provide the municipal service relevant to the contract. It is therefore left to a municipality itself to determine if a party to a service delivery agreement is indeed competent to provide a specific municipal service in the municipal area or a part thereof. Municipalities are therefore obligated to review or decide on an appropriate mechanism to provide a municipal service. In cases of a service provision which is provided through an internal mechanism, municipalities must review or decide on an appropriate service provision mechanism when:

⁴⁰ See the Systems Act s 76(a)(i)-(iii).

- an existing municipal service is to be significantly upgraded, extended or improved
- a performance evaluation requires a review of the existing mechanism
- the municipality is restructured or re-organised in terms of the Municipal Structures Act.⁴¹

When a municipal service is provided through an external mechanism, a municipality must review or decide on an appropriate mechanism to provide a particular service when:

- a performance evaluation requires a review of the particular service delivery agreement⁴²
- the service delivery agreement is anticipated to expire or be terminated within the next 12 months or
- an existing municipal service or part thereof is to be significantly upgraded, extended or improved and such an event is not addressed in the relevant service delivery agreement.⁴³

A municipality must also review and decide on an appropriate mechanism in order to provide a municipal service when a review of such a service is required by an intervention in terms of section 139 of the Constitution. The same obligation is required when a new municipal service is to be provided or when the local community has requested such review or when a review of the municipalities IDP also requires a review of the delivery mechanisms regarding a service or services.⁴⁴

Apart from the obligation placed on municipalities to review and decide on mechanisms to provide municipal services, certain criteria and processes for deciding on such mechanisms have been statutorily provided for. Accordingly, when a municipality has decided on a particular mechanism to provide a municipal service or to review any existing mechanism, it must first assess five particular criteria. These criteria are the following:⁴⁵

⁴¹ See the Systems Act s 77(a)(i)-(iii).

⁴² In order to determine if such a performance evaluation is required, refer to the Systems Act ch 6.

⁴³ See the Systems Act s 77(b)(i)-(iii).

⁴⁴ See the Systems Act s 77(c)-(f). The procedure for review on request by the local community is determined in terms of the Act ch 14.

⁴⁵ See the Systems Act s 78(1)(a)(i)-(v).

- The direct and indirect costs and benefits associated with the project if the service is provided by the municipality through an internal mechanism. Part of this assessment must also include the expected effect the mechanism could have on the environment, on human health and well-being, as well as safety.
- The municipality's capacity and potential future capacity to furnish the skills, expertise and resources that are necessary or will become necessary for the provision of the service through an internal mechanism.
- The extent to which the re-organisation of the municipality's administration and the development of the human resource capacity within that administration could be utilised to provide a service through an internal mechanism.
- The likely impact the decision could have on aspects such as development, job creation and employment patterns in the municipality.
- The views of organised labour.

It is important to note that all of the abovementioned aspects must be assessed. After thorough assessment has taken place a municipality may also take into account any developing trends that are generally applicable to the sustainable provision of municipal services.⁴⁶ After the abovementioned criteria have been applied, a municipality may decide on an appropriate internal mechanism to provide the service or, before it takes a decision on an appropriate mechanism, explore the possibility of providing such a service through an external mechanism. If it decides to explore an external mechanism, the municipality must give notice to the local community of its intention to explore the provision of the service through an external mechanism and must also assess the various delivery options as are mentioned in section 76(b) of the Systems Act. When assessing such options, the municipality must take into account similar criteria, as would be the case under section 78(1)(a) of the Systems Act.⁴⁷ The municipality must also

⁴⁶ Refer to the Systems Act s 78(1)(b).

⁴⁷ See the Systems Act s 78(2) and (3). The mentioned criteria are: (i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, well-being and safety; (ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service; (iii) the

conduct or commission a feasibility study which must be taken into account before a final decision is taken. The feasibility study must include the following:⁴⁸

- a clear identification of the municipal service for which the municipality intends to consider an external mechanism
- an indication of the number of years for which the provision of the service through an external mechanism might be considered
- the projected outputs which the provision of the service might be expected to produce
- an assessment as to the extent to which the provision of the service will provide value for money, address the needs of the poor, be affordable for the municipality and residents and impact of the transfer of appropriate technical, operational and financial risk
- the projected impact on the municipality's staff, assets and liabilities
- the projected impact on the municipality's integrated development plan
- the projected impact on the municipality's budget including impacts on revenue, expenditure, borrowing, debt and tariffs
- any other matter that may be prescribed.

After having applied and assessed the mentioned criteria, a municipality must decide on an appropriate internal or external mechanism that would ultimately result in or achieve the best outcome.⁴⁹

On the question of whether a municipality is obligated to assess or take into account the views of organised labour before making a decision to establish a (municipal police) service, the Supreme Court of Appeal stated that while provisions 16-21 of the Systems Act, which foster participation by the community in municipal decision-making processes, are expressed in relatively wide and general terms, the provisions of section 78 of the Act are not. Section 78 provisions are applicable only when a municipality has

views of the local community; (iv) the likely impact on development and employment patterns in the municipality; and (v) the view of organised labour.

⁴⁸ See s 78(3)(c)(i)-(viii) of the Systems Act.

⁴⁹ It is important to note that when a municipality is following the abovementioned requirements, it must comply with any applicable legislation that is relating to the appointment of a service provider other than the municipality itself and also any other additional requirements that may be prescribed by regulations. See the Systems Act ss 78(4)-(5).

decided on a mechanism to provide or review a municipal service in terms of section 77. Section 78 provisions are not applicable to the anterior decision to provide or extend a municipal service. Sections 77 and 78 of the Act are concerned with the question of how things (services) are to be done and not whether they should be done. The purpose of sections 77 and 78 of the Act is to compel a municipality to consider how a particular service can be done and through which appropriate internal mechanism it can be done. Only after that has been done may the provision of a service through an external mechanism be considered. It is in considering these questions that section 78(1)(a)(v) and (3)(b)(v) oblige the municipality to assess and take into account the views of *inter alia* organised labour. Section 78 also postulates that a decision has already been made to provide or review a municipal service.⁵⁰

Apart from the determining criteria discussed above, a further important obligation on municipalities is that, if a municipality has decided to provide a municipal service through an internal mechanism, it must allocate sufficient human, financial and other resources to the particular unit that might be necessary for the proper provision of such service and must also transform the actual provision of that service in accordance with, and thus in compliance with, the provisions of the Systems Act.⁵¹ If a municipality decides to provide a service through a service delivery agreement in terms of section 76(b) of the Systems Act with:

- a municipal entity or another municipality, it may, subject to subsection (3) of the Act, negotiate and enter into such an agreement with the relevant municipal entity or municipality without applying part 3 of chapter 8 of the Systems Act which refers to service delivery agreements involving competitive bidding

⁵⁰ Refer to *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA). The court held that the provisions of ss 77 and 78 do not have to be complied with before a decision to provide a new service or to upgrade or review an existing service is reached. Paras 11-14 at 551-552 and also at 555.

⁵¹ See the Systems Act s 79(a)-(b). In determining what would be sufficient resources, all relevant circumstances should be taken into account. Various factors can have an impact on such a determination. It is suggested that if a municipality makes an objective and informed determination, such a determination would hardly fall foul of the requirements of the Act.

- a national or provincial organ of state, it may enter into such an agreement with the relevant organ of state without applying the principles of competitive bidding
- any institution or entity, or any person, either juristic or natural, which was not mentioned above in either paragraphs (a) or (b), then it must apply part 3 referring to competitive bidding before entering into an agreement with such institution, entity or person.⁵²

It is further provided that before a municipality enters into a service delivery agreement with an external service provider it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media. In instances where a municipality decides to enter into a service delivery agreement with another municipality, that other municipality must conduct or commission a feasibility study and take it into account before the agreement is entered into.⁵³

The new legislative framework also establishes specific responsibilities of municipalities when they provide services through service delivery agreements with other external mechanisms. In such instances it is required that if a municipal service is provided through a service delivery agreement with an external mechanism the municipality remains responsible for ensuring that such service is provided to the local community in accordance with new legal standards.⁵⁴ In order to oversee and ensure its obligations of final service provision, all municipalities must do the following:⁵⁵

⁵² See s 80(1)(a)-(b) of the Systems Act as substituted by Act 44 of 2003 s 12. Note that a 'municipal entity' means a private company, a service utility or a multi-jurisdictional service utility. A 'multi-jurisdictional service utility' again means a body established in terms of s 87 of the Systems Act. Refer to the definitions of the Act, s 1 as amended by Act 44 of 2003.

⁵³ Read ss 80(3)(a)-(b) of the Systems Act. Note that the feasibility study must include an assessment on the impact on the budget and other assets, liabilities and staff expenditure, an assessment whether staff should be increased, an assessment on the ability of the other municipality to absorb any commitments, liabilities or employees involved, when the appointment ends and finally any other relevant information as may be prescribed.

⁵⁴ Such provisions confirm the new constitutional obligations in terms of accountability and sustainable service provisions. Municipalities cannot contract their responsibilities away regarding service provision.

⁵⁵ See the Systems Act s 81(1)(a)-(e).

- regulate the provision of the service in accordance with section 41 of the Systems Act, which sets certain core components for performance management
- monitor and assess the implementation of the service agreement and performance management of the particular service provider⁵⁶
- perform its functions and exercise its powers according to the Systems Act if the municipal service falls within a development priority or objective of the municipality's IDP
- control the setting and adjustment of tariffs by the service provider for the service, within the council's tariff policy
- general exercise its service authority to ensure uninterrupted delivery of service in the best interests of the local community.

Through its conclusion of a service delivery agreement, a municipality is legally authorised to do the following⁵⁷ in order to ensure effective, sustainable and uninterrupted municipal services:

- It may assign to a service provider the responsibility for
 - (a) developing and implementing detailed service delivery plans (SDP) within the framework of the municipality's IDP
 - (b) the operational planning, management and provision of the municipal service
 - (c) the undertaking of social and economic development that is directly related to the provision of the service
 - (d) customer management
 - (e) managing its own accounting, financial management, budgeting, investment and borrowing activities within the framework of transparency, accountability, reporting and financial control determined by the municipality, all of which are subject to the MFMA.⁵⁸

⁵⁶ Such evaluation of performance by a service provider must be done in terms of s 41 provisions.

⁵⁷ See the Systems Act s 81(2)(a)-(e).

⁵⁸ See the Local Government: Municipal Finance Management Act 56 of 2003.

- (f) the collection of service fees for its own account from users of services, in accordance with the municipality's tariff policy and credit control measures.⁵⁹
- It may pass on funds for the subsidisation of services to the poor to the service provider through a transparent system, which must be subject to performance monitoring and audit.
 - It must ensure that the agreement provides for a dispute-resolution mechanism to settle disputes between the municipality and the service provider.
 - It may transfer or second any staff members to the service provider, with the concurrence of the staff member concerned and in accordance with applicable labour legislation.
 - It must ensure continuity of the service if the service provider is placed under judicial management, becomes insolvent, is liquidated or for any other reason is unable to continue performing its functions and obligations in terms of the particular service delivery agreement.
 - It must, where applicable, take over the service, including all assets, when the service delivery agreement expires or is terminated.

The municipal council is also permitted to set, review or adjust the tariffs within its tariff policy. The service delivery agreement may further provide for the adjustment of tariffs by the service provider, within certain limits set by the municipal council⁶⁰ It is further possible for a service delivery agreement to be amended by agreement between the parties, except where an agreement has been concluded, following a competitive bidding process. Where a service agreement has been concluded following a competitive bidding process, an amendment can be made only after the local community has been given:

- reasonable notice of the intention to amend the agreement, including the reasons for the proposed amendment
- sufficient opportunity to make representations to the municipality.⁶¹

It is important to note that no councillor or staff member may share in any profits or improperly receive any benefits from a service provider providing or

⁵⁹ See also the Act ch 9 which deals with aspects concerning credit control and debt collection.

⁶⁰ See the Systems Act s 81(3).

⁶¹ See the Systems Act s 81(4)(a)-(b).

proposing to provide any municipal service in terms of a service delivery agreement.⁶²

16.3.2.3 Service delivery agreements that involve competitive bidding

The Systems Act further provides that if a municipality decides to provide a municipal service through a service delivery agreement with a person referred to in section 80(1)(b) of the Act, it is obliged to select such a service provider through a selection process which

- complies with chapter 11 of the MFMA
- allows all prospective service providers to have equal and simultaneous access to information relevant to the bidding process
- minimises the possibility of fraud and corruption
- makes the municipality accountable to the local community with regard to the progress of selecting a service provider and the reasons for any decision in this regard
- takes into account the need to promote the empowerment of small and emerging enterprises.⁶³

It is also provided for, but subject to the provisions of the Preferential Procurement Policy Framework Act,⁶⁴ that a municipality may determine a preference for categories of service providers in order to advance the interests of persons disadvantaged by unfair discrimination, as long as such preference is exercised in a manner that does not compromise or limit the quality, coverage cost and developmental impact of the services.⁶⁵ The selection of preferential service provider contenders must be fair, equitable, transparent, cost-effective and competitive.⁶⁶ Such requirements may be

⁶² Such prohibition on receiving any profits or benefits is in line with new procedures to eradicate corruption and bribery. Apart from possible criminal prosecution, councillors and staff members that receive such profits or benefits will also contravene their respective codes of conduct and can also be held punishable under such codes.

⁶³ See the Systems Act s 83(1)(a)-(e).

⁶⁴ Act 5 of 2000, which aims at giving effect to the Constitution s 217(3) by providing a framework for the implementation of a procurement policy.

⁶⁵ In other words, preferential service providers such as affirmative action appointments or black empowerment groups may be preferred, as long as certain minimum standards and obligations are not compromised.

⁶⁶ See *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) where it was submitted that the Preferential Procurement Policy Framework Act requires organs of state to establish a procurement policy, and also makes it obligatory for organs of state to

provided for in other applicable national legislation. Even in cases of the consideration of a municipality to select a service provider, the selection process must also apply with the criteria listed in section 78 of the Systems Act in addition to the preferences for certain categories referred to in this subsection.⁶⁷

It is also required that on the basis of the bidding documents, any addenda, amendments or variations that were provided to all bidders after a prospective service provider has been selected, the municipality must negotiate the final terms and conditions of the service delivery agreement with the preferred service provider. If the negotiations are successful, the municipality must then enter into the agreement on such terms and conditions that were specified in the bidding documents, together with additions thereto. It should be noted that modifications to the bidding process must not materially affect the bid in any manner that would compromise the integrity of the bidding process. If the terms and conditions of an agreement cannot be agreed upon within a reasonable time, the municipality may negotiate a possible agreement with the next-ranked prospective service provider.⁶⁸ When a municipality has entered into a service delivery agreement it must

- make copies of the agreement available at its offices for public inspection
- give notice in the media of the particulars of the service that will be provided in terms of the agreement, the name of the selected service provider and the place and period where copies of the agreement will be available for public inspection.⁶⁹

16.3.2.4 The legal requirements relating to internal municipal service districts

It is generally understood that the provision of municipal services, according to the new constitutional and other legal requirements, is not an easy task.

follow a tender procedure for the procurement of goods and services. If such requirements are not met, then the tender process, if any, was unlawful.

⁶⁷ See the Systems Act s 83(2) and (3).

⁶⁸ The bidding process is therefore not to be repeated because the first preferred service provider did not accept the conditions of the agreement. The reference to a reasonable time for the negotiations will depend on the circumstances of each case. The more urgent the service that should be provided, the less time would be regarded as reasonable. It is, however, advisable for municipalities to communicate in writing the circumstances and urgency of each case and to put the preferred bidder on terms to either accept or withdraw from the bidding process.

⁶⁹ Refer to the Systems Act s 84(1)-(3).

Even more difficult is the provision of services in large metropolitan or district municipal jurisdictions. In an effort to lighten the burden on service delivery and in order to ensure effective and sustainable service provision, the new legislative framework on local

government allows for the establishment of so-called “internal municipal service districts”. In this regard and in accordance with its policy framework, a municipality is allowed to establish part of the municipality as an Internal Municipal Service District (IMSD) to facilitate the provision of a municipal service in that part of the municipality. Before an IMSD is established, the municipality must:

- consult the local community on the following matters:
 - (a) the proposed boundaries of the service district
 - (b) the proposed nature of the municipal service
 - (c) the proposed method of financing the service
 - (d) the proposed mechanism for provision of the service and
- obtain the consent of the majority of the members of the local community in the proposed IMSD that will be required to contribute to the provision of the municipal service.⁷⁰

Following on subsection 85(2), when a municipality establishes an IMSD, the municipality must determine the boundaries of the district, the mechanism to provide the service and establish a separate accounting system and other record-keeping systems in respect of the service. The municipality may also set a tariff or levy for the service, impose a special surcharge in the district for the service or increase the tariff in the district for the service. The municipality may further establish a committee comprising persons representing the community of the IMSD to act as a consultative or advisory forum regarding the management and other matters of the service.⁷¹ In areas where IMSDs are considered, a municipality must develop and adopt a policy framework for the establishment, regulation and management of such an IMSD. Such a policy framework must reflect at least the following aspects:

- the development needs and priorities of designated parts of the municipality which must be balanced against the needs and priorities of the municipality as a whole and
- the extent to which the establishment of one or more IMSDs will promote the local economic development of the municipality as a whole, will

⁷⁰ See the Systems Act s 85(1) and (2).

⁷¹ See the Systems Act s 85(3)(a)-(e). Note that the committee proposed in s 3(e) should be established on the basis of gender representivity.

contribute to enhancing the social, economic and spatial integration of the municipality and which may not entrench or contribute to further disparities in service provision in the municipal jurisdiction.⁷²

According to wide-ranging amendments to the Systems Act during 2003, various new issues have been incorporated under section 86 of the Act. Section 86A provides now for the following:

The Minister may for purposes of municipal services, make regulations or issue guidelines in accordance with section 120 of the Act, in order to provide for or regulate the following matters:

- The preparation, adoption and implementation of a municipal tariff policy
- the subsidisation of tariffs for poor households through cross-subsidisation within and between services, equitable share allocations to municipalities and national and provincial grants to municipalities
- limits on tariff increases
- criteria to be taken into account by municipalities when imposing surcharges on tariffs for services and determining the duration thereof
- incentives and penalties to encourage the economical, efficient and effective use of resources when providing services; the recycling of waste and other environmental objectives
- criteria to be taken into account by municipalities when assessing options for the provision of a municipal service
- measures against malpractice in selecting and appointing service providers, including measures against the stripping of municipal assets
- mechanisms and procedures for the co-ordination and integration of sectoral requirements in terms of legislation and the manner in which municipalities must comply with these
- standard draft service delivery agreements
- the minimum content and management of service delivery agreements
- additional matters that must be included in a feasibility study in terms of section 78(3)(c) of the Act, which may include the strategic and operational costs and benefits of an external mechanism in terms of the municipality's strategic objectives, an assessment of the municipality's capacity to

⁷² Refer to the Systems Act s 86(1) and (2).

effectively monitor the provision of the municipal service through an external mechanism and to enforce the service delivery agreement

- performance guarantees by service providers and
- any other matter that would facilitate the effective and efficient provision of municipal services or the application of the provisions of the Act.⁷³

The Minister may make regulations and issue guidelines relating to fiscal matter only after consulting with the Minister of Finance and any other Cabinet member whose portfolio is affected by such regulations and guidelines. When making regulations or issuing guidelines, the Minister must take into account the capacity of municipalities to comply with such regulations and guidelines and differentiate between different kinds of municipality according to their respective capacities.⁷⁴

The Act specifically determines that there are the following kinds of municipal entity:

- a private company established by one or more municipalities in terms of Part 2 of the Act or in which one or more municipalities have acquired or hold an interest according to Part 2 of the Act
- a service utility established by a municipality in terms of Part 3 of the Act and
- a multi-jurisdictional service utility established by two or more municipalities in terms of Part 4.⁷⁵

It is specifically provided that no municipality may establish, or participate in the establishment of, or acquire or hold an interest in, a corporate body, including a trust, except where such corporate body is a private company, service utility or multi-jurisdictional service utility referred to above or a fund for the benefit of its employees in terms of a law regulating pensions or medical aid schemes. However, such requirements do not apply to the acquisition by a municipality for investment purposes of securities in a company listed on the Johannesburg Securities Exchange in accordance with

⁷³ See s 86A(1)(a)-(m) of the Systems Act.

⁷⁴ Refer to ss 86A(2)-(3) of the Systems Act.

⁷⁵ Read s 86B(a)-(c) of the Systems Act.

the investment framework envisaged in section 13 of the Municipal Finance Management Act.⁷⁶

It is further provided that a municipality may, subject to subsection 86C (2), establish or participate in the establishment of a private company in accordance with the Companies Act,⁷⁷ or acquire or hold an interest in a private company in accordance with the Companies Act. In this regard it is further permitted that:

- A municipality may in terms of subsection 86C(1)(a) or (b) either acquire or hold full ownership of a private company or acquire or hold a lesser interest in a private company.
- A municipality may acquire or hold such a lesser interest in a private company only if all the other interests are held by (i) another municipality or municipalities, (ii) a national or provincial organ of state or organs of state or (iii) any combination of institutions referred to in (i) and (ii).
- A municipality may, despite paragraph (b), acquire or hold an interest in a private company in which an investor other than another municipality or a national or provincial organ of state has an interest, but only if effective control in the private company vests in that municipality, another municipality, or that municipality and another municipality collectively.⁷⁸

It is also important to note that a private company referred to in section 86C(1) is a municipal entity if a municipality, or two or more municipalities collectively, have effective control of that private company or is a public entity to which the Public Finance Management Act applies, if ownership control in the company is held by a national or provincial organ of state.⁷⁹ A private company which is a municipal entity must further restrict its activities to the purpose for which it is used by its parent municipality in terms of section 86E(1)(a) of the Systems Act and it has no competence to perform any activity which falls outside the

⁷⁶ See ss 86B(2)-(3) of the Systems Act.

⁷⁷ 61 of 1973.

⁷⁸ Refer to ss 86C(1)-(3) of the Systems Act. Note that if a municipality establishes a private company or acquires or holds an interest in such a company, it must comply with the Companies Act and any other law regulating companies. If any conflict however arises between the Companies Act or other law and a provision of the Systems Act, then the Systems Act prevails.

⁷⁹ See Act 1 of 1999 read together with s 86D(1) of the Systems Act.

functions and powers of its parent municipality contemplated by section 8 of the Act.⁸⁰

Municipalities may further establish a private company or acquire an interest in such a company only for the purpose of utilising the company as a mechanism to assist it in the performance of any of its functions or powers or if the municipality can demonstrate that there is a need to perform that function or power in accordance with business practices in order to achieve the strategic objectives of the municipality more effectively and that the company would benefit the local community. It is also imperative that all other conditions that may be prescribed have been complied with. It should be noted however that if a municipality establishes a private company or acquires an interest in such a company for the purpose of using that company as a mechanism to provide a municipal service, then the provisions of Chapter 8 of the Systems Act are applicable.⁸¹

According to the new amendments, if two or more municipalities intend to establish a private company or to acquire interests in the same private company, each of those municipalities must:

- comply with section 86E of the Systems Act
- consider and reach agreement on proposals for shared control of the company and
- consider cash flow projections of the company's proposed operations for at least three financial years.⁸²

A municipality may further transfer ownership or otherwise dispose of a wholly owned private company, subject to the Municipal Finance Management Act, or an interest in a private company subject to section 14 of the Municipal Finance Management Act and only if that transfer or disposal would not result in an infringement of section 86C (2) of the Systems Act by another municipality which holds an interest in the company.⁸³

In respect of the establishment of a service utility, it is now statutorily permitted for a municipality to pass a by-law establishing such a service utility. A by-law establishing a service utility must: state the purpose for which the

⁸⁰ Read ss 86D(1)-(2) of the Systems Act.

⁸¹ Ss 86E(1)-(2) of the Systems Act.

⁸² See s 86F of the Systems Act.

⁸³ Read s 86G of the Systems Act.

service utility is established, confer the powers and impose the duties on the service utility which are necessary for the attainment of such purpose and provide for the following aspects:

- a board of directors to manage the service utility
- the number of directors to be appointed
- the appointment of directors, the filling of vacancies and the replacement and recall of directors by the parent municipality
- the terms and conditions of appointment of directors

- the appointment of a chairperson
- the operating procedures of the board of directors
- the delegation of powers and duties to the board of directors
- any other matter necessary for the proper functioning of the board of directors
- the acquisition of infrastructure, goods, services, supplies or equipment by the service utility, or the transfer of infrastructure, goods, services, supplies or equipment to the service utility
- the appointment of staff by the service utility or the transfer or secondment of staff to the service utility in accordance with applicable labour legislation
- the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- the governance of the service utility and
- any other matter necessary for the proper functioning of the service utility.

The by-law may also determine budgetary and funding arrangements for its implementation. No by-law may confer on a service utility any functions or powers falling outside the competence of the parent municipality contemplated by section 8 of the Systems Act.⁸⁴ It should also be noted that a service utility is a juristic person and a municipal entity under the sole control of the municipality which established it. All service utilities must restrict their activities to the purpose for which they were established and have no competence to perform any activity which falls outside their functions or powers as are determined in terms of the by-law of the municipality.⁸⁵

Apart from establishing IMSDs, municipalities may also establish so-called Multi-jurisdictional Municipal Service Utilities (MMSUs).⁸⁶ In this regard it is provided that two or more municipalities, by written agreement, may establish a multi-jurisdictional service utility to perform any function or power envisaged by section 8 of the Systems Act, in their municipal areas or in any designated parts of their municipal areas. The Minister may, in the national interest and in consultation with the Cabinet member responsible for the functional area in question, request two or more municipalities to establish a multi-jurisdictional

⁸⁴ Read ss 86H(1)-(4) of the Systems Act.

⁸⁵ See s 86I(1)-(2) of the Systems Act.

⁸⁶ See s 87 of the Systems Act as substituted by s 19 of Act 4 of 2003.

service utility to conform to the requirements of national legislation applicable to the provision of a specific municipal service. The

municipalities that receive such a request must within two months decide whether to accede to the request, and convey their decision to the Minister.⁸⁷

An agreement establishing a multi-jurisdictional service utility must describe the rights, obligations and responsibilities of the parent municipalities, and must :

- determine the boundaries of the area for which the multi-jurisdictional service utility is established
- identify the municipal service or other function to be provided in terms of the agreement
- determine budgetary and funding arrangements for implementation of the agreement
- provide for a board of directors for the multi-jurisdictional service utility, the appointment of directors by the respective parent municipalities, the filling of vacancies and the replacement and recall of directors, the number of directors appointed by each parent municipality, the terms and conditions of appointment of directors, the appointment of a chairperson, the operating procedures of the board of directors, the delegation of powers and duties to the board of directors and any other matter relating to the proper functioning of the board of directors
- provide for the acquisition of infrastructure, goods, services, supplies or equipment by the multi-jurisdictional service utility or the transfer of infrastructure, goods, services, supplies or equipment to the multi-jurisdictional service utility; the appointment of staff by the multi-jurisdictional service utility or the transfer or secondment of staff to the multi-jurisdictional service utility in accordance with applicable labour legislation and the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- determine the conditions for, and consequences of, the withdrawal from the agreement of a parent municipality
- determine the conditions for, and consequences of, the termination of the agreement, including the method and schedule for winding-up the operations of the multi-jurisdictional service utility; the distribution of the

⁸⁷ See s 88 as amended by s 20 of Act 44 of 2003.

proceeds and the allocation among the parent municipalities of any assets and liabilities

- provide for the governing of the multi-jurisdictional service utility, compulsory written reports regarding the activities and performance of the multi-jurisdictional service utility to a parent municipality, information that may be requested from the multi-jurisdictional service utility by a parent municipality, the amendment of the agreement and any other matter necessary for the proper functioning of the multi-jurisdictional service utility.⁸⁸

A multi-jurisdictional service utility is further accountable to the parent municipality(ies) and must comply with the Municipal Finance Management Act. Parent municipalities are again entitled to receive such regular written reports from the multi-jurisdictional service utility with respect to its activities and performance, as may be set out in the agreement establishing the multi-jurisdictional service utility. They may also request the multi-jurisdictional service utility to furnish them with such information regarding its activities as the parent municipality(ies) may reasonably require. Parent municipalities may also appoint a nominee to inspect, at any time during normal business hours, the books, records, operations and facilities of the multi-jurisdictional service utility and those of its contractors relating to the performance of the function or power for which the multi-jurisdictional service utility is established.⁸⁹

Multi-jurisdictional service utilities terminate automatically, when there is only one remaining parent municipality or by written agreement among all of the parent municipalities or upon the termination date or the fulfilment of any condition for termination contained in the agreement establishing the multi-jurisdictional service utility.⁹⁰

The parent municipality(ies) of a municipal entity have specific duties towards such a municipal entity and must:

⁸⁸ See s 90 of the Systems Act as substituted by s 22 of Act 44 of 2003. A (MMSU) is a juristic person and falls under the control/shared control of the parent municipalities. All (MMSU) must restrict their actions to the object of their establishment and they have no other competencies outside the functions set out in their establishment agreement.

⁸⁹ Read s 92 as substituted by s 24 of Act 44 of 2003.

⁹⁰ S 92 as substituted.

- exercise any shareholder, statutory, contractual or other rights and powers it may have in respect of the municipal entity to ensure that both the municipality and the municipal entity comply with this Act, the Municipal Finance Management Act and any other applicable legislation and that the municipal entity is managed responsibly and transparently and meets its statutory, contractual and other obligations
- allow the board of directors and chief executive officer of the municipal entity to fulfil their responsibilities and
- establish and maintain clear channels of communication between the municipality and the municipal entity.⁹¹

In instances where a parent municipality, which has sole control of a municipal entity, or effective control in the case of a municipal entity which is a private company, the parent municipality must ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act. The parent municipality is further obligated to monitor and annually review, as part of the municipal entity's annual budget process, the performance of the municipal entity against the agreed performance objectives and indicators and may liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.⁹² Parent municipalities that have shared control of a municipal entity must enter into a mutual agreement determining and regulating the following:

- their mutual relationships in relation to the municipal entity
- the exercise of any shareholder, contractual or other rights and powers they may have in respect of the municipal entity

⁹¹ Refer to s 93A as inserted by s 26 of Act 44 of 2003.

⁹² See s 93B of the Systems Act.

- the exercise of their powers and functions in terms of the Systems Act and the Municipal Finance Management Act with respect to the municipal entity
- measures to ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act
- the monitoring and annual review, as part of the municipal entity's annual budget process as set out in section 87 of the Municipal Finance Management Act, of the performance of the municipal entity against the established performance objectives and indicators
- the payment of any monies by the municipalities to the municipal entity or by the municipal entity to the municipalities
- procedures for the resolution of disputes between those municipalities
- procedures governing conditions for and consequences of withdrawal from the municipal entity by a municipality
- procedures for terminating the appointment and utilisation of the municipal entity as a mechanism for the performance of a municipal function
- the disestablishment of the municipal entity, the division, transfer or liquidation of its assets and the determination of the responsibility for its liabilities and
- any other matter that may be prescribed.

Parent municipalities may further liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems, or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.⁹³

In respect of municipal representatives, it is now determined that the council of a parent municipality must designate a councillor or an official of the parent municipality, or both, as the representative or representatives of the parent

⁹³ Read s 93C as inserted by s 26 of Act 44 of 2003.

municipality. The functions of such representative(s) are to represent the parent municipality as a non-participating observer at meetings of the board of directors of the municipal entity concerned and to attend shareholder meetings and exercise the parent municipality's rights and responsibilities as a shareholder, together with such other councillors or officials that the council may designate as representatives. It is further important to note that the official lines of communication between a municipal entity and the parent municipality exist between the chairperson of the board of directors of the municipal entity and the mayor or executive mayor, as the case may be, of the parent municipality. The mayor or executive mayor, as the case may be, of a parent municipality may at any time call or convene any meeting of shareholders or other general meeting comprising the board of directors of the municipal entity concerned and the representatives of the parent municipality, in order for the board of directors to give

account for actions taken by it. The council of a parent municipality may also determine the reporting responsibilities of a municipal representative. A municipal representative is strictly obligated to represent the parent municipality faithfully at shareholder meetings, without consideration of personal interest or gain, and must keep the council informed of how voting rights were exercised and of all relevant actions taken on behalf of the municipality by the representative. A municipal representative must further act in accordance with the instructions of the council and may be reimbursed for expenses in connection with his or her duties as a municipal representative. The municipal representative may not receive any additional compensation or salary for such duties, however.⁹⁴

It is also provided that the board of directors of a municipal entity must have the requisite range of expertise to effectively manage and guide the activities of the municipal entity. The board must consist also of at least a third non-executive directors and must have a non-executive chairperson. Before nominating or appointing a director, it is the responsibility of the parent municipality of a municipal entity to establish a process through which applications for nomination or appointment are widely solicited, to compile a list of all applicants and any prescribed particulars concerning applicants and to ensure that the municipal council makes the appointment or nomination from such list.⁹⁵ A person is not eligible to be a director of a municipal entity if he or she:

- holds office as a councillor of any municipality
- is a member of the National Assembly or a provincial legislature
- is a permanent delegate to the National Council of Provinces
- is an official of the parent municipality of that municipal entity
- was convicted of any offence and sentenced to imprisonment without the option of a fine, and a period of five years since completion of the sentence has not lapsed
- has been declared by a court to be of unsound mind or
- is an unrehabilitated insolvent.

⁹⁴ See s 93D of the Systems Act as amended.

⁹⁵ See s 93E of the Systems Act.

If a director of a municipal entity during that person's term of office becomes disqualified on a ground mentioned above, then such a person ceases to be a director from the date of becoming disqualified.⁹⁶ The parent municipality of a municipal entity is further authorised to remove or recall a director appointed or nominated by that municipality. Such removal or recall is permitted only when the performance of the director is unsatisfactory; when the director, either through illness or for any other reason is unable to perform the functions of office effectively or if the director, whilst holding office, is convicted of fraud or theft or any offence involving fraudulent conduct or has failed to comply with or breached any legislation regulating the conduct of directors, including any applicable code of conduct.⁹⁷

The board of directors of a municipal entity has also been afforded specific duties and responsibilities. As such, the board must provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity. It must also ensure that it and the municipal entity comply with all applicable legislation and agreements and communicate openly and promptly with the parent municipality of the municipal entity. In general, the board must deal in good faith with the parent municipality of the municipal entity. A director of a municipal entity is further obligated to disclose to the board of directors and to the representative of the parent municipality any direct or indirect personal or business interest that the director or his or her spouse or partner may have in any matter before the board, and must withdraw from the proceedings of the board when that matter is considered, unless the board decides that the director's direct or indirect interest in the matter is trivial or irrelevant. Directors must at all times act in accordance with the Code of Conduct for directors referred to in section 93L of the Systems Act, which is referred below.⁹⁸ In respect of meetings of the board of directors it is provided that such meetings must be open to the municipal representatives referred to in section 93D of the Systems Act. Municipal representatives have non-participating observer

⁹⁶ Refer to s 93F of the Systems Act.

⁹⁷ Read s 93G of the Systems Act as inserted by s 26 of Act 44 of 2003.

⁹⁸ See s 93H of the Systems Act.

status in a meeting of the board of directors of a municipal entity.⁹⁹ It is also determined that the board of directors of a municipal entity must appoint a chief executive officer of the municipal entity. Such a chief executive officer is accountable to the board of directors for the management of the municipal entity.¹⁰⁰

Municipal entities may not establish or participate in the establishment of a company or any other corporate body, including a trust, or acquire or hold an interest in a company or any other corporate body, including a trust. This prohibition does not apply, however, to the acquisition by a municipal entity of securities in a company listed on the Johannesburg Securities Exchange for investment purposes, subject to any applicable provisions of the Municipal Finance Management Act or a fund for the benefit of employees of a municipal entity in terms of a law regulating pensions or medical aid schemes.¹⁰¹

Mention was made earlier in this chapter that the Systems Act now provides for a specific Code of Conduct for directors and members of staff of a municipal entity. In this regard, it is provided that the Code of Conduct for councillors contained in Schedule 1 of the Act also applies, with the necessary changes, to directors of a municipal entity. In the application of item 14 of Schedule 1 of the Act to directors of a municipal entity, that item must be regarded as providing that:

- the board of directors of a municipal entity may investigate and make a finding on any alleged breach of a provision of this Code by a director or establish a special committee to investigate and make a finding on any alleged breach of a provision of this Code by a director or make appropriate recommendations to the board of directors
- if the board of directors or special committee finds that a director has breached a provision of this Code, the board of directors may issue a formal warning to the director, reprimand the director, fine the director or recommend to the parent municipality that the director be removed or recalled

⁹⁹ Refer to s 93I of the Systems Act.

¹⁰⁰ S 93J of the Systems Act.

¹⁰¹ Read s 93K of the Systems Act.

- the board of directors of a municipal entity must inform a parent municipality of that entity of any action taken against a director in terms of the Code of Conduct.

The Code of Conduct for municipal staff members contained in Schedule 2 of the Systems Act applies, with the necessary changes, to the members of staff of a municipal entity. For purposes of this provision, any reference in Schedule 1 or 2 of the Act to a 'councillor', 'MEC for local government in the province', 'municipal council', 'municipality' and 'rules and orders' must, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a director of a municipal entity, parent municipality, board of directors, municipal entity and procedural rules, respectively.¹⁰²

16.4 An overview of services that are generally provided by local governments

16.4.1 *General factors that impact on municipal services*

It has been explained in the introductory chapters of this work that the provision of municipal services is arguably the most important reason for the existence and creation of local government structures. So important and fundamental is the provision of municipal services to local communities that it has been incorporated and entrenched within the new constitutional framework of South Africa. Before one investigates the basic services that municipalities should provide, it is important to look briefly at specific factors that have an impact on service provision and service levels, however. To a large extent these factors are determining factors in achieving a system of effective and sustainable service provision. The factors can be summarised as follows:

- *Financial resources* Finance is often regarded as the oil that keeps the engine of government running smoothly.¹⁰³ Without financial resources there can be no effective and sustainable provision of municipal services. All municipalities should maximise their potential financial income and should utilise such resources sparsely and diligently. Municipal finances are generated mainly via two sources:

¹⁰² Refer to s 93L of the Systems Act as inserted by s 26 of Act 44 of 2003.

¹⁰³ See Craythorne (1997) 391.

- (a) the sharing in revenue that is raised nationally
 - (b) revenue that is generated locally through the collection of rates, taxes and surcharges on services.
- *Training and municipal planning* The restructuring of municipal governments since 1993 has had a somewhat negative impact on skilled municipal employees. Many municipalities have lost the services of highly skilled and experienced municipal personnel. Coupled with the reality of a new legal and administrative framework, all municipalities are in need of extensive training and education programmes to ensure services are provided in compliance with the new legal foundation. Local governments should not be short sighted in respect of the importance of new training initiatives. The new local government systems must be supported by a comprehensive and continuous programme of training and skills development. Without proper attention to such aspects, sustainable service provision might be an unattainable ideal. Equally important to training is the principle of municipal planning. Planning in general is an inseparable part of the processes of public administration and accordingly requires specific consideration.¹⁰⁴ In basic terms, municipal planning means looking ahead by anticipating and making arrangements for dealing with future problems by projecting trends. One such trend is, for example, the migration of people. Migration of people from mostly rural areas to more developed areas such as towns or cities is a universal phenomenon. People migrate from one place to another in the hope of obtaining work and achieving a better quality of life. The most important consideration in municipal planning in terms of accommodating migration trends is to anticipate future demand for basic municipal services such as water, sanitation, refuse removal and primary health care facilities and means. Often migration patterns are difficult to anticipate, because many informal settlements are established almost anywhere. In light of such sudden municipal demands, municipal planning is a *sine qua non* for a successful local government system.

¹⁰⁴ See Craythorne (1997) 400-402. The writer refers to certain definitions of the term "planning", which in essence means that objectives need to be clarified, whereafter specific actions should be implemented to achieve the desired goals. Planning involves not only the financial inputs necessary but also who the various role players should be.

Planning thus has its roots in the past, but with a view to deciding the future in the present.¹⁰⁵

- *Accountability, effective decision making and local democratic governance* The new constitutional dispensation of South Africa, which includes local governments, is founded *inter alia* on the values of a democratic, accountable, responsive and open government.¹⁰⁶ All municipal governments must therefore structure and manage their affairs in compliance with such values. Municipalities must take decisive steps to eradicate all forms of maladministration and corruption and must align themselves with the new supreme values in the state. Without a concerted effort to establish a new, clean and accountable local governance, there is little chance that the newly established local government structures will secure and fulfil their obligations towards effective and sustainable service delivery.¹⁰⁷
- *Public participation and social and economic development* Public participation within all spheres of government is a constitutional prerequisite. This is of particular importance since the former local government dispensation excluded many people from its processes and decision-making procedures. Without proper participation of all the role players in local communities, the new local government dispensation is stillborn from the outset. In general, participation leads to information, which in turn ensures support. It is further a well-known fact that people generally support and participate in processes in which they have a direct or even an indirect stake. Communities need to realise that local governments are there mainly to provide services and to manage and control the local area to the benefit of all that are living or working there. As a counterweight, municipalities must assure and provide their services so as to ensure social and economic development which in turn will ensure a

¹⁰⁵ See Craythorne (1997) 402.

¹⁰⁶ See the Constitution s 1(d).

¹⁰⁷ The more money is lost or wasted because of maladministration and corruption, the fewer resources are available to provide much-needed services and infrastructure to service hungry local communities.

better future for all residents. The importance of this objective has been given constitutional protection.¹⁰⁸

16.4.2 Municipal services to be provided under the Constitution

16.4.2.1 Distinguish between functions and services

Before one looks at the different services a municipality is required to provide, it is of value to distinguish between the terms functions and services. As defined by Craythorne,¹⁰⁹ a municipal function is something that is linked to the nature of governance. A government must govern, and in order to govern it must perform certain functions, such as making laws, levying taxes, employing personnel and allocating resources. On the other hand, a service is something that is provided by one person or institution to another person or groups of persons. In this regard, a service is something that is to be rendered to others.¹¹⁰

16.4.2.2 Specific municipal services

It is interesting to note that within the new constitutional dispensation no direct or specific mention is made with regard to the specific services that municipalities should ordinarily render to their communities. On the contrary, the new legal framework refers to the powers, functions, objects and duties of municipalities. A closer evaluation of such powers, functions, objects and duties the terms seem to indicate reveals, albeit indirectly, certain services that should be rendered. However, it is submitted that it is not altogether certain whether certain powers, functions or duties also require municipalities specifically to render services regarding such matters.¹¹¹ In summary, municipalities have executive and legislative powers with regard to the matters listed in Part B of Schedule 4 and 5 of the Constitution, as well as with

¹⁰⁸ See the Constitution s 152.

¹⁰⁹ See Craythorne (1997) 409.

¹¹⁰ The main objective of municipalities, not only historically, but also according to the Constitution, is to provide effective and sustainable services to their respective communities. In order to provide such services, a municipality must also perform certain functions. The provision of services is therefore dependent on the ability to perform certain functions.

¹¹¹ The Constitution Sch 4 Part B and Sch 5 Part B identify the functional areas of municipal executive authority and also indirectly municipal legislative authority. Only a few of these functional areas refer to a service or services that are to be rendered. Sch 4 Part B refers only to fire fighting services, municipal health services and water and sanitation services. Sch 5 Part B does not refer to any services that should be provided. In this regard it is somewhat uncertain if the other functional areas also refer to a service that should be rendered regarding such areas or if they are only to be regulated through executive and legislative actions.

regard to those matters that have been assigned to them in terms of national or provincial legislation.¹¹² Apart from the functional areas mentioned above, all municipalities have to strive, within their financial and administrative capacities, to achieve the objects set out in section 152(1)(a)-(e) of the Constitution.¹¹³ Seen in context, the areas or matters mentioned in Part B of Schedules 4 and 5 indicate the type of service that local government should provide for. These seem to be areas that neither the national nor the provincial government would be able to provide without unnecessary bureaucratic growth. Before the different services are discussed briefly, it must be remembered that, according to item 2 of Schedule 6 of the Constitution, much old order legislation, for example old provincial ordinances, are still in force, and many of them require extra services or functions to be rendered.¹¹⁴

Upon a close evaluation of the different municipal services that should be rendered, two broad categories of such service are recognisable. Some services are regarded as *support services*, while others are classified as *operational services*. Support services refer broadly to those services that are vital for the efficient and effective operation of the overall municipal machine and differ from one municipality to another, according to size and capacity. Operational services again refer to those services that are generally considered to be services that a municipality should render to its local community. The different services in each category can be summarised briefly as follows:

(a) General municipal support services

- *Legal services* All municipalities need legal advice and support in order to ensure that they operate within the Constitution and the law in general. Basically all the different branches of the law are applicable and relevant to municipal operations and activities. There are hardly any legal aspects,

¹¹² See the Constitution s 156(1)(a)-(b). Again reference should be made to the obligation on the two higher spheres of government to assign to municipalities those matters listed in Schs 4 and 5 Part A, which necessarily relates to local government. See the Constitution s 156(4)(a)-(b).

¹¹³ See the Constitution s 152(2).

¹¹⁴ Only if such old-order laws are contrary to the Constitution or have been repealed would they be of no further force. See, eg, also the matters listed in the LGTA Schs 2 and 2A. The LGTA has been revoked, however, and is no longer applicable.

apart from aspects such as international relations, that are not applicable within some municipal situation. In order to deal with the many legal aspects, municipalities appoint either their own legal staff or make use of various private legal advisors.

- *Financial services* Internal financial advice services are indispensable for all municipalities. Without such advice, municipalities will not be able to plan and realise their other responsibilities according to the new constitutional requirements.¹¹⁵ The importance of financial services therefore speaks for itself.
- *Personnel services* As a legal person, no municipality can act without natural persons that act on behalf of the municipality. This municipal corps or administration is thus vital to any local government. All in all personnel services refers to the recruitment, selection, appointment, placement, promotion and disciplinary procedures relating to the members of staff of a particular municipal government.
- *Secretarial services* These services refer mainly to the overall administration of a municipality. All internal procedural aspects are handled mostly through such services which include internal correspondence and also the finalisation of council agendas and the keeping of council minutes.
- *Repair and maintenance services* Municipalities need a very large infrastructure to operate effectively. This infrastructure requires various movable assets, which assets should be maintained and repaired from time to time. Basically all municipi

¹¹⁵ See again the Constitution ss 152(2) and 153.

palities therefore provide for internal repair and maintenance services.

- *Information and technology services* In the 21st century, no government can operate effectively and sufficiently without the modern world's new technological development. It is especially the computerised information services that have revolutionised all institutions. No local government can afford to be without such services.
- *Supply services* All municipalities must provide for a certain number of supplies that should be available for effective and smooth operations. Such services are a vital support service to municipal operations. Supplies include aspects such as stationery, furniture, and other supplies, to name but a few.

(b) Municipal operational services:¹¹⁶

- *Air pollution* Municipalities similar to the two higher spheres of government are also responsible for environmental protection. Air pollution from car exhaust fumes or industrial smoke is an important environmental concern and should be addressed and controlled on a local level.¹¹⁷
- *Building regulations* The control and oversight of building activities is generally regarded as one of the so-called "inspection services". All municipalities should control and inspect compliance to building regulations and standards. This is a very important service to the public in general, as substandard building or dwellings can have life-threatening consequences. Although building regulations and standards are set nationally, it is their enforcement and control on a municipal level that ensures a safe and acceptable system.¹¹⁸
- *Childcare facilities* The provision and control of childcare facilities is also a municipal matter. Neither national government nor the provincial governments are in an ideal position to address and control such a functional area. It is for municipalities themselves to determine local needs and expectations and to provide for them as may be required. Although

¹¹⁶ See the Constitution Schs 4 and 5 Parts B.

¹¹⁷ Municipalities are constitutionally obliged to promote a safe and healthy environment. The Constitution s 152(d).

¹¹⁸ See the National Building Regulations and Building Standards Act 103 of 1977. Many municipalities also provide for their own town-planning schemes, which also require certain standards regarding building activities. Some municipal by-laws are also important in this regard.

childcare facilities and services have also been allocated to local governments, the specific role of such governments is not clearly explained. Some commentators have already suggested that new legislative guidance is needed to rectify such a position.¹¹⁹

- *Electricity and gas reticulation* Arguably one of the most common and important services that are provided for by municipalities is electricity and/or gas reticulation. This is an example of a traditional service that has become indispensable within a modern society. The service does not necessarily relate to the generation of electricity or exploitation of gas, but rather to providing such commodities to local premises for utilisation.

In a similar way to water provision, electricity is normally rendered to local residents after such residents have concluded a service-provision agreement with their local municipality. When such services are received, residents are normally responsible for paying for such services.¹²⁰ Most municipalities are mere suppliers of electricity to local residents. In order to become a supplier, a municipality must become a licensee, as is intended in national legislation.¹²¹ Once a municipality has started to supply electricity to consumers, it is prohibited from disconnecting such supply if such a consumer has paid the full amount due in respect of the supply of electricity. This is the position regardless of whether the consumer owes any other amount to the municipality for other services or other causes of

¹¹⁹ See Zaal and Matthais "Local Government and the Provision of Childcare Services: An Essential area for legislative reform" *SALJ* 119 (1) 138 *et seq.* The writers mention that the potential importance of the role of local authorities was recognised by the drafters of the 1996 Constitution: therefore its inclusion in Sch 4B. They finally reiterate that local government authorities have a constitutional obligation to provide services for children but that such an obligation has largely gone unrecognised, and needs urgent attention. They conclude by suggesting that the best way to redress this serious inadequacy is for the national legislature to promulgate additional legislation. At 153-154.

¹²⁰ See *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A). In the case the appellants, each of whom owned immovable property within the respondent's municipal jurisdiction, concluded agreements with the respondent in terms of which the respondent was to supply the properties in question with electricity and water. In its particulars of claim in an action in a local division the respondent alleged that the appellants were liable to it for the payment of certain amounts in respect of such services. The appellants excepted to these particulars on the ground that the agreements were *ultra vires* the relevant by-laws and could accordingly not support a claim for payment. The local division assumed, for the sake of argument, that the agreements were indeed *ultra vires*, but held, on the authority of a long line of cases, that the appellant, having received benefits under the contract, was estopped from raising the *ultra vires* defence.

¹²¹ See the Electricity Act 41 of 1987.

action.¹²² Generally a municipality is required to supply electricity to consumers. To supply means to make available rather than to actually deliver. Electricity is normally also supplied to consumers and not a property. There can thus be more than one consumer on a particular erf.¹²³ Generation or exploitation is normally done nationally, although it is not entirely uncommon for certain municipalities to generate electricity for themselves.¹²⁴ Generally municipalities are responsible for the establishment and maintenance of the electricity provision network and for providing support services thereto. Local authorities must note that they are not generally allowed to discontinue one service because of arrear rates for another. In the case of *Hartzenberg v Nelson Mandela Metropolitan Municipality (Despatch admin unit)*,¹²⁵ the court held that although the applicants were in unlawful occupation of houses and were in arrears with payments for water supplies, the respondent municipality could not disconnect the electricity supply to the properties. The court held that neither the relevant Electricity Supply by-law nor the Local Government: Municipal Systems Act gave the respondent such authority. The respondent was thus not entitled to discontinue the electricity supply because of the arrears on the water accounts.¹²⁶

- *Fire fighting services* The provision of fire fighting services is the first service that is specifically referred to in Part B of Schedule 4 of the Constitution. It is self-explanatory that this service is of cardinal importance to all residents of municipal areas. Every day local residents are at risk in respect of fires. In this respect, such services are often lifesaving. Municipalities should ensure that fire stations are ideally located within each particular municipal jurisdiction, in order to provide a rapid and effective service. The nature of the service at hand requires the quickest response possible. The personnel that provide the service must be properly trained and should be effectively equipped to handle any foreseeable

¹²² See *Senekal Inwonersvereniging v Plaaslike Oorgangsraad* 1998 (3) SA 719 (O). The court held that the disconnection of the electricity supply of residents who had not paid all accounts in respect of services or rates in full could not be valid. At 727 paras H-I.

¹²³ See *Omters (Edms) Bpk v Welkom Stadsraad* 1999 (3) SA 787 (SCA).

¹²⁴ See the Electricity Act 41 of 1987 and the Gas Act 48 of 2001 for more details.

¹²⁵ 2003 (3) SA 633 (SE).

¹²⁶ See at 638E-F.

situation. Emphasis should be placed not only on corrective fire-fighting services, but also on preventative initiatives. Such initiatives and responsibilities are especially important in high-risk areas such as informal settlements. Fire-fighting services are controlled mainly through national legislation.¹²⁷ It should be noted that fire-fighting services are not free of charge and that fees could be recovered by the service provider.¹²⁸

- *Local tourism* In an effort to attract national or even international investment, all municipalities should explore local investment opportunities. Tourism is one such opportunity that could be a significant enhancement in municipal financial income and one which should be explored thoroughly. Local tourism is something that cannot be done locally on an isolated basis, however; it needs to tie in with an overall national programme for the country as a whole.
- *Municipal airports* In some municipal areas there might be a need to provide and or maintain a municipal airport. To this extent, such a service should be provided to fulfil local needs, depending on financial resources and overall strategic programmes. When such a service is indeed provided for, municipal governments should take note of the various responsibilities and possible liabilities that accompany the provision of such a service.
- *Municipal planning* It has been stated several times in this work that all municipalities are obligated to provide and ensure proper municipal planning services. Such services refer mainly to various aspects of the management and control of land use or land use rights. There are many laws applicable in relation to municipal planning services, ranging from national laws such as the Physical Planning Act¹²⁹ and the Development

¹²⁷ See the Fire Brigade Services Act 99 of 1987.

¹²⁸ See, eg, *Tuinroete Klein Karoo Distriksmunisipaliteit v Lategan* 2003 (2) SA 683 (C). The Fire Brigade Services Act 99 of 1987 (the Act) s 10 creates a statutory obligation to pay for fire brigade services, coupled with an effective debt-recovery mechanism. The Act s 10(1) authorises a controlling authority (which is a local authority in terms of the Act s 1) to determine the fees payable by a person on whose behalf fire-fighting services were rendered. The subsection creates a *sui generis* cause of action. It does not exclude the recovery of compensation for the rendering of services on common-law grounds. The chief fire officer who wishes to recover compensation from a person on whose behalf fire-fighting services were rendered has a choice to institute action for compensation on a common-law cause of action or to recover the moneys as determined by the controlling authority.

¹²⁹ 88 of 1967 and also the Physical Planning Act 125 of 1991.

Facilitation Act¹³⁰, provincial laws and ordinances and also relevant local by-laws and town planning schemes.¹³¹

- *Municipal health services* All municipalities are involved in ensuring and providing certain minimum health services to their local communities. Such service provision is essential to everyday life, and municipalities are best suited to provide and ensure such services. Again, one should remember that such services interact with national and provincial programmes on health services.
- *Municipal public transport* Public transport is an indispensable service to the public at large. Depending on the size and density of a local area, municipalities should plan and make provision for public transport facilities. These services are very expensive and need to be justified according to local needs.
- *Municipal public works* Municipalities should also provide for certain municipal public works. Such works refer only to facilities or services that are required in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law. Most other public works services are to be provided by the higher spheres of government.
- *Municipal services relating to pontoons, ferries, jetties, piers and harbours* Depending on location and geographical features, some municipalities are required to provide, maintain and control certain services where water is applicable. Often such services are also regulated in terms of higher legislative provisions. In some instances municipal involvement is entirely excluded. The regulation of, for example, international and national shipping and matters related thereto are exempt from local government control.
- *Storm water management systems in built-up areas* As municipal jurisdictions are becoming more and more developed, the management, provision and maintenance of storm-water systems are becoming ever so troublesome. Urbanisation with complaisant modern infra-structure such as

¹³⁰ 67 of 1995.

¹³¹ See, eg, the old Transvaal ordinance on town planning and towns, ordinance 15 of 1986 and the former Pretoria town-planning scheme 1974, which was enacted in accordance and on the authority of s 19 of the ordinance.

tarred roads and roofed buildings increasingly causes severe flooding in residential areas. Municipalities therefore need to plan and provide for sufficient infrastructure to handle and control such higher volumes of storm water.

- *Trading regulations* The modern 21st century city has undergone significant changes from its humble beginnings a few hundred years ago. Many changes in society, especially in some third world countries and economies, have led to new approaches regarding trading patterns in especially highly populated areas. In many towns and cities, residents have become accustomed to informal trading practices that are permitted throughout the municipal area. However, such trading habits can sometimes have a negative impact on long-established and more traditional business establishments, which in turn could negatively affect new job creation and sustainable enterprises.¹³²
- *Water and sanitation services* The provision of water, and more specifically drinking water, to local residents is generally accepted as one of the most basic of services that municipalities must render.¹³³ Without water and basic sanitation infrastructure and services, it is difficult to imagine how such settlements can sustain and survive. Accordingly, water and sanitation services are seen to tie in strongly with the developmental duties and objectives of municipalities that have been entrenched in the Constitution.¹³⁴
- *Beaches and amusement facilities* Coastal municipalities have an additional service to their communities, in that they must control and manage local beaches in their areas. Apart from beachfront management,

¹³² Most informal or so-called "street trader" do not pay levies for being able to trade in certain areas and it is the responsibility of formal business owners to cross-subsidise for loss in municipal revenue. These practices not only create unequal trading standards but they often also pose environmental and safety hazards. The trading of goods and services within municipal areas should therefore be regulated and controlled, to the benefit of all parties concerned.

¹³³ See the Water Services Act 108 of 1997. See also *Manqele v Durban TMC* 2002 (6) SA 423 (D).

¹³⁴ Refer to the Constitution ss 152(d) and 153. Water is an essential life-sustaining commodity and is also indispensable to ensure a healthy environment. Municipal water and sanitation services are, however, limited to portable water supply systems and domestic wastewater and sewage disposal systems. As is the case with many other services, water and sanitation services should link up with national and provincial programmes and initiatives.

all municipalities are to a greater or lesser degree responsible for the control and management of amusement facilities.

- *Billboards and the display of advertisements in public places* The advertising industry has become a very competitive and fast-growing business. Every municipal administration is therefore regularly confronted with new developments regarding advertisement initiatives. Because of factors such as traffic safety, environmental considerations and an overall aesthetic presentation of a particular area, proper management and control over billboards and the display of advertisements in public is necessary. Under the Constitution, special attention should be given to the regulation of billboards and the display of advertisements in public places. In light of the fact that the Bill of Rights protects the right to freedom of expression, which right also includes commercial free speech, municipalities must ensure that their policies and by-laws do not limit such a right unreasonably. For more on such aspects see *African Billboard Advertising v NSS Central Local Councils*.¹³⁵ In this case the applicant erected certain advertising signs on property in the Durban area which was owned by Spoornet. Acting in terms of its local building by-laws, the respondent objected to the presence of the signs on the basis that they had been erected either in contravention of its by-laws or without the requisite permission to do so, and it placed the applicant on terms to remove them. When the applicant failed to oblige, the respondent engaged the services of a contractor to remove them. The applicant demanded its property back. The court held that the removal of the billboards was unlawful and that the by-law in question had not intended that such signs be removed without a court order. The respondent was subsequently ordered to re-erect the signs.¹³⁶
- *Cemeteries, funeral parlours and crematoria* Providing for cemeteries, crematoria and funeral parlours has always been a function of local governments. Such services are important in the day-to-day living experiences of all communities and should thus be provided on a continuous basis.

¹³⁵ 2004 (3) SA 223 (N).
¹³⁶ See pages 228-229.

- *Cleansing services* According to the Constitution, the provision of cleansing services is also regarded as a local government matter that falls within the functional areas of exclusive provincial legislative competence. What is included under such services is not clear. It is submitted that cleansing services are closely related to municipal health services, however, and that a strong link between the two types of services is self-evident.
- *Control of public nuisances* Municipalities are also responsible for controlling public places within their relevant municipal jurisdiction, and they must therefore also provide for control measures to ensure that public nuisances are addressed. Typical examples of public nuisances that should be controlled are matters that relate to noise control, zoning-scheme contraventions and aspects that have their origin in bad neighbour relations. Municipalities should ensure that community members live as far as possible in harmony with one another and that clear and effective mechanisms exist in order to address any negative or nuisance-like actions or activities that do arise.
- *Control of undertakings that sell liquor to the public* The selling of liquor to the public has always been a contentious and often difficult issue, as there are many negative consequences attached to such activities. Because of the enormous extent of the liquor industry and liquor consumption in our country, control over the liquor trade is something that must be exercised in all three spheres of government. Various national and provincial laws are directed at the liquor trade, and municipalities must also do their bit in order to complete and enhance the overall regulatory framework.¹³⁷
- *Facilities for the accommodation, care and burial of animals* The keeping of animals for farming or as pets is part of human life all over the world. To accommodate aspects relating to animals, especially within modern urbanised areas, certain services should be provided to address issues such as the accommodation, care and disposal of animals. Often the neglect of such services could lead to health risks or could even cause the outbreak of infectious diseases, which in turn could have enormous

¹³⁷ Eg, see the Liquor Act 27 of 1989 as amended.

consequences, not only within a particular municipal area but even for the country as a whole.¹³⁸

- *Fencing and fences* Depending on local circumstances, issues relating to fencing and fences within a municipal area could also have important implications. Not only are fences and issues relating to fencing important for private and public safety reasons, they often also assist in preventing damage to property or even disputes relating to ownership of goods or animals. The control and services relating to fences are therefore often more important in rural or farming communities than in some urban developments.
- *Licensing of dogs* Mention was made of the fact that many people keep so-called “domestic animals” as pets on their properties. The control over such animals is much less of a problem in rural communities, as they are within modernised towns or cities. Arguably the most common domesticated pet and security measure is a dog. In light of the nature of such animals, certain minimum controls should be exercised, and thus municipalities are empowered to insist that dogs within their areas of jurisdiction be licensed.
- *Licensing and control of undertakings that sell food to the public* In an effort to ensure and enhance public health standards, municipalities should provide for measures that regulate the licensing and the control over undertakings that sell food to the public. There are various standards and requirements that must be enforced to ensure and promote a safe and healthy environment.¹³⁹ Municipalities are often best suited to ensuring and enforcing such standards and requirements.

¹³⁸ One should recall the attention that was given to the outbreak of mad cow disease and foot and mouth disease in Britain, eg, to see what devastation such diseases can create within a country.

¹³⁹ Note the case of *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994 (3) SA 170 (A). The appellant, a bottler and distributor of soft drinks, was convicted in a magistrate’s court of contravening by-law 18(c) of the City of Durban Food By-Laws, which had been promulgated in terms of the Local Government Ordinance 21 of 1942 (N) s 197(1)(f). The conviction was based on an admission at the appellant’s trial that it had sold a bottle of carbonated mineral water which contained a bee to a supermarket in Durban. The magistrate found that by-law 18(c) imposed a strict liability. The court held that the contamination was foreseeable and that the appellant had been negligent in preventing foreign objects from passing into the consumable products.

- *Local amenities* Municipalities should make a determination with regard to local needs in respect of possible amenities and should then provide, manage and control such amenities. The availability of resources and budget priorities would impact considerably on the variety and extent of local amenities provided. General amenities are municipal pools, picnic areas, caravan parks and even resorts.
- *Local sport facilities* South Africa is generally recognised as a sporting nation. Our climate and weather patterns allow for favourable outdoor sporting activities. Sport forms an important part of many people's private lives and social interactions. Most people do not have the financial capacity to build and maintain their own private sporting facilities. Local governments are therefore tasked and best suited to provide, manage and maintain such facilities.
- *Markets* In large metropolitan areas, some municipalities also provide and manage market facilities. A market is a place where people trade in various items, but mostly in foodstuff. The existence of fresh produce markets or wholesale flower markets is well known in this respect.
- *Municipal abattoirs* In some instances, and depending on local circumstances, some municipalities are also required to provide and control municipal abattoirs. An abattoir is a place where animals are slaughtered and meat is prepared for public consumption. Strict hygiene and health requirements must be adhered to at all times.
- *Municipal parks and recreation* All municipalities should provide so-called "open spaces" or municipal parks where members of local communities can relax and where children can meet and play. In modern urbanised areas, many residents in high-rise compartment blocks do not have gardens or play areas of their own. It is thus a responsibility of municipal governments to create and maintain such public recreational areas.
- *Municipal roads* Municipal infrastructure plays an important role in achieving social and economic development and ensuring that other essential services can also be rendered. In this regard, the proper control and maintenance of municipal roads are of paramount importance. The control and maintenance of municipal roads cannot be done on an isolated basis and must interact with national and provincial initiatives and

schemes. Maintenance of municipal roads also includes the provision and maintenance of storm-water systems citywide.

- *Noise pollution* Within the new constitutional scheme, environmental issues are the responsibility of all three spheres of government. Various national and provincial laws are applicable in order to enhance the protection of environmental demands and requirements. Noise pollution, especially in urban areas, is an aspect that ties in with other environmental interests, and municipalities are best suited within their local jurisdictions to address and control such a matter.
- *Pounds* It is advisable for municipalities to provide for so-called “municipal pounds” where stray animals, illegally parked vehicles or other unauthorised goods can be stored and secured. Pounds vary accordingly to what is to be secured. Proper measures should be introduced to ensure that municipal councils do not incur civil liability for goods or property that have been impounded.
- *Public places* The provision and maintenance of public places is also an important local service that should be provided to local communities. The availability of finances will determine to what extent such places can be afforded.
- *Refuse removal, refuse dumps and solid waste disposal* It is an essential service for municipalities to provide for both domestic and industrial refuse or solid waste removal and dumping facilities. Such services are needed in every community and must be rendered and controlled effectively in order to prevent possible health risks. Because of environmental importance, services relevant to refuse removal, dumps and solid waste disposal mechanisms must comply with legislative requirements from the higher spheres of government.
- *Street trading* Many municipal functions and services are interrelated with other services. The control and management of street trading is a good example. Street trading also ties in with general trading regulations and is directed at controlling and managing trading activities that are conducted next to municipal streets. Other functions such as traffic, parking and municipal roads are also relevant to trading services.

- *Street lighting* Apart from addressing the services relating to municipal roads and public transport, municipalities should also provide street lighting in certain areas. The provision of street lighting is particularly important for road safety and personal security. Not all municipal roads can be provided with lighting facilities, and municipalities should conduct investigations to determine which streets require lighting.
- *Traffic and parking* Traffic control and parking facilities are among the most common municipal services that have been rendered over the years. Such services must interrelate with other similar services such as municipal transport and municipal roads. Various national and provincial laws also exist regarding such matters and must be complied with in the fulfilment or rendering of such services. Traffic control is regarded as an area-bound service and should be managed through strict command and control procedures.

The abovementioned areas of municipal service provision have been entrenched within the new constitutional dispensation of South Africa and cannot be taken away unless the Constitution so permits.¹⁴⁰ Apart from the areas mentioned in the Constitution, some older laws that are still in place and in effect also identify and confirm certain services or functions to be fulfilled by local governments. Some such services or functions are the following:

- *Civil protection services* All municipalities should plan and provide for emergency protection or even disaster management services. In this regard, all possible scenarios should be investigated and potential crisis areas or hazards should be identified. Common aspects that should be provided for are, for example, floods or

¹⁴⁰ See the Constitution Sch 4 and 5 Part B.

other natural disasters, outbreaks of infectious diseases and possible human-made emergency situations such as terrorist attacks or arson incidents. The prevention and management of such incidents is very important and should not be neglected.¹⁴¹

- *Housing* All spheres of government are involved in providing housing services in South Africa. Therefore, housing is one of the most needed commodities in our new state. Many people are living in extreme poverty and with no roof over their heads. Because of the special need of new houses, the national government has introduced various housing schemes.¹⁴² Broadly speaking, the provision of housing services includes aspects such as low-cost housing, modern township developments, retirement homes and facilities, as well as rental properties. Municipalities must interact with the programs of the two higher spheres of government and must also assess and evaluate local housing needs. It is submitted that without the provision of proper housing services there can be no real social and economic development. Housing is thus a high priority service in the new governmental systems in South Africa.
- *Licensing services* In many instances municipalities are tasked with certain licensing services that are to be performed within their areas of jurisdiction. Such services are often required by either national and provincial laws, which in turn mandate local authorities to act as a so-called “controlling” or “inspection” authorities. Examples of these services include business- and vehicle-licensing services, inspection of the premises of liquor-selling businesses and also building regulation fulfilments.
- *Civic centres, city halls and public libraries* Over the years, it has been customary for local authorities to provide and maintain civic centres and city halls. Such centres play an important role in building a local symbolic identity. City halls or civic centres provide a place for public gatherings, official and ceremonial functions and also cultural activities. It is obvious that such centres fulfil an important role in local community activities. Such

¹⁴¹ In South Africa special attention must be given to frequent fires that occur within rural areas and also within informal settlements. As prevention is better than cure, local governments should not be unaware of the devastating effect such incidents could have on local communities.

¹⁴² See, eg, the Redistribution and Development Program, which specifically provides for the provision of housing developments.

services are very expensive, however, and careful prioritisation should be done locally. Building town halls or city halls is very costly, but most towns or cities in South Africa already possess one, and these should be maintained and controlled.¹⁴³ Providing a library service is not a specific function of municipalities, but many municipalities often provided such a service. A library service is directed at serving the local population through the provision of educational and recreational information. In light of modern electronic development, such centres should also provide internet and even e-mail facilities.

- *Law enforcement and municipal police services* It was explained above that municipalities have various law-enforcement obligations and services that must be rendered. Such services differ from building inspections, town planning scheme control, various health and safety measures and also road traffic law enforcement. Apart from providing such services, municipalities are also permitted to establish and maintain a municipal police service.¹⁴⁴ It should be pointed out that local governments do not have an automatic right to establish a municipal police service.¹⁴⁵ Specific requirements must be met before permission can be granted for the establishment of a municipal police service.

16.5 Conclusion

As is the case with many other aspects of the new local government dispensation, it is imperative that municipal services and service provision should comply and conform to the new constitutional vision and requirements. Municipal services must be equitable and accessible for all local residents and must enable all municipalities to achieve and fulfil their objectives and duties.

¹⁴³ City halls are often rich with local heritage and traditions.

¹⁴⁴ According to the Constitution s 205(1), the national police services must be structured to function in the national, provincial and, where appropriate, local spheres of government. S 206(7) further states that national legislation must provide a framework for the establishment, powers, functions and control of municipal police services. For more detail, see the South African Police Service Act 68 of 1995.

¹⁴⁵ *In re Certification of the Constitution of the RSA, 1996 1996 (4) SA 744 (CC)* the Constitutional Court held that whereas the interim Constitution required provision to be made for the establishment by a local government of a municipal or metropolitan police service whose functions would be restricted to crime prevention and the enforcement of municipal and metropolitan by-laws, there was no comparable provision in the new text. Local policing was a matter to be dealt with by an Act of parliament. See paras 395-401 at 888-890.

The basic municipal services are set out in Part B of Schedules 4 and 5 of the Constitution. Apart from such services, national or provincial governments may assign other matters to municipalities via legislation.¹⁴⁶ One can thus conclude that municipal services are not absolutely defined or identified and can differ from one municipality to another as circumstances may require. Within the new local government legislative framework there seems to be rediscovery of the basic essential services that a municipality is supposed to render. This development has caused almost all local governments to focus mainly on the core services and to deregulate or even privatise many other secondary services.

The Constitution compels all municipalities to strive within their financial and administrative capacities to achieve the objectives and therefore the services that were identified above. Services should be provided and rendered to uplift and enhance the quality of life of all local people without a sacrifice in quality or sustainability. In many cases services should be decentralised or even privatised in order to allow local governments all over South Africa to focus and achieve their main constitutional service objectives.

¹⁴⁶ See the Constitution s 156(1)(b). Subs (4) further enhances such assignment as national and provincial governments must assign to a municipality the administration of a matter listed in the Constitution Sch 4 or 5 Part A, which matter necessarily relates to local government.