

**A LOCAL GOVERNMENT'S EXECUTIVE AUTHORITY IN RESPECT OF
"MUNICIPAL PLANNING"**

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By

AE NORTJÉ

11112328

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Study supervisors: Me MC Roos and Prof F Venter

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1 Introduction

The *Development Facilitation Act*¹ came into operation on 22 December 1995 and it *inter alia* provides for Development Tribunals to be established in the respective Provinces to consider any land development application.

The *DFA* did not, however, repeal the various provincial Ordinances² which applied in the respective former provinces. Thus, the Development Tribunals, as a provincial body and established in terms of a national act, are currently taking decisions on any land development application, whilst you also have municipalities who take decisions on land development applications in terms of the old provincial Ordinances still in operation. In other words, two decision-making bodies from different spheres of government taking decisions on development applications in the same area of jurisdiction.

Not all the Provinces established these Tribunals. However, the establishment of these Tribunals in those Provinces that did adopt such an approach and them taking decisions on any land development application, even if the land is situated within the jurisdiction of a municipality, has now lead to an intergovernmental dispute between such municipalities and the respective Provincial Governments. This is certainly the case in the Gauteng Province.

The dispute stems from section 156 of the 1996 *Constitution of the Republic of South Africa*³ which states that a municipality has executive authority in respect of and has the right to administer the local government matters listed in parts B of schedules 4 and 5 to the *Constitution*.

¹ *Development Facilitation Act*, 67 of 1995 (hereinafter referred to as the *DFA*).

² *Land Use Planning Ordinance* 15 of 1985 (C); *Townships Ordinance* 33 of 1934 (C); *Townships Ordinance* 9 of 1969 (O); *Town Planning and Townships Ordinance* 15 of 1986 (T); *Division of Land Ordinance* 20 of 1986 (T); *Town Planning Ordinance* 27 of 1949 (N). In some of the Provinces these Ordinances have been replaced by new Provincial Acts.

³ *Constitution of the Republic of South Africa* 108 of 1996 (hereinafter referred to as the *Constitution*).

It is the functional areas of the powers and functions of provincial and local government that are listed in these schedules with part A confined to provincial government and part B to local government. Schedule 4 contains the functional areas of concurrent national and provincial legislative competence and schedule 5 the functional areas of exclusive provincial legislative competence.

The problem arises in that these schedules list the functional areas without any detailed definitions of each functional area. There seems to be a considerable overlap between provincial and local government functional areas. This lack of clarity, in practice, creates confusion about who does what and who has authority over what.

One of these functional areas listed in schedule 4 part B as a local government matter is "municipal planning". On the other hand schedule 4 part A lists "regional planning and development" as well as "urban and rural development" as functional areas.

Because of the above mentioned overlap of the different functional areas, municipalities are arguing that it has the exclusive right to do "municipal planning" in its area of jurisdiction, in other words, the exclusive right to take decisions on all land development applications in its area of jurisdiction, whilst the respective Provincial Governments are arguing that it does not have such an exclusive right based on the fact that "urban and rural development" have been included as one of its functional areas.

The Tribunals established in terms of the *DFA* are, therefore, taking decisions on any land development application submitted in terms of the *DFA*, even if the land is situated within the jurisdiction of a municipality, as it is of the view that such authority falls within the ambit of "urban and rural development" as one of its functional areas as a provincial body.

This paper will endeavour to explain the confusion that currently exists around “municipal planning” on the one hand compared to “urban and rural development” on the other.

It will also try to put a definition to “municipal planning” and then lastly it will analyse whether a local government’s executive authority in respect of “municipal planning” is being compromised or impeded by national and/or provincial government.

This will be done with specific reference to the *DFA* and the powers and functions set out in it and the Development Tribunals established in terms thereof, compared to the provisions of especially the *Local Government: Municipal Systems Act*⁴, provisions of other relevant local government legislation relating to town-planning and the *Constitution*.

2 The origin of the *Development Facilitation Act 67 of 1995*

2.1 *South African land law prior 1994*

South African land law was used during the apartheid era to entrench the political ideal of racial segregation in the form of so-called grand apartheid, which consisted of laws enforcing the spatial separation of race groups. The policy of special race segregation became institutionalised in the first years of National Party rule from 1948 onwards, but it was, in actual fact, part of the South African political tradition long before that.

The aims of apartheid land law have been described as:

... to define and physically separate various race groups; to provide a legal framework for administrative and political control over black population movements and concomitant land rights; to create and control a black unskilled labour market; and to ensure through spatial-political separation that universal suffrage does not result in black majority rule.⁵

⁴ *Local Government: Municipal Systems Act 32 of 2000* (hereinafter referred to as the *Systems Act*).

⁵ Van der Walt 1990 *De Jure* 2.

Given the close connection between land law and apartheid policies it was to be expected that land reform would have been one of the major issues in the reform negotiations since 1990.

Hence, a land reform programme was introduced by way of a *White Paper on Land Reform* in March 1991, following the historical speech made by former President De Klerk in Parliament on 2 February 1990. This White Paper set out broad policy decisions with regard to land reform and proposed a set of bills to promote those policy objectives. The central aspect was the abolition of all so-called racially based legislation.

The most important of the proposed bills was the Abolition of Racially Based Land Measures Bill. This Bill was eventually promulgated as the *Abolition of Racially Based Land Measures Act*⁶ which repealed the *Land Acts*⁷, the *Group Areas Act*⁸ and a host of other statutes.

The White Paper also proposed the Upgrading of Land Tenure Rights Bill which was promulgated as the *Upgrading of Land Tenure Rights Act*⁹ and the Less Formal Township Establishment Bill which was enacted as the *Less Formal Township Establishment Act*.¹⁰ The first mentioned Act was intended to facilitate the upgrading of black land tenure whereas the latter mentioned Act was intended to facilitate the creation and establishment of new black townships with so-called "less formal" procedures.

The Advisory Commission on Land Allocation was created by Chapter VI of the *Abolition of Racially Based Land Measures Act* which Act was amended in 1993 to increase the powers of the Commission and its name was changed to the Commission on Land Allocation.

⁶ *Abolition of Racially Based Land Measures Act* 108 of 1991.

⁷ *Land Acts* of 1913 and 1936.

⁸ *Group Areas Act* 36 of 1966.

⁹ *Upgrading of Land Tenure Rights Act* 112 of 1991. See also Bennet and Roos 1992 SALJ 447-471.

¹⁰ *Less Formal Township Establishment Act* 113 of 1991.

The Commission on Land Allocation was phased out when the new land claims procedure was agreed upon in the 1993 *Constitution of the Republic of South Africa*.¹¹

The *Restitution of Land Rights Act*¹² was promulgated on the basis of sections 121-123 of the *interim Constitution* which provided the formal framework for the restitution process in that it established a number of extremely important principles demarcating the limits of the restitution process.

Quite a few other Acts have been enacted, either before the *Constitution* and, hence, under the *interim Constitution*, or after, mostly to redress the legacy of “apartheid land law” but also to assist and to realise the land reform and housing programme of Government for example:

The Land Reform (Labour Tenants) Act 3 of 1996;
Communal Property Associations Act 28 of 1996;
Interim Protection of Informal Land Rights Act 31 of 1996;
Extension of Security of Tenure Act 62 of 1997; and
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

In addition to the land restitution claims made possible and controlled by the *Restitution of Land Rights Act* a further bill was proposed by the abovementioned White Paper to provide for additional land reform matters not arising from specific historical land claims. This bill was enacted as the *DFA* and came into force, as previously stated, on 22 December 1995.

It is necessary to explain the above background to enable one to understand where exactly does the *DFA* fits into the scheme of things for this dissertation to succeed in its objective.

¹¹ *Constitution of the Republic of South Africa* 200 of 1993 (hereinafter referred to as the *interim Constitution*).

¹² *Restitution of Land Rights Act* 22 of 1994.

It should, furthermore, be noted that the *DFA* was enacted before the *Constitution* and prior to the new local government legislation, specifically the *Systems Act*.

2.2 Extraordinary measures

The *DFA* does have extraordinary features. Among these are:

- The introduction of a “mini Bill of Rights” in relation to land development on a nationally uniform basis, to be amplified over time by the publication of further principles and policies at national, provincial and local government levels;
- The establishment of administrative, non-political tribunals in each of the Provinces to implement these principles and policies;
- The introduction of land development procedures in both the urban and agricultural contexts;
- The inclusion of various measures potentially accelerating the pace of land development, such as the ability to override title conditions or even laws that may delay development;
- The creation of a mechanism for the early delivery of title in stages; and
- The creation of national and provincial commissions with the task to make recommendations to Government at provincial and national levels, concerning future reforms to land development administration, policy and law.

It is my opinion, however, that the legislature included these extraordinary features with a specific application in mind. More about this later.

2.3 The Chapter III Development Tribunals

Essentially, the *DFA* provides for any Province to establish an administrative development tribunal charged with the responsibility to implement land development principles and policies in an objective manner.

Although legally speaking there is only one tribunal in a Province, it performs its functions through a number of geographical committees, each with responsibility for one or more local government area.¹³

Provincial and local government employees appointed to tribunals are officials already dealing with the land development functions at provincial and local government levels (at least in the case of the Gauteng Development Tribunal).

These tribunals has extraordinary powers of which the most extraordinary is to give directions relevant to its functions to any person in the service of a provincial administration or a local government body, to decide any question concerning its own jurisdiction, to suspend restrictive conditions/servitudes, and to suspend certain laws.¹⁴

2.4 The intention of the DFA

The *DFA* is directly linked to the effective implementation and facilitation of the reconstruction and development programmes (RDP) and other projects relating to land: it lays down general principles governing future land development throughout the whole of the Republic. The long title to the *DFA* announces its aim:

... to introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land.¹⁵

¹³ S 15(7)(d) of the *DFA*.

¹⁴ See s 16 and s 33 of the *DFA*.

¹⁵ See the first phrase of the long title to the *DFA*.

The *DFA* is pre-constitutional legislation and by pre-constitutional it is meant pre- the 1996 *Constitution*. Taking the provisions of the *DFA* and its extraordinary measures into account, the question arises: Is the *DFA* just another mechanism available to developers, parallel to the old Planning Ordinances, which can be used by applicants for any land development application? In other words, can an applicant do “forum shopping”; or does it have limited jurisdiction?

I support the argument that it has limited jurisdiction. It is not authorised to make decisions on conventional land development applications on land that has already been developed, on land that falls under the jurisdiction of a municipality, or on land that forms part of or has been incorporated under an existing town-planning scheme. The right to consider and make decisions on those applications rests exclusively with the relevant municipality.

There is an alternative argument contrary to the above and that is on a proper interpretation of the provisions of the *DFA*, the whole of the *DFA* and not merely a phrase in the pre-amble, it is self evident that it does not only cater for the provision of reconstruction and development programmes and projects. This based on the following considerations:

Firstly, the general principles for land development as set out in section 3 of the *DFA* apply throughout the Republic.¹⁶

Secondly, those principles are to apply to the actions of the State and every local government body.¹⁷

Thirdly, those general principles serve to guide, among other things, the administration of any zoning scheme or any like plan or scheme administered by any competent authority in terms of any law.¹⁸

¹⁶ S 2 of the *DFA*.

¹⁷ S 2(a) of the *DFA*. The expression “local government body” is defined in s 1 of the *DFA* to include every conceivable institution or body that operates within the local sphere of government.

¹⁸ S 2(b) of the *DFA*.

Fourthly, such principles are to serve as guidelines by reference to which any competent authority shall exercise any discretion or take any decision in terms of the *DFA* or any other law dealing with land development, including any such law dealing with subdivision, use and planning of or in respect of land.¹⁹

Fifthly, the general principles set out in section 3 of the *DFA* apply to “all land development”.²⁰

Therefore, if regard is had to the foregoing provisions of the *DFA*, it is manifest that the *DFA* provides for all types of land development included in the definition of the latter term and is not limited to so-called RDP projects only.

It is so that the pre-ambule to the *DFA* refers to RDP projects and programmes, however, although the courts are entitled to consider the long title of a statute in order to determine what objective the legislature had in mind,²¹ it is nevertheless a well established principle that a court will only consider the long title and pre-ambule where the specific provisions of the statute are ambiguous or obscure.²²

In any event, the long title of the *DFA* has a much wider scope. It includes objectives formulated in the following terms, namely:

- to facilitate the formulation and implementation of land development objectives by reference to which the performance of local government bodies in achieving such objectives may be measured; and

¹⁹ S 2(c) of the *DFA*. See also the definition of “land development” in s 1 of the *DFA* which is defined in the widest possible terms.

²⁰ S 3(1) of the *DFA*.

²¹ *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129.

²² *R v Magano and Madumo* 1924 TPD 129 at 139; *Norden and Another NNO v Banki and Others* 1974 4 SA 647 (A) at 654H – 655 B.

- to provide for nationally uniform procedures for the subdivision and development of land in urban and rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses.

To, therefore, argue that the *DFA* caters for only RDP projects is simply wrong.

I shall endeavour to explain later in this paper on a proper interpretation of the relevant constitutional provisions why the above alternative argument cannot hold water.

3 Local government in the new South African constitutional dispensation

3.1 Local government as a “sphere” of government in its own right

Before a local government’s executive authority to do “municipal planning” can be assessed, it is necessary to, in the first instance, highlight the autonomous status of local government as a distinctive “sphere” of government since the introduction of a new constitutional dispensation for South Africa.

The *Constitution* is the supreme law of the Republic and any law inconsistent with it is invalid.²³

A highly advanced Bill of Rights forms the cornerstone of the *Constitution*.²⁴ Provision is made for a three-sphere system of government comprising national, provincial and local spheres, which are distinctive, interdependent and interrelated.²⁵ The principle of cooperative governance underpins intergovernmental relations.

²³ S 2 of the *Constitution*.

²⁴ Chapter 2 of the *Constitution*.

²⁵ S 40 of the *Constitution*.

Section 41 of the *Constitution* states, *inter alia*, that all spheres of government must:

- Respect the constitutional status, institutions, powers and functions of government in these spheres;
- Not assume any powers or functions except those conferred on them in terms of the *Constitution*;
- Exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;
- Cooperate with one another in mutual trust and good faith; and
- Avoid legal proceedings against one another.

The concept of cooperative governance was not included in the *interim Constitution*. Although partially borrowed from the German experience, it is a *sui generis* attempt to develop South Africa's approach to intergovernmental relationships.²⁶

The terms "sphere" is meant to indicate a shift towards a less hierarchical system of intergovernmental relations. What is particularly important upon a proper interpretation of the provisions of the *Constitution* is that local government, which was a provincial function in terms of the *interim Constitution*, has been lifted out to become a sphere of government in its own right.

3.2 The Local Government Negotiating Forum and the transition of local government to its current state

By the mid-1980s, and notwithstanding efforts at cosmetic reform of the role of black local authorities, apartheid local government was in a state of deep crisis. Black Local authorities had all but ceased to function and white municipalities faced the devastating impact of consumer boycotts.

Out of this crisis emerged a gradual process of negotiation between white municipal structures and black civic representatives, a process which foreshadowed the broader national negotiation process.

In 1992 the South African National Civics Organization (SANCO) began talks with the National Party government regarding the wholesale reshaping of local government. These discussions led to the establishment, in March 1993, of the Local Government Negotiating Forum. The Forum operated as the principal mechanism for negotiating a new local government dispensation.

The Forum itself met on several occasions, and in November 1993 ratified its three principle outputs: an Agreement on Local Government Finances and Services, the *Local Government Transition Act*²⁷ and the provisions of the *interim Constitution* Chapter 10, the local government chapter.

The complex deals reached during these negotiations became law when the *Transition Act* was passed.²⁸

The operation of the *Transition Act* commenced on 2 February 1994, almost three months before the commencement of the *interim Constitution*. Although the *Transition Act* was simply an ordinary Act of Parliament, it fulfilled the same role for local government as the *interim Constitution* did for National and Provincial government.

The *Transition Act* presented a loose collection of interim measures to facilitate the orderly passage of local government through the pre-interim and interim phases.

²⁶ Rautenbach and Malherbe *Constitutional law* 266-268; Devenish *Constitution* 105-108; Currie and de Waal *Constitutional* 119-124.

²⁷ *Local Government Transition Act* 209 of 1993 (hereinafter referred to as the *Transition Act*).

²⁸ Currie and De Waal *Constitutional law* 214; Pimstone *Local Government* 5A.2(b); *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 1 SA 661 (CC) at par 44.

The primary role of the *Transition Act* was to reintegrate the fractured, race-based local government system bequeathed by apartheid in local government's restructuring phases.²⁹

The *Transition Act* mapped out three phases of transition:

- The pre-interim phase, which prescribed the establishment of local forums to negotiate the appointment of temporary Councils, which would govern until municipal elections.
- The interim phase, beginning with municipal elections and lasting until a new local government system has been designed and legislated upon.
- The final stage, when a new local government system will be established.

The third and final phase had to be initiated and regulated by new legislation passed to give effect to the local government chapter of the *Constitution*.

That legislation has now been adopted through, *inter alia*, the *Local Government: Municipal Structures Act*,³⁰ the *Systems Act*, the *Local Government: Municipal Demarcation Act*,³¹ and the *Local Government: Municipal Finance Management Act*³². With the new laws in place, the *Transition Act* has been repealed, except for section 10G(7).

The Constitutional Court remarked on this transformation in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*³³ as follows:

²⁹ Chaskalson P in *Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & others* 1995 4 SA 877 (CC), 1995 10 BCLR 1289 (CC) at par 6.

³⁰ *Local Government: Municipal Structures Act* 117 of 1998 (hereinafter referred to as the *Structures Act*).

³¹ *Local Government: Municipal Demarcation Act* 1998 (hereinafter referred to as the *Demarcation Act*).

³² *Local Government: Municipal Finance Management Act* 56 of 2003 (hereinafter referred to as the *Finance Management Act*).

³³ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC); 1998 12 BCLR 1458 (CC).

Thus, for the first time in our history, provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.³⁴

3.3 *The Constitution and the legal status of local government*

As with the *interim Constitution*, there is a chapter in the *Constitution* dealing with local government³⁵. The Constitutional Court initially referred the entire chapter on local government back to the Constitutional Assembly on the grounds that the first text was too vague on how it should work. In particular, the Court asked for greater detail about differing municipal structures, legislative processes and finances. This was rectified in the second text, which was approved by the Constitutional Court.

Local Government emerged under two broad heads in the judgment of the *First Certification* case.³⁶ In the first place, the court's attention was drawn to the comparatively "stand-alone" requirements of Constitutional Principles XXIV and XXV. In this respect, the court found that the first constitutional draft failed to meet the requirements of Constitutional Principle XXIV, in that it did not provide a framework for local government structures.³⁷

The absence of adumbrated legal procedures also infringed Constitutional Principle X, which required the adherence to formal legislative procedures at all levels of government.

The court in addition held that no provision had been made for appropriate fiscal powers and functions in respect of different categories of local government.

³⁴ At par 126.

³⁵ See Chapter 7 of the *Constitution*.

³⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC).

³⁷ At par 301.

Further the court was of the view that the meaning of “excise taxes” which local government were entitled to impose under the original draft text, was uncertain and could not be said to be an “appropriate fiscal power” as demanded by Constitutional Principle XXV.

Secondly, local government was discussed at length in the context of Constitutional Principles giving effect to provincial interests, most notably Constitutional Principle XVIII.2 which, in vague terms, required that provincial powers and functions contained in the *interim Constitution* should not be substantially diminished in the new text.

On submission of an amended text, the Court was satisfied that the amended text met all of its concerns.³⁸

The commencement of the *Constitution*, thus, heralded a new legal order in which the constitutionally recognised status of local government was reconfirmed.

Zybrands³⁹ define local government as follows:

Local government can be described as that level of government closest to its constituents and involved in the rendering of a wide range of services that materially affect the lives of the inhabitants residing within its area of jurisdiction.

Thus, apart from the newfound status of local government, it is also that branch of government and administration that is most intimately concerned with the lives of ordinary people and with those matters that are closest to them in their daily experience and their basic needs.

³⁸ *Ex parte Chairperson of the Constitutional Assembly: In re the Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 2 SA 97 (CC); 1997 1 BCLR 1 (CC).*

³⁹ *Zybrands Local Government 1.*

Local government is perceived to be the cornerstone of a contemporary democratic government⁴⁰ and because of its essentially parochial nature it more easily allows the people within its jurisdiction to participate in the democratic process at this level than at the levels of provincial and national government.⁴¹ It brings decision-making closer to the inhabitants.⁴²

4 A local government's executive authority to do "municipal planning"

4.1 "Urban and rural development" v "municipal planning"

The development tribunals are defending their actions based on the fact that "urban and rural development" has been included in Part A of Schedule 4 to the *Constitution*. The argument being that there has always been a distinction between "municipal planning" on the one hand and "urban and rural development" on the other which distinction is now also underpinned in the *Constitution*, which denotes that a municipality has exclusive executive authority in respect of the functional area of "municipal planning" only.⁴³

As far as the concept of development is concerned, the functional area of "urban and rural development" in distinction to "municipal planning" is an area that first falls within the concurrent legislative competence of both the national and provincial legislatures⁴⁴ and second, the executive authority of implementing national legislation pertaining thereto is vested in the Premier of the province concerned.⁴⁵

In view of the foregoing, it becomes evident, it is argued, that municipalities cannot have exclusive authority over the issues of urban and rural development and the procedures pertaining thereto.

⁴⁰ De Villiers *Birth of a Nation* 294.

⁴¹ Devenish *Constitution* 200.

⁴² Rautenbach and Malherbe *Constitutional law* 263.

⁴³ S 156(1)(a) of the *Constitution*.

⁴⁴ S 44(1)(a)(ii) of the *Constitution* read with Part A to Schedule 4 thereto and s 104(1)(b)(i) of the *Constitution* read with Part A to Schedule 4 thereto.

⁴⁵ S 125(2)(b) of the *Constitution* read with Part A to Schedule 4 thereto.

"Municipal planning" and "urban and rural development" is distinctive concepts which have been consistently set apart from one another under the new constitutional order. The old Planning Ordinances, which is still old order legislation, does not mirror this distinction with the same clarity.

In view of the foregoing, it is manifest, it is argued, that municipalities do not have "exclusive authority" in respect of "urban and rural development" which incorporates any form of land development pertaining to issues such as rezoning, township establishment and the amendment of town planning schemes.

I shall now argue and explain why I do not support the above argument.

4.2 *An analysis of the relevant constitutional provisions*

To determine whether a municipality can perform a particular act or function it is, since the adoption of the *interim Constitution* and the *Constitution*, no longer appropriate to enquire whether the municipality is specifically empowered to perform the act or the function in question. That approach was correct under the pre-1993 regime when municipalities were institutions of applied administrative law.

They were creatures of the various constitutions and as such "entrusted to the care, and a rigid control, of a provincial council".⁴⁶

Under the previous regime a municipality exercised delegated powers. If it was not expressly empowered to perform a particular function or a function reasonably incidental thereto, any attempt to do so was *ultra vires* and invalid.

⁴⁶ Meyer *Local Government* 8.

Under the *Constitution* the position of municipalities or a "Municipal Council", is entrenched in chapters 3 and 4. As previously stated, section 40 institutes the principle of national, provincial and local spheres of government "which are distinctive, inter dependent and inter related".

In terms of section 41 all spheres of government must "respect the constitutional status, institutions, powers and functions of government in the other spheres" and must not "assume any power or function except those conferred on them in terms of the Constitution".⁴⁷

What is entrenched here, as previously stated, is a principle of separate or autonomous spheres of government as opposed to hierarchical "levels" of government.⁴⁸ The qualification or exception to the principle will be mentioned below. What is important is that a municipal council is an autonomous, separate constitutional organ of state functioning in the "local sphere of government".

Chapter 4, section 43 establishes that autonomous legislative authority in the local sphere of government vests in the Municipal Councils. It is a principle which is of cardinal importance as far as local authorities are concerned. The implications thereof are set out in more detail in section 151.

What is also clear is that as far as legislative authority is concerned, in the local sphere a municipality has original (as opposed to administrative delegated) authority.⁴⁹

Chapter 7 deals specifically with local government. The provisions of section 151 make it clear that the principles entrenched in chapters 3 and 4 are adhered to and worked out in further detail. Section 151(1) further explains the concept of "local sphere". It firstly provides that the local sphere of government consists of municipalities, i.e. territorial areas.

⁴⁷ S 41(1)(f) of the *Constitution*.

⁴⁸ Bekink *Principles* 64ff; Meyer *Local Government* 12-14.

⁴⁹ *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) at 350C-D; *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitaanse Munisipaliteit* (unreported judgment by Froneman J in ECLD -no 047/2005) at p 6 par [7].

It provides, secondly, that the whole of the territory of the Republic must be covered by municipalities. This is the principle of "wall-to-wall" municipalities. This has important consequences for the position of provincial governments in that there are no territorial areas where the provincial government governs directly any local government affair as a starting point.⁵⁰

There is always a municipality which, in terms of section 151(3) has the right:

... to govern on its own initiative the local governmental affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

The autonomy of the municipality is again reflected in section 151(4) which provides:

The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Section 151 and its sub-sections are fundamental. They appear under the heading "Status of Municipalities".

One of the corner stones of this status is the right of a municipality to govern, with original legislative and executive authority, the local government affairs of its community. The qualification "subject to national and provincial legislation" which is imposed in section 151(3) is itself qualified by the addition of the words "as provided for in the Constitution". This means national and provincial legislation can, where and in so far as it is allowed by the *Constitution*, prescribe how the "local government affairs" should be governed by municipal councils.⁵¹ This constitutes one of the limitations on the autonomy of municipal councils but does not neutralise the principle.

⁵⁰ For example: There are no longer peri-urban areas governed by a Peri-Urban Areas Health Board.

⁵¹ Examples of constitutional provisions which prescribe or allow national provincial legislation of this nature are s 156(1)(b) and s 164.

The limitation is also constitutionally limited. The remark by the Constitutional Court in the *Fedsure* case that:

... the detailed powers and functions of local government have to be determined by laws of a competent authority⁵²...

was made in the context of section 175(1) of the *interim Constitution*. The formulation of local government's status and powers in the *Constitution* is fundamentally different.

The implications have not yet been fully analysed by the writers or the courts. As previously mentioned, in the *Robertson* case⁵³, Moseneke J in a unanimous judgment of the Constitutional Court said that the

advent of the (final) Constitution has enhanced, rather than diminished, the autonomy and status of local government that obtained under the interim Constitution.

He also said:

Now, the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws.⁵⁴

This was said in the immediate context of the following *dictum*:

Thus, a municipality has the right to govern the local government affairs of its area and community.⁵⁵

The phrase "on its own initiative" marks, as De Visser⁵⁶ points out, the end of an era when municipalities were the implementers of national and provincial legislation.

⁵² *Fedsure* 394 par 39.

⁵³ See fn 49 par 58.

⁵⁴ At p 351 par 60.

⁵⁵ At p 351 par 59.

⁵⁶ De Visser *Developmental local government* 78.

Up to this point the *Constitution* has provided for the type of authority which the municipal councils have in the local sphere (i.e. legislative and executive). It has also described the subject-matter which can be governed, namely, local government affairs. The authority cannot be exercised capriciously but must be directed at certain prescribed objectives namely those laid down in section 152.

These can be summarised as democracy, sustainable services, social and economic development, health and safety of the environment. The objective of social and economic development is detailed further in section 153, *inter alia*, by requiring the municipality to give priority to the basic needs of the community.

This is, therefore, an aspect of local government affairs which the *Constitution* prioritises.

De Visser says:

The South African Constitution chooses unequivocally to make local government the epicentre of development and provides it with a strong institutional status. Behind this lies a claim that decentralisation to local government is good for development. This claim seems to be influenced by, amongst other things, negative experiences on the African continent with centralised development.⁵⁷

The concept of "development" is therefore central to the objects and functions of local government.

The point that emerges is that with the type of authority, the subject-matter of the authority and the objectives to be achieved, clearly outlined, there was no need to specify further any specific "powers and functions". The municipality has plenary powers to deal with local government affairs. The *Constitution* would have created a workable structure for municipalities to operate in had it stopped dealing with municipal council's authority before section 156.

⁵⁷ De Visser *Developmental Local Government* 1

The question arises why it was necessary to enact section 156 with the schedules to which it refers. The listing of specific powers and functions seems out of tune with what went before and is reminiscent of the previous regime.⁵⁸ If the catalogues of parts B of schedules 4 and 5 are the beginning and end of a municipality's powers, then the *Constitution* is in effect taking away in section 156 much of what it had given in the previous sections. A closer examination of the wording and function of schedules 4 and 5 and the wording of section 156 shows that parts B of the schedules fulfil a different role.

The schedules are not introduced in chapter 7 (local government) for the first time. They also appear in section 44, which deals with national legislative authority and in section 104 which deals with the legislative authority of provinces. Section 44(1)(a)(ii) provides that the national assembly has the power to pass legislation

... with regard to any matter including a matter within a functional area listed in schedule 4, but excluding, subject to sub-section (2), a matter within a functional area listed in schedule 5...

Schedule 4 bears the heading "Functional Areas of Concurrent National and Provincial Legislative Competence". Schedule 5 bears the heading "Functional Areas of Exclusive Provincial Legislative Competence".

Section 104 which deals with the provincial legislative competence does not have provisions which can be regarded as the equivalent of section 44(1)(a) (parliament can pass legislation with regard to any matter) or section 151 (a municipality has legislative and executive power to deal with local government affairs).

⁵⁸ For example s 79 of the *Local Government Ordinance*, 17 of 1939, which contains a long catalogue of specific powers.

There are no plenary provincial powers such as that of parliament (for the whole country) and a municipality (for the local government affairs in its area of jurisdiction). The powers of a province are limited to those in schedules 4 and 5.

It appears, therefore, that the schedules primarily serve the purpose of demarcating the legislative powers of a province as against that of the national government, schedule 4 for concurrent powers and schedule 5 for exclusive provincial powers. This also applies to the B part of each schedule.

It is against the foregoing background that section 156(1)(a) should be read: A municipality is given the executive authority in respect of those matters listed in the B parts of schedules 4 and 5.

The cumulative effect of the provisions mentioned is that in respect of schedule 4 both government and province have legislative authority but only the municipality has the executive authority because the functional areas in part B of schedule 4 are declared to be local government matters. In respect of all of schedule 5, only provinces may legislate but municipalities have the executive functions in respect of the matters in part B because they are declared to be local government matters.

The catalogues contained in the B parts of the schedules referred to in section 156 could not have been intended to be the beginning and end of a municipality's functions and powers. In terms of section 156 a municipality has no legislative authority whatsoever whereas section 43 and section 151 expressly state that it has. The power to make by-laws referred to in section 156(2) is for the "effective administration" of the matters in parts B of schedules 4 and 5. These by-laws are not the legislative authority referred to in section 151(2). The by-laws are old-style "legislative administrative acts" in respect of topics over which province and parliament have the legislative authority.

They are "a form of subordinate delegated legislation".⁵⁹ Kotze also holds this view,⁶⁰ however, it is disputed by De Visser who is of the view that the power to "make and administer by-laws for the effective administration of the matters which it has the right to administer", means that the local authority has original legislative authority.⁶¹

It is not clear how a local authority can be said to have original legislative authority (to govern "on its own initiative") if it can only "legislate" if and how a provincial or national law allows it to do so.

It is, therefore, my considered opinion that a municipality has, subject to the limitations mentioned above and to be mentioned below, original, autonomous, plenary legislative and executive power over all local government affairs.⁶²

It has delegated administrative powers over the matters listed in parts B of schedules 4 and 5 where either parliament and province or only province, as the case may be, has the legislative authority. Here it is irrelevant whether the matter is factually "local" or not.

If a matter is not mentioned specifically in schedules 4 and 5 but is a local government affair, it falls within the municipality's legislative and executive authority. Any matter (i.e. if not mentioned in paragraphs B of schedules 4 and 5) can be assigned to a municipality in terms of section 156(1)(b).

This optional assignment applies even if it is a provincial or national matter. If a matter is listed in the A parts of schedules 4 and 5 but "necessarily relates to local government", it must be assigned to a municipality in terms of section 156(4).

⁵⁹ Baxter *Administrative Law* 150-151 and 344-351.

⁶⁰ Kotze 1996 15 *Politeia* 1-3.

⁶¹ De Visser *Developmental Local Government* 113.

⁶² Over what does a municipality have original, autonomous, legislative authority, if not over local government affairs? Its "Part B" authority is executive (or administrative) including the power to pass by-laws.

The schedules, therefore, primarily serve to facilitate the demarcation of legislative functions between national government and provinces and to identify those matters over which either province or parliament and province, have legislative authority but the administration of which are assigned to municipalities. The administration of these are given to the municipalities together with the power to administer any matter reasonably necessary for or incidental to the effective performance of its functions.⁶³

A further limitation on the autonomy of local government is constituted by the supervisory function of the national and provincial governments provided for in section 155(7) in the following terms:

The national government, subject to section 44, and the provincial governments, have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of the matters listed in schedules 4 and 5 by regulating the exercise by the municipalities of the executive authority referred to in section 156(1).

This supervisory function only applies to the specific functions mentioned in schedules 4 and 5 where parliament and/or the provinces have legislative authority and the municipalities are tasked with the administration. I submit that it does not apply to the municipalities' plenary legislative and executive authority over local government affairs nor does it apply to the prioritised responsibilities in respect of the basic needs of the community and to promote the social and economic development of the local community in terms of section 151 and section 153. How these responsibilities are carried out is left to the discretion of the municipal council.⁶⁴

A vital provision for present purposes is the injunction in section 151(4):

The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

⁶³ S 156(5) of the *Constitution*.

⁶⁴ *Meyer Local Government Law* 73.

As previously stated, to determine whether a municipal council has the power (in the wide sense) to deal with a particular matter, it is not correct to simply read schedules 4 and 5. It is necessary to make the following enquiries:

Is the matter in question a local government affair? If so, then the municipal council has executive and legislative authority to deal with the matter.⁶⁵

If it is a matter mentioned in parts B of schedules 4 and 5, the municipal council has executive authority to administer the matter in accordance with the provincial and/or national legislation.⁶⁶

The position in the previous paragraph applies also to matters assigned to a municipal council by national or provincial legislation in terms of sections 156(1)(b) or 156(4) or by a Member of the Executive Council (MEC) in terms of section 126.

For present purposes it is not necessary to deal with the "override" powers of the national legislation provided for, for example, in section 44(2).

4.3 "Municipal planning" as a "local government affair"

The functional area, as emerges from the above, appears to be the planning and management of land use and development. In her book *"Planning Law"* Van Wyk describes the various terms used to denote this discipline and this part of the law namely "planning" as the "regulation and management of the physical environment or the use of land in a social context", or "land-use planning" or "spatial regulation" or "land-use management".⁶⁷ Significantly the word "development" does not appear in any of the abbreviated names for this discipline.

⁶⁵ S 151(2).

⁶⁶ S 151(1)(a).

⁶⁷ Van Wyk *Planning Law* 3-4.

In my opinion, what is traditionally known in the literature and practice as "town-planning" can essentially be divided into two components. The first component consists of forward planning for a particular area. This component can be performed at various levels of government. The second component of town planning is to regulate the exercise of land-use rights and manage any change in existing land-use rights.

In light of the foregoing, therefore, I submit that it is justified to refer to the functional area in dispute as the planning and management of land-use and development abbreviated as "land use management" or simply "town-planning". It clearly has a planning and an executory component. This is borne out by the nature of the basic tools prescribed by the Ordinance, namely, the town-planning scheme and the concept of a "township". As with all governmental functions, in whatever sphere, there is a planning component and an executory component.

To put the one component in the hands of one organ of state in one sphere and the other component in the hands of a different organ of state in a different sphere (like a provincial *DFA* development tribunal) is not only impractical but not in accordance with the scheme of the various sections of the *Constitution* referred to above and to be referred to further in this dissertation.

That the function is a distinctively local government affair seems clear. All the aspects provided for in a town-planning scheme referred to above and all the aspects involved in the concept of township establishment can safely be regarded as "local" in character.⁶⁸

⁶⁸ For example, the Johannesburg Town-planning Scheme's purpose is the coordinated and harmonious development of the municipality. It should promote the common good and not only that of one class or race. The local authority has a duty to ensure compliance. Also see Van Wyk *Planning Law* 37-39.

This flows from the objects of local government as required by section 152 of the *Constitution* particularly the provision of sustainable services, the promotion of social development and the promotion of a safe and healthy environment. Town-planning in this broad sense is also an essential component of the developmental duties of a municipality as laid down in section 153 of the *Constitution* in terms of which its administrative, budgeting and planning processes must give priority to the basic needs of the community and promote social and economic development.

These duties cannot be divided by vesting the planning of development in municipalities and the execution of development in provinces. The municipalities charged with the whole duty and must achieve the end result or at least make progress towards the end result.

The conclusion is, therefore, that in terms of the sections of the *Constitution* referred to above a municipality can deal with town planning, in the wide sense, including land use management, as a local government matter (affair).

The constitutional mandated legislation supports this view.

4.4 Constitutional mandated legislation

Any remaining doubt about the correct allocation of town planning as defined above disappears if the provisions of the constitutional mandated legislation is taken into consideration. To give effect to the new local government dispensation all municipalities were re-named, re-defined and re-structured. Under the *Structures Act* all municipalities were re-established.⁶⁹

⁶⁹ Bekink *Principles* 38.

The *Structures Act* defined the structural framework of the various types of municipalities. It does not add to the constitutional functions of a municipality.⁷⁰ This Act is one which was envisaged by the *Constitution* to complete the basic framework of new local government structures.⁷¹ Another act in the same category is the *Systems Act*. One of the purposes of this Act is "to provide for the manner in which municipal powers and functions are exercised and performed."⁷²

According to the long title of the *Systems Act* it was not the intention of the legislature to add to the powers of municipalities. The *Systems Act* can, therefore, be seen as a magnifying glass which enlarges the cryptic descriptions of the *Constitution* of the functions and powers of a municipality.

Section 2(a) is based on the provisions of section 151 of the *Constitution* and provides as follows:

A municipality - is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998.

It bears repetition that the reference to legislative and executive authority indicates that a municipality has more and wider powers than the matters appearing in schedules 4 and 5 to the *Constitution* in respect of which it only has "executive authority ... and the right to administer those matters" (functional areas in respect of which the national and or a provincial legislature has (have) the legislative competence).

⁷⁰ S 83 of the *Structures Act* merely refers to the "functions and powers assigned to" a municipality in terms of s 156 and s 229 of the *Constitution*.

⁷¹ Bekink *Principles* 79

⁷² Bekink *Principles* 80.

Section 4 of the *Systems Act* enlarges and highlights several of the aforementioned constitutional provisions. The plenary authority of the municipality to deal with all "local government affairs" is restated with clarity, as is also its duty to promote and undertake development.

Neither in section 4 nor in section 8, which deals with "general empowerment", is there a reference to schedules 4 and 5 of the *Constitution* or the catalogue of functional areas. Section 8(1) simply records that a municipality has "all the functions and powers conferred by or assigned to it in terms of the Constitution". Section 8(2) restates the principle that a municipality has the right to do anything reasonably necessary for or incidental to the effective performance of its functions and the exercise of its powers.

It is not necessary for present purposes to deal with all the provisions which set out how the legislative powers have to be exercised as provided for in the *Systems Act*.

The legislature has seen fit to regulate only certain aspects of local government namely: community participation⁷³; performance management⁷⁴; local public administration and human resources⁷⁵; municipal services⁷⁶; municipal entities⁷⁷; credit control and debt collection⁷⁸; provincial and national monitoring and national monitoring and standard setting⁷⁹; and legal matters⁸⁰.

⁷³ Chapter 4.
⁷⁴ Chapter 6.
⁷⁵ Chapter 7.
⁷⁶ Chapter 8.
⁷⁷ Chapter 8A.
⁷⁸ Chapter 9.
⁷⁹ Chapter 10.
⁸⁰ Chapter 12.

From the above and an analysis of the detailed provisions it is clear that the roles of provinces and the national government in local government affairs are in principle limited to monitoring⁸¹; the setting of national and minimum standards⁸² and assistance⁸³. In the functional areas listed in parts B of schedules 4 and 5, the national and/or provincial legislature has the legislative authority and the local authority's role is limited to administration.

Two aspects of local government that have been omitted from the list referred to above in order to deal with them in more detail herein is that of "development" and "planning". As has been submitted above, all governmental functions have a planning and an executory aspect.

The legislature deemed the planning aspects and the developmental objectives of local government functions só important that they were lumped together and singled out for treatment in chapter 5 of the *Systems Act* under the heading "Integrated Development Planning".

"Development" is defined as-

(s)ustainable development, and includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at –

- (a) improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and
- (b) ensuring that development serves present and future generations ...⁸⁴

⁸¹ Ss 105 – 107 of the *Systems Act*.

⁸² S 108 of the *Systems Act*.

⁸³ S 154(1) of the *Systems Act*.

⁸⁴ S 1 of the *Systems Act*.

The second part of the definition from "and includes" is clearly a magnification and elucidation of the social development duty of municipalities as laid down in principle in section 153 of the *Constitution*. That "development" is a wide concept is implied not only by the word "includes" but also by the contents of the detailed provisions of section 23 to section 37 which deals with "Integrated Development Planning" and, even more importantly, section 23 itself which provides as follows:

Municipal planning to be developmentally orientated-

- (1) A municipality must undertake developmentally-orientated planning so as to ensure that it-
 - (a) strives to achieve the objects of local government set out in section 152 of the Constitution;
 - (b) gives effect to its developmental duties as required by section 153 of the Constitution; and
 - (c) together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.
- (2) Subsection (1) must be read with Chapter 1 of the Development Facilitation Act, 1995 (Act No 67 of 1995).

De Visser distinguishes three elements of development, namely, (1) the improvement of material well-being, (2) the empowerment with choice and (3) inter social equity in the delivery of development.⁸⁵ Certain aspects need to be highlighted. Firstly, development is all-inclusive in that it is not restricted to certain municipal functions. Secondly, it has to be integrated and it has to be co-ordinated.

⁸⁵

De Visser *Developmental local government* 13.

Bekink explains these aspects as follows:

Within any local area there are many different agencies that contribute to development. These usually include various national and provincial government institutions, parastatals, community organisations and private-sector institutions.⁸⁶

The reference to the *DFA* should be noted. The reference is only to chapter 1 of the *DFA* which lays down general principles for "land development". The context thus becomes clearer. All local government functions must be developmentally-orientated towards achieving the goals laid down in various sections of the *Constitution* as summarised in section 23 of the *Systems Act*.

As has been submitted above, a municipality is involved with land development from two positions: as developer and as regulator of development. Both these positions are covered by the principles in chapter 1 of the *DFA* and the detailed provisions for integrated development in chapter 5 of the *Systems Act*.

In passing the provisions of chapter 3 of the *DFA* should also be mentioned. The long title of the *DFA* states as one of the purposes of the Act:

... to facilitate the formulation and implementation of land development objectives by reference to which the performance of local government bodies in achieving such objectives may be measured.

Chapter 3 of the *DFA* requires municipalities to set land development objectives⁸⁷. What is required to be dealt with by the municipality is classic town planning in both its components referred to above.

⁸⁶ Bekink *Principles* 71.

⁸⁷ S 28 of the *DFA*.

The objectives set by municipalities must then be achieved by the municipality in the performance of its local governmental functions including land-use management. It would make no practical sense to require municipalities to set land development objectives and to leave it to provincial governments through its development tribunals to execute the planning in such objectives. I submit that it could not have been the intention of the legislature and it is not what the *DFA* intended.

It is my opinion that Land Development Objectives (hereinafter referred to as LDOs) became superfluous and outdated with the commencement of the *Systems Act* and its institution of the Integrated Development Plan (hereinafter referred to as IDP) as the basic planning instrument of the municipality, a component of which is the spatial development framework (hereinafter referred to as SDF) which must include provisions of basic guidelines for a land-use management system for the municipality.

The role of province in the formulation of an IDP is limited to assistance and supervision.⁸⁸

Once adopted the IDP is the principal strategic planning instrument which guides and informs all planning and development and all decisions with regard to planning management and development in the municipality⁸⁹, and it binds the municipality in the exercise of its executive authority.⁹⁰

Section 36 of the *Systems Act* is important in evaluating the argument that planning is the function of the municipality and development, including land-use management, is the function of a province.

⁸⁸ Ss 31 – 34 of the *Systems Act*.

⁸⁹ S 35(1)(a) of the *Systems Act*.

⁹⁰ S 35(1)(b) of the *Systems Act*.

It provides:

A municipality must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan.

A municipality is clearly regarded as the organ of state responsible for carrying out what is planned in the IDP including land development and the management thereof. This is borne out by the provisions of chapter 6⁹¹ in respect of "performance management". One of the obvious criteria against which the performance of the municipality will be measured is its own IDP.

4.5 Interpretation of Schedules 4 and 5 to the Constitution

None of the recognised names of the disputed functional area, i.e. "town planning" or "land-use management" appears in either of the schedules. This presents the daunting task of the interpretation of the schedules and the constitutional legislation such as the *Systems Act*.

The functions listed in the schedules are "unclear and create confusion" says Steytler⁹² quoting a report to the Department of Provincial and Local Government.

De Visser also states:

(T)he demarcation of local government powers vis-à-vis other spheres of government is fast becoming a critical area of academic research and intergovernmental dialogue. As they become aware of their constitutional scope, municipalities will start asserting their institutional integrity with powerful metropolitan municipalities taking the lead.⁹³

⁹¹ Ss 38 – 49 of the *Systems Act*.

⁹² Steytler *Provincial and Local Government* 4 par 1.3.

⁹³ De Visser 2004 *SAPLJ* 365.

Steytler's aforementioned article provides a clear guide to the interpretation of the schedules⁹⁴ based on the approach of the Constitutional Court in the *DVB Behuising* case⁹⁵ namely that legal principles should be applied to the inter process. This functional approach was taken by the Constitutional Court in *Ex parte the President of the Republic of South Africa; in re Constitutionality of the Liquor Bill*.⁹⁶

According to Steytler:

Important consequences follow from the Court's functional approach to the interpretation of local government's legislative competences. First, the territorial principle applies; only matters that have no extra-municipal dimension fall within local government's domain. This element is reinforced with the reference to 'municipal' and 'local' services and goods.

Second, any interpretation of the functional areas must be guided by 'the functional view of what [is] appropriate to each sphere' of government. Factors, other than territorial limitation, may then inform the decision of determining what is appropriate for local government.

He then refers to De Visser and states:

De Visser thus argues that the competences of local government should reflect the constitutional vision of developmental local government. The competences must enable local government to discharge its development-driven functions 'fully and effectively'.⁹⁷

Steytler shows convincingly that in interpreting the functional areas in order to formulate a definition thereof, four aspects have to be dealt with: Firstly, the object for which a power is exercised with respect to a functional area must be identified.

⁹⁴ Steytler 21 par 4.

⁹⁵ *DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 4 BCLR 347 (CC); Steytler 12.

⁹⁶ *Ex Parte the President of the Republic of South Africa; in re the Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC), 760H-761I, par [51-54].

⁹⁷ Steytler 14.

Secondly, the subject matter of the functional area (whether a thing, a place, a social or natural phenomenon) should be delineated. Thirdly, the activity by which a municipality may realise the objects of local government in respect of the subject matter should be defined. Fourthly, any specific qualifications in respect of either the subject matter or the activity should be defined.⁹⁸

The object can be obtained from section 152 of the *Constitution*.⁹⁹

The interpretation should be guided by the principle of subsidiarity and the principle of developmental local government.¹⁰⁰ The first means that a function should be performed at the lowest possible level where that particular function will be carried out.¹⁰¹ The second means that the powers of local government must be defined to realise the constitutional goal of developmental local government as expressed in section 152 of the *Constitution*, i.e. the socio and economic development of local communities with the full participation of those communities.

Since developmental local government is conceived as giving local communities control over their own lives, an expansive rather than restrictive interpretation should thus be adopted.¹⁰²

Applying the foregoing approach and guiding principles, Steytler comes to the conclusion that "municipal planning" comprises the compilation and implementation¹⁰³ of an integrated development plan in terms of chapter 5 of the *Systems Act* and its regulations.¹⁰⁴

⁹⁸ Steytler 22 par 4.1.

⁹⁹ Steytler 22 par 4.2.1.

¹⁰⁰ Steytler 25 par 4.3.

¹⁰¹ See also Budhu and Wiechers 2003 *SAPL* at 468ff.

¹⁰² Steytler 25 par 4.3.

¹⁰³ My emphasis.

¹⁰⁴ Steytler 33 (the reference to the *Structures Act* is clearly an unintended error).

In dealing with the object of the function he states that: "Implicit are all the objects of local government". To this it can be added that particularly its socio-economic developmental objective and the objective of the provision of services cannot be achieved without the functional area of integrated development planning which includes the implementation thereof. This is also clear from Steytler's definition of "municipal planning" and the envisaged activities in connection therewith.

The spatial development framework (SDF) as a part of the integrated development plan and the activity of implementation thereof, specified by Steytler as part of "municipal planning" comprises all the elements of traditional land use planning and management, including matters such as rezonings and the establishment of townships.

Any remaining doubt is removed by the principle of subsidiarity, as explained above, and which is inherent in the system of section 156 of the *Constitution*. It dictates that the said functions be executed at local government level as the lowest possible level at which they can be administered.

The addition of "municipal" is a qualification or limitation to the subject matter of the functional area. It matches the corresponding "Provincial planning" in Part A of Schedule 5.

The question that arises is what "Urban and rural development" listed in Part A of Schedule 4 then means. From what has been set out above it is clear that the local authority is primarily the institution chosen to drive development.

However, in line with the obligation on central and provincial government to assist local government,¹⁰⁵ section 153(b) of the *Constitution* provides for "national and provincial development programmes" in which a local authority is required to participate.

Urban development as a functional competence of province refers to its function to lend assistance to local authorities by designing programmes, and providing financial assistance for socio-economic development in urban areas, for example in the area of housing. It is clear from the foregoing that there is no basis for a contention that "urban development" comprises the administration of land use management in urban areas.

In the event of it being held that "Municipal planning" is not wide enough to encompass the administration of the legislation dealing with the spatial development planning, it is submitted that this function is reasonably necessary for, alternatively incidental to the effective performance of its "Municipal planning" function and that the municipality has the right to exercise that administration under section 156(5) of the *Constitution*.

5 Honouring section 151(4) of the *Constitution*

5.1 Current actions of Development Tribunals

As per section 151(4) of the *Constitution* the national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

¹⁰⁵ *Executive Council of the Western Cape v The Minister for Provincial Affairs and Constitutional Development* 2000 1 SA 661 (CC) par [29] p 682.

Bearing all of what was said in the previous paragraphs in mind, I am of the opinion that the Development Tribunals established in terms of the *DFA* is compromising and/or impeding municipality's ability or right to do "municipal planning" by entertaining conventional development applications on land that has already been developed, that already falls under an existing town planning scheme, and falls within the jurisdiction of a municipality.

Even in *Municipality City of Port Elizabeth v Rudman*¹⁰⁶ Melunsky J referred to section 3 of the *DFA* and he indicated that "land development" is defined in the *DFA* to mean *inter alia* a

procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes.

The Court continues and states that the definition implies that the general principles in section 3 of the *DFA* apply to future development. Consequently the definition does not cover land that has already been developed according to a town-planning scheme. Moreover, states Melunsky J, the long title of the *DFA* clearly relates to future development.¹⁰⁷

Thus, the *DFA* is clearly an attempt at controlling and promoting a variety of land-reform initiatives of a redistributive nature. This would involve making land which is both suitable and sufficient available for development purposes and providing suitable mechanisms by which people can gain access to it quickly and cheaply.

The memorandum which accompanied the *DFA* when it was still in Bill form explained that the measures in the Bill are temporary solutions to problems currently facing reform while more permanent solutions are being developed.

¹⁰⁶ *Municipality City of Port Elizabeth v Rudman* 1999 1 SA 665 (SE), 1998 4 BCLR 451 (SE).

¹⁰⁷ At 677H-678C, 464D-H.

One of the main objectives is to provide a “fast track” for the development of land without getting bogged down in some of the existing procedures.

In this way developed land can be produced more quickly in order to promote the land-reform objectives of the RDP.

It is exactly for the above reasons that the *DFA* provides for such extraordinary measures to fast track development for the sake of RDP projects and for the sake of land reform and housing programmes.

Bearing in mind what was said above, that the *DFA* has been enacted to fast track RDP projects, to assist with land reform and housing programmes, applies to future development and not land that has already been developed in a township that has already been established under an Ordinance read with the applicable town planning scheme, etc, the *DFA* (most certainly in Gauteng) is being used not for the true intentions of the *DFA* but for day to day conventional applications which has nothing to do with RDP projects or land reform or housing projects.

These Development Tribunals' agendas are so clogged up with these kind of applications that it does not get to those applications for which the *DFA* was intended in the first place, i.e. rapid land development, low cost housing, formalising settlements, etcetera.

5.2 Integrated Development Plans (IDPs) in terms of Chapter 5 of the Systems Act

There is an obligation on every municipality to adopt an IDP¹⁰⁸, which will be dealt with more fully below. The IDP binds the municipality's decision-making body in its consideration of town planning applications such as those for the amendment of the relevant town-planning scheme and the rezoning of properties covered by such scheme, and the establishment of townships on properties falling within that municipality's area of jurisdiction.

¹⁰⁸ See the provisions under Chapter 5 of the Systems Act.

It is required to take decisions that are consistent with the IDP. It is submitted, as motivated in previous paragraphs, that the function of town planning (municipal planning) is a significant and integral aspect of municipal government. It is a matter of great concern to the municipality's inhabitants, by whom the municipality's councillors are elected and to whom the councillors are accountable.

5.5 *The Development Tribunals are acting beyond the intentions of the DFA?*

I respectfully submit that the provisions of the *Systems Act* referred to above have the effect *inter alia* that when a municipality exercises its executive authority, in the sense of developing (or formulating) or adopting policy and plans, including plans relating to land development and land use of properties within its area. It is bound by its IDP and it cannot depart from the IDP in its policy formulation function as long as the IDP remains binding. That is until it is reviewed or amended in terms of section 34 of the *Systems Act*; and the IDP also binds the administrative decision making for planning and development just as it binds executive decision making. That is all decisions taken by the municipality which relate to municipal planning, the management thereof and development must be consistent with the IDP.

It is respectfully submitted that in dealing with applications that do not fall within the ambit and/or intentions of the *DFA*, these Development Tribunals are materially influenced by an error of law regarding its powers and functions in terms of the *DFA*, read with the *Constitution* and the *Systems Act*.

Such decisions are not authorised by the *DFA* and is therefore *ultra vires*. It undermines, usurps or negates the "municipal planning" powers and functions of municipalities as described above. It, therefore, violates the fundamental requirement of legality and it violates the section 151(4) of the *Constitution*.

It, furthermore, violates the requirement of cooperative government under section 41 of the *Constitution*, which requires *inter alia* that organs of state act in a way which is coordinated with, and not inconsistent with, the acts and decisions of other organs of state, and respects their functions and authority.

In the alternative, and if it were to be found that the provisions of the *DFA* are to be interpreted in such a manner that they purportedly grant to these tribunals the authority to take decisions on any land development application, those provisions of the *DFA* are (it is respectfully submitted) for the reasons set out in previous paragraphs to that extent constitutionally invalid. They *inter alia* negate or undermine a municipality's powers and duties to ensure that municipal planning issues are properly determined, regulated and coordinated by the municipality itself - as the duly elected government vested with such function within its area of jurisdiction. This requires decision making on amendments to town planning schemes, zoning, land use and township establishment to be consistent with the applicable IDP as determined by the relevant municipality.

It is submitted that the relevant provisions of the *DFA* authorise these tribunals to deal only with land development related to the implementation of the reconstruction and development programs and projects and not land which has already been developed and/or subject to a town-planning scheme. It does not authorise them to deal with any and every type of zoning and land use applications which would result in an amendment to or departure from the relevant Town Planning Scheme and the municipality's IDP.

For if these tribunals were able to act in this manner, it would result in changes to or inconsistencies with the relevant Town Planning Scheme and the zoning of properties under such Scheme or the establishment of townships which would conflict with or undermine the decisions of the municipality (or its predecessors).

6 Conclusion

The intention of the *DFA* is good. It is just unfortunate that it hardly ever gets used for the reasons it has been enacted. It also serves as a guideline for future planning legislation in the Provinces, for example the principles in the *DFA* has to a great extent been used in the new *Gauteng Planning and Development Act*¹⁰⁹, which has not come into operation yet as the regulations still needs to be finalised.

It is so that a statutory relationship exists in terms of the *DFA* between the Commissions, the Tribunals and the municipalities. However, this relationship should be in relation to the true intentions of the *DFA*. The National Development and Planning Commission in a Green Paper for development planning made comments that the different roles of the different spheres of government relating to planning should be resolved. I submit that those roles have not been clarified till this day.

For me the role of local authorities is clear if you read the provisions of the *Systems Act* in conjunction with the *Constitution*. Local government has a constitutional duty to do "municipal planning" and these Development Tribunals is impeding on that right contrary to section 151(4) of the *Constitution*.

If the *DFA* is interpreted to allow these Tribunals to deal with any development application, then those relevant sections in the *DFA* must be declared unconstitutional for reasons set out above.

¹⁰⁹

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The constitutionality of the *DFA* should, in the light of the foregoing, be considered firstly on the basis of the conclusion that town planning in the wide sense is a "local government affair" not provided for in schedules 4 and 5 and in respect of which the municipalities have the exclusive executive and legislative competence.

On this basis most of the *DFA*, but certainly chapters 5 and 6, are unconstitutional in that these parts seek to legislate in respect of town planning and in doing so encroaches on the functional sphere of local government in breach of the principle of co-operative government in section 41(1)(g) of the *Constitution*.

If the alternative conclusion referred to above is accepted namely that the disputed functional area falls under "municipal planning" in part B of schedule 4 and is, therefore, an area of concurrent national and provincial legislative competence in respect of which municipalities have executive authority and the right to administer, several serious constitutional problems also arise in connection with the *DFA* and in particular chapters 5 and 6 thereof. By virtue of the foregoing it is submitted that the assignment to these tribunals of the various town-planning functions described above, is *prima facie* unconstitutional and invalid.

It is irrelevant whether the *DFA* is a statute dealing with a matter under concurrent national and provincial legislative competence which "requires uniformity across the nation" and establishes uniform norms and standards as envisaged in section 146 of the *Constitution*. Even a national statute complying with the requirement of the said section, dealing as it per definition does with a schedule 4 matter, cannot abolish the constitutional executive authority of a municipality and its right, in terms of s 156 to administer the matter.

In passing it is pointed out that, in any event, the *DFA* is clearly not designed to establish uniform norms and standards. It provides an extraordinary procedure to expedite land development and only the procedure itself is more-or-less uniform. But, the *DFA* does not abolish the various greatly dissimilar provincial and municipal land-use laws.

In fact, it presupposes the continued operation of those laws and simply superimposes a uniform procedure for extraordinary land development.

Even if the foregoing argument does not hold water, it is in any event submitted that the actions of these tribunals in amending town-planning schemes and in approving townships are not authorised or, if authorised by the *DFA*, such authorisation is unconstitutional.

Again it needs to be repeated that if town planning is held to be not mentioned in schedules 4 and 5 it is a purely local government matter and the whole *DFA* is unconstitutional. On the alternative basis where town planning is "municipal planning" in part B of schedule 4, it can be regulated by a national statute provided it complies with the constitutional requirements. If there is a provincial law in operation a conflicting national law will only prevail if the requirements of sections 146-150 of the *Constitution* are complied with.

I submit that there is an interpretation of the *DFA* which will avoid a conflict. The essence of this interpretation is that the procedure in chapters 5 and 6 of the *DFA* is designed for urgent new land development.¹¹⁰ This will apply primarily to a piece of farmland that is developed for the first time. The procedure created by the *DFA* does not spell this out.

¹¹⁰ Carey-Miller 413; Budlender-Latsky 2A-10.

At first blush it could be applied to all traditional town-planning applications. A closer analysis shows that it cannot, without creating vast uncertainty. The end result of the procedure under the *DFA* is a land development area and not a township.

There must be sufficient reason to follow the extraordinary procedure provided for in the *DFA*.

The answer lies in the long title of the *DFA* which envisages the speeding up of the implementation of reconstruction and development programmes and projects in relation to land. If the procedure is restrictively applied as an extraordinary measure and if full effect is given to the preconditions for its application a constitutional conflict can be avoided.

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