

Municipal Government in the New Constitutional Dispensation

Paper for the Institute of Municipal Administrators of South Africa

When the new Constitution¹ was introduced on 4th January 1997, administrators in Local Government largely believed that the new dispensation was a vast improvement over the old one and that, at last, municipalities were truly empowered. In the light of the current review of the constitution, it is perhaps appropriate that municipal councillors and municipal administrators first ask the question, “Is Local Government genuinely better off under the new dispensation?” *before* we ask Lenin’s question, “What’s to be done?” The full answer to the first question really requires a more detailed treatment than this brief paper can provide. My main hope is that it will stimulate debate.

Viewed from local government’s perspective, the constitution had certain positive features:-

- The constitution recognised three distinct spheres of government of which local government was acknowledged as one².
- National and Provincial Government were obliged to respect the status, institutions, powers and functions of municipalities³ and not assume any power or function of local government except those powers conferred on them by the Constitution⁴. Those powers given to national and provincial government had to be exercised in a manner which did not encroach upon or compromise or impede the geographical, functional or institutional integrity of local government⁵. If they intruded – whether by passing a law or by conduct- such law or conduct was invalid⁶ and any offending legislation could be struck down by the Courts⁷.
- The Constitution gave the Municipalities the real legislative and executive powers set out in Schedule 4B and 5B to the Constitution. The powers of the provincial and the national governments in relation to Schedule 4B was restricted to regulating the executive authority of the Municipality and monitoring and supporting the municipality concerned⁸. The provincial government alone had such powers in respect of Schedule 5B matters⁹. As, to the extent the local government matters concerned were provincial/national or provincial matters, the usual restriction on national government¹⁰ and conflict resolution matters¹¹ still applied.

¹ Act 108 of 1996(ConSA)

² S.40(1) ConSA

³ S.41(1)(e) ConSA

⁴ S.41(1)(f) ConSA

⁵ S. 41(1)(g) ConSA r/w s. 151(4) ConSA

⁶ S. 2 ConSA

⁷ S. 167 ConSA

⁸ Schedule 4Bpr r/w s. 155(6)(a) and (7)(ConSA)

⁹ Schedule 5Bpr r/w s. 155(6)(a) and (7)(ConSA)

¹⁰ S. 44 ConSA

¹¹ S.146 ConSA

- The Constitution introduced a strict separation of powers at central government level between the legislature¹², executive¹³ and judiciary¹⁴. Parliament has wide legislative authority¹⁵ but cannot perform executive functions. Likewise, the President has full executive authority¹⁶ where Parliament cannot intrude. At provincial level, the division between the legislature¹⁷ and the executive¹⁸ is maintained but there is no judiciary. At provincial level, legislative power is vested in the provincial legislature¹⁹ and the Executive power in the Premier²⁰. ***At local government level there is no division of powers between an executive and legislative organ of state²¹.***

I have stressed the doctrine of division of powers as two of the most important abuses have arisen because too many people in central and provincial government still think in terms of the British constitutional doctrine of legislative supremacy or a “Parliamentary Sovereign”.

The first key abuse is for the national or provincial legislature to attempt to transfer an executive duty to the municipality by legislation – often coupled with a power and without money. **The legislatures are restricted to assigning legislative power only²². It is the prerogative of the national executive or provincial executive (as the case may be) to assign its executive authority – and then only in terms of the procedures set out in the Constitution²³. *In both cases the procedures for the assignment of executive authority require the consent of the Municipal Council²⁴ concerned.***

The second key problem arising from the division of powers arises from the vesting of the executive authority of the municipality in the Council rather than an Exco or Mayor. The Council may delegate most of its powers²⁵ but the vesting of the Executive authority in the Council cannot be undone by a mere legislative act²⁶ - whether of the national or provincial legislature – nor can executive duties lawfully imposed on the municipality by the national legislature for which the Council is politically responsible be assigned by a body in another sphere of government to an unelected officer such as a Municipal Manager.

¹² Chap 4 of ConSA

¹³ Chap 5 of ConSA

¹⁴ Chap 8 of ConSA

¹⁵ S. 44 ConSA

¹⁶ S. 85(1) ConSA

¹⁷ Ss. 104 -124 ConSA

¹⁸ Ss. 125-141 ConSA

¹⁹ S. 104 ConSA

²⁰ S. 125(1) ConSA

²¹ S. 151(2) ConSA

²² S. 44(1)(a)(iii) ConSA(Parliament’s power to assign legislative authority by legislation) and s. 104(1)(c) ConSA (province’s powers to assign legislative power to a municipality by legislation).

²³ S. 99 ConSA(national executive’s powers to assign executive powers to a municipality) and s. 126 ConSA (provincial executive’s power to assign executive authority to a municipality)

²⁴ Not the Municipality.

²⁵ S.160(1)(a) and (2)ConSA

²⁶ Such as the Local Government: Municipal Systems Act , 2000 (Act 32 of 2000) (MSysA)

So far we have been talking about overreaching of powers by the provincial and national legislatures. If such actions give rise to an intergovernmental dispute, the municipality must invoke the provisions of the expensive and cumbersome Intergovernmental legislation before it can tackle the offending legislature or executive in court²⁷. The delay of central and provincial governments in paying their debts to the municipalities is, at least, partly caused by the fact that they can hide behind section 41(3) of the Constitution – and then blame local governments who do not receive their money in time for non-performance!

There are other situations where the provincial or national government actually behaves lawfully but creates a situation of “unfunded mandates”:-

- The Municipality may be carrying a provincial or national function in terms of old order legislation²⁸ and only get a “subsidy” of peanuts. The worst examples in my Municipality are Housing, Clinics, Libraries, Museums and Disaster Management. These functions are still carried by eTM largely because the political consequences of the Municipality dumping them back holus bolus on the offending government are too ghastly to contemplate.
- “Regulation of the executive authority” is a very broad term. It can be so broadly interpreted that either other sphere may impose so many regulations on the executive authority of the Municipality that the Municipality simply cannot rationally undertake the function without going down the dizzy slope to bankruptcy. A typical example is the provisions of the KZN Pounds Act. If “Regulation of the executive” is going to mean that the Municipality is out of pocket, the municipality has to exercise its right to administer by electing not to administer the function until the offending government applies the “piper principle of good government” i.e. “He who calls the tune must pay the piper.”

The power to “regulate the executive of the Municipality” seems to have become a challenge to every legal adviser in every central or provincial department which has anything to do with local government. This problem has largely arisen because of the way national and provincial governments have handled the division of functions at ministerial level. Instead of having one Department responsible for regulating the Executive and for the monitoring and support of municipalities we have legions of departments in both other spheres trying to regulate local government. The level of knowledge about local government in these department is often uneven – to say the least.

The various draft “Acts” and “Regulations” dealing with Schedule 4B and 5B of the Constitution that are put into circulation by the departments can have a “chill effect” on local government’s own legislation as it is impossible to draft meaningful new bylaws where fair chunks of them may fall to legislation “regulating the executive of the municipality”. As for codifying the Bylaws of a Municipality,²⁹ that project can be put on hold until the other two spheres of government enact all their regulatory legislation that they can dream of or get over their desire to regulate every executive action of a municipality through a legion of different departments.

²⁷ S. 41(3) ConSA

²⁸ Preserved by the provisions of Item 2 of the 6th Schedule to ConSA

²⁹ As “required” by s. 15 of the MSysA

The most far reaching powers of interference in the activities of the Municipality are given by the Constitution in respect of fiscal and financial matters. Here three key pieces of legislation have been enacted:-

- The MFMA³⁰
- The MPRA³¹
- The Municipal Fiscal Powers and Functions Act, 2007³²

These Acts, like the MSysA, are excessively regulatory in their own right. They are typical of the view of the closeted old Pretoria bureaucracy that the principle “one size fits all” is the ideal for local government. Somehow Donkergat and Durban have to have the same shaped administration and rules. These Acts also rely heavily on far reaching powers of enacting subordinate legislation on just about everything. Some of the subordinate legislation is undoubtedly unconstitutional. Thus the Supply Chain Management Regulations are not a “framework” as commonly understood in English (and thus in section 217 of the Constitution) nor, in English, is immovable property goods – and thus capable of being regulated as goods without amending the MFMA.

I could go on for hours about other failures in the new system but, mercifully, will not. I have deliberately avoided discussing the problem of funding of local government because of time constraints.

If I go back to the question of Local Government’s expectations in 1997 and ask, “Are we genuinely better off?” the answer must be a resounding “Ja-Nee”. We still are far too easily the prey of the other two spheres and our politicians and officials will continue to be the “fall-guys” for public discontent unless both municipal councillors and officials are willing to challenge bad provincial or national legislation –in court if necessary- and municipal councillors are prepared to push for the reform of the current dumping, funding and regulatory policies of the national and provincial bureaucracies.

J.M. Paley

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³⁰ The Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003)

³¹ The Local Government: Municipal Property Rates Act, 2004 (Act 6 of 2004)

³² Act 12 of 2007