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**THE LEGISLATIVE AUTHORITY OF THE LOCAL SPHERE OF
GOVERNMENT TO CONSERVE AND PROTECT THE ENVIRONMENT: A
CRITICAL ANALYSIS OF *LE SUEUR v eTHEKWINI MUNICIPALITY*
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1 Introduction

Legislative authority in South Africa is divided among the national, provincial and local spheres of government. Section 43 of the *Constitution* provides in this respect that the legislative authority of the national sphere of government is vested in Parliament;¹ that the legislative authority of the provincial sphere of government is vested in the provincial legislatures;² and that the legislative authority of the local sphere of government is vested in the municipal councils.³

The division of legislative authority among the different spheres of government imposes important limits on each legislature's power to pass legislation. These "federalism limits" provide that a legislature (for example, Parliament or a specific provincial legislature or municipal council) may not pass legislation that falls outside its competence. An important consequence of these limits is that, if a legislature does adopt legislation that falls outside its competence, the legislation in question will be invalid.⁴

The allocation of legislative authority to municipal councils gives rise to a number of complex questions. One of these is the extent to which municipal councils are

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¹ S 43(a) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

² S 43(b) of the *Constitution*.

³ S 43(c) of the *Constitution*.

⁴ See Freedman "Constitutional Law" para 104.

entitled to pass legislation that deals with the conservation and protection of the "environment". This issue was considered by the KwaZulu-Natal High Court: Pietermaritzburg in *Le Sueur v eThekweni Municipality*.⁵

In this case the High Court found that even though the functional area of "environment" has been explicitly allocated to the national and provincial spheres of government and not to the local sphere by the *Constitution*, municipal councils are entitled to pass legislation that deals with the conservation and protection of the "environment", at least in those circumstances where it forms a part of "municipal planning".⁶

Before turning to discuss this case, however, it will be useful first to examine the manner in which the *Constitution* allocates legislative authority to the municipal councils.

2 The local sphere of government

The legislative powers of the municipal councils are set out in section 156 of the *Constitution*.

Section 156(1) provides in this respect that a municipality has executive authority in respect of, and has the right to administer:

- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
- (b) any other matter assigned to it by national or provincial legislation.

In addition, section 156(2) of the *Constitution* also provides that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

⁵ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6.

⁶ Schedule 4A of the *Constitution*.

Apart from sections 156(1) and (2), section 156(5) also provides that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

A careful examination of these sections shows that they distinguish between three types of powers:

- (a) First, those powers that are derived directly from the *Constitution*. These powers may be referred to as "original powers".⁷
- (b) Second, those that are assigned to municipalities in terms of national or provincial legislation. These powers may be referred to as "assigned powers".⁸
- (c) Third, those powers that are reasonably necessary for, or incidental to, the effective performance of a municipality's functions. These powers may be referred to as "incidental powers".⁹

3 Original municipal powers

3.1 The nature of a municipal council's original powers

As we have seen, sections 156(1) and 156(2) of the *Constitution* provide that a municipal council has the authority to pass laws in respect of the local government matters listed in Part B of Schedule 4 and in Part B of Schedule 5 of the *Constitution*. Given that these powers can be altered or withdrawn only if the *Constitution* itself is amended, they form the most significant source of municipal powers and are a fundamental feature of local government's institutional integrity.¹⁰

⁷ Ss 156(1)(a) and (b) of the *Constitution*.

⁸ Ss 156(1)(b) and (2) of the *Constitution*.

⁹ S 156(5) of the *Constitution*.

¹⁰ The fact that original legislative powers have been conferred on municipal councils by the *Constitution* was confirmed by Moseneke J (as he then was) in his judgment in *City of Cape Town v Robertson* 2005 2 SA 323 (CC) where he held that "[a] municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched

Although the *Constitution* confers the authority on municipalities to pass laws in respect of the matters listed in Part B of Schedule 4 and Part B of Schedule 5, the same authority has also been conferred upon the national and provincial governments. Municipalities, therefore, share the power to pass legislation on the matters listed in Schedules 4B and 5B with the national and provincial governments.

While municipalities share the power to pass legislation on the matters listed in Schedules 4B and 5B with the national and provincial governments, it is important to note that they do not share the power to administer and implement these laws. This is because the power conferred upon the national and provincial governments to pass laws on Schedule 4B and 5B matters is limited by sections 155(6)(a) and 155(7) of the *Constitution*.

Section 155(6)(a) of the *Constitution* provides in this respect that

...[e]ach provincial government ... by legislative and other measures, must provide for the monitoring and support of local government in the province...

and section 155(7) that

...[t]he 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 matters listed in Schedule 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,¹¹ the Constitutional Court held that an important consequence of section 155(7) of the *Constitution* is that neither the national nor the provincial spheres of government

powers, functions, rights and duties that may be qualified or constrained by law and only to the extent that the Constitution permits" (para 60). For a detailed discussion of a municipality's original powers, see Steytler and De Visser *Local Government Law* 5-5, 5-11 to 5-12.

¹¹ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC).

can, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs.¹²

This is because, the Constitutional Court held further, the mandate of these two spheres is ordinarily limited to "regulating" the exercise of executive municipal powers, and the administration of municipal affairs by municipalities and the authority to "regulate" does not include the power to exercise municipal competencies and perform municipal functions. Instead, it simply includes the power to establish a framework within which a municipality must perform.¹³

In other words, while the national and provincial spheres of government are entitled to pass laws regulating the local government matters set out in Schedule 4B and Schedule 5B, they are not entitled to legislate on the "core" of Schedule 4B and Schedule 5B matters. Instead, they are entitled to pass only framework legislation dealing with national standards, minimum requirements, monitoring procedures and so on.

In addition, while the national and provincial spheres of government are entitled to pass laws regulating the local government matters set out in Schedule 4B and Schedule 5B, they are not entitled to give themselves the power to administer or implement those laws. The power to administer or implement those laws must be exercised by municipalities themselves.

3.2 The scope and ambit of a municipal council's original powers

The scope and ambit of the functional areas set out in Schedule 4 and Schedule 5 have been considered by the Constitutional Court on a number of occasions.¹⁴ One

¹² *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 59.

¹³ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 59.

¹⁴ See *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC); *Warey Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC); *Johannesburg Metropolitan*

of the most important of these judgments is *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill*.¹⁵

In this case the Constitutional Court held that that the scope and ambit of the matters set out in Schedule 4 and Schedule 5 of the *Constitution* must be interpreted in the light of the model of government adopted by the *Constitution* and the manner in which the *Constitution* allocates power to the different spheres of government.

In relation to the model of government adopted by the *Constitution*, the Constitutional Court has also held that the *Constitution*:

- (a) distributes authority amongst the national, provincial and local spheres of government;
- (b) provides that each sphere has the autonomy to exercise its powers and perform its functions within the parameters of its defined space;
- (c) imposes a duty on each sphere not to assume any power or function except those conferred on it in terms of the *Constitution*; and
- (d) confers extensive powers on parliament including the power to pass legislation on "any matter", excluding only those matters that fall within the functional areas of exclusive provincial competence set out in Schedule 5.¹⁶

Two important consequences flow from this model:

First, although they may appear to overlap, the functional areas of concurrent national and provincial competence listed in Schedule 4 must be interpreted as being distinct from and excluding the functional areas of exclusive provincial competence

Municipality v Gauteng Development Tribunal 2010 6 SA 182 (CC); *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC); *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC); and *Minister of Local Government, Environmental Affairs and Development Planning v Lagoon Bay Lifestyle (Pty) Ltd* 2013 ZACC 39.

¹⁵ *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC).

¹⁶ See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996* 1996 4 SA 744 (CC) para 364; *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 42; and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 43.

set out in Schedule 5.¹⁷ This is because even though section 44(2) confers the power on Parliament to intervene and pass legislation on a matter set out in Schedule 5, the requirements of section 44(2) are very strict and Parliament will be able to do so on very rare occasions only. If the functional areas listed in Schedule 4 and 5 overlapped, therefore, Parliament would be able to pass legislation that affected a Schedule 5 matter without first having to satisfy the requirements of section 44(2).¹⁸

Second, the functional areas of exclusive provincial competence listed in Schedule 5 relate only to those matters which may appropriately be regulated within the boundaries of a province (intra-provincially) and not to those matters which should be regulated across the boundaries of a province (inter-provincially).¹⁹ This is because the grounds on which parliament is entitled to intervene in Schedule 5 matters in terms of section 44(2) of the *Constitution* and the grounds on which national legislation may override provincial legislation in terms of section 146(2) of the *Constitution* clearly show that Parliament has the authority to regulate those activities that take place across provincial boundaries. If the functional areas listed in Schedule 5 include activities that take place across provincial boundaries. Therefore, Parliament would not be able to regulate them unless it intervened in terms of section 44(2) which, as we have seen, is difficult for Parliament to do.²⁰

The principle that a province's exclusive powers relate only to those matters which may appropriately be regulated within the boundaries of a province was extended to municipalities by the Western Cape High Court: Cape Town in *The Habitat Council v Provincial Minister of Local Government, Environmental Affairs and Development Planning Western Cape*.²¹

¹⁷ *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 51.

¹⁸ *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) paras 49-50.

¹⁹ *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 53.

²⁰ *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 52.

²¹ *Habitat Council v Provincial Minister of Local Government etc, Western Cape* 2013 6 SA 113 (WCC).

In this case the High Court held that a municipality's exclusive powers should be interpreted as applying primarily to matters which may appropriately be regulated intra-municipally, as opposed to intra-provincially. This means that where a matter requires regulation inter-municipally, rather than intra-municipally, the national and provincial governments have been given the power to do so, either concurrently or exclusively.

In arriving at this conclusion, the High Court relied heavily on the judgment in the *Liquor Bill* case even though that case dealt with the distribution of legislative powers between the national and provincial spheres of government, rather than the distribution of executive powers between the provincial and local spheres of government.

The second principle to which I wish to draw attention concerns the municipality's exclusive powers, which should be interpreted as applying primarily to matters which may appropriately be regulated intra-municipally, as opposed to intra-provincially.

In *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC), Cameron, AJ (as he then was) said the following in this connection:

The Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere and, accordingly, the competences itemised in Schedules 4 and 5 are referred to as being in respect of 'functional areas'. The ambit of the provinces' exclusive powers must, in my view, be determined in the light of that vision. It is significant that s 104(1)(b) confers power on each province to pass legislation 'for its province' within a 'functional area'. It is thus clear from the outset that the Schedule 5 competences must be interpreted as conferring power on each province to legislate in the exclusive domain only 'for its province'. From the powers of s 44(2) it is evident that the national government is entrusted with overriding powers where necessary to maintain national security, economic unity and essential national standards; to establish minimum standards required for the rendering of services; and to prevent unreasonable action by provinces which is prejudicial to

the interests of another province or the country as a whole. From s 146 it is evident that national legislation within the concurrent terrain of Schedule 4 that applies uniformly to the country takes precedence over the provincial powers and circumstances contemplated in s 44(2)...²²

From this dictum it is evident that, where a matter requires regulation inter-provincially as opposed to intra-provincially, the *Constitution* ensures that national government is accorded the necessary power, either exclusively or concurrently under Schedule 4 or through the powers of intervention accorded to it by section 44(2). It appears that this principle must likewise apply to the proposition that has been outlined with regard to intra-municipal, as opposed to inter-municipal regulation.²³

Apart from the principles set out in the *Liquor Bill* case, the Constitutional Court has also held that where two or more matters in the same Schedule appear to overlap with each other they should be interpreted in a "bottom-up" manner.²⁴ A bottom-up method of interpretation is one in which the more specific matter is defined first and all residual areas are left for the much broader matter.²⁵

When it comes to determining where apparently overlapping functional areas of respective spheres commence and end, therefore, a court must determine, first, what powers are vested in municipalities; second, what powers are vested in provincial governments; and third, what powers are vested in the national government.²⁶

²² *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 51.

²³ *Habitat Council v Provincial Minister of Local Government etc, Western Cape* 2013 6 SA 113 (WCC) 120C-G.

²⁴ See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) paras 60-63.

²⁵ See Steytler and De Visser *Local Government Law* 5-21 to 5-22.

²⁶ See *Habitat Council v Provincial Minister of Local Government etc, Western Cape* 2013 6 SA 113 (WCC) 120H-I.

In the *Gauteng Development Tribunal* case, for example, one of the key questions the Constitutional Court had to answer was whether the power to approve applications for the rezoning of land and establishment of townships fell into the broad matter of "urban and rural development", which is listed in Schedule 4A, or into the specific matter of "municipal planning", which is listed in Schedule 4B. In accordance with the bottom-up method of interpretation, the Constitutional Court began its analysis, not with an examination of the scope and ambit of the broad matter of "urban and rural development", but rather with an examination of the scope and ambit of the specific matter of "municipal planning".

Insofar as the scope and ambit of "municipal planning" was concerned, the Constitutional Court began by explaining that although the term is not defined in the *Constitution* it has a particular and well-known meaning, which includes the zoning of land and the establishment of townships.²⁷

In addition, the Constitutional Court explained further that there is nothing in the *Constitution* which indicated that the term "municipal planning" should be given a meaning which is different from its common meaning.²⁸ The power to approve applications for the rezoning of land and the establishment of a township did, therefore, fall into the area of "municipal planning" listed in Schedule 4B.²⁹

After coming to this conclusion, the Constitutional Court turned to consider whether the same powers also fell into the broad matter of "urban and rural development". The Court held that they did not. In arriving at this conclusion, the Constitutional Court began by explaining that the term "urban and rural development" could not be interpreted in a way that included the power to approve applications for the rezoning of land and the establishment of townships. This is because, the Constitutional Court

²⁷ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57.

²⁸ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57.

²⁹ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57.

explained further, such an interpretation would infringe the principles of co-operative governance which provide that each sphere of government must respect the functions of the other spheres and must not assume any functions or powers not conferred upon them by the *Constitution* or encroach on the functional integrity of the other spheres.³⁰

An important consequence of this approach, the Court went on to hold, was that the term "urban and rural development" should be interpreted narrowly so that each sphere of government could exercise its powers without interference by another sphere of government.³¹

Having found that the term "urban and rural development" was not broad enough to include the powers that form a part of "municipal planning", the Constitutional Court then concluded, it was not necessary to go any further and define exactly what the scope of the functional area of "urban and rural development" was.³²

³⁰ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) paras 58, 61.

³¹ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 62.

³² *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 63. In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) para 35 the Supreme Court of Appeal described the "bottom-up" approach as follows: "The construction that was adopted by the court below ... and that was advanced before us by counsel for the respondents, all proceed by inferential reasoning from the proposition that the functions with which we are now concerned are embraced by the concept of 'development' (a functional area that falls within the concurrent legislative authority of national and provincial government) and thus, by inference, fall to be excluded from the functional area 'municipal planning'. That line of reasoning seems to me to approach the matter the wrong way around. It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as a starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government".

In the same case, the Constitutional Court also held that not only must the functional areas listed in Schedule 4 be interpreted as being distinct from the functional areas listed in Schedule 5, but the functional areas *within* each Schedule must also be interpreted as being distinct from one another. "Urban and rural development", therefore, must be given a different content from "municipal planning". In this respect, the Constitutional Court stated that:

It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. This is the position, even in respect of functional areas that share the same wording, like roads, planning, sport and others. The distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to 'provincial roads', whereas municipalities have authority over 'municipal roads'. The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres. In the example just given, the functional area of 'provincial roads' does not include 'municipal roads'. In the same vein, 'provincial planning' and 'regional planning and development' do not include 'municipal planning'. The constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise.³³

4 Assigned municipal powers

Sections 156(1) and (2) of the *Constitution* provide that municipal councils have the authority to pass laws with respect to the matters assigned to them by national or provincial legislation.³⁴ These sections must be read together with section 44(1)(a)(iii) of the *Constitution*, which provides that the National Assembly may assign any of its legislative powers, except the power to amend the *Constitution*, to

³³ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55.

³⁴ For a detailed discussion of a municipality's assigned powers, see Steytler and De Visser *Local Government Law* 5-42 to 5-50.

any legislative body in another sphere of government. In addition, they must also be read together with section 104(1)(c) of the *Constitution*, which provides that a provincial legislature may assign any of its legislative powers to a municipal council in that province.

The National Assembly's authority to assign any of its legislative powers to the provincial sphere of government was considered by the Constitutional Court in its judgment in *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government*.³⁵ One of the issues the Constitutional Court had to decide in this case was whether the National Assembly could assign a matter that falls outside of Schedules 4 and 5 to the provinces impliedly rather than expressly. The Constitutional Court held that it could not; instead, it had to assign these matters expressly.

The Constitutional Court based its decision on the following grounds:

First, that section 104(1)(b)(iii) of the *Constitution* states that a provincial legislature has the authority to pass legislation on any matter outside Schedule 4 and 5 that has been "expressly" assigned to it by national legislation.³⁶

Second, that the word "expressly" should not be interpreted broadly to include the word "impliedly". This is because the constitutional scheme shows that the legislative authority of the provinces must be clearly identifiable and that the word "expressly" must be given a meaning that is consistent with this scheme.³⁷

Third, that the principle of the rule of law provides that when Parliament assigns powers to the provinces it must do so in a manner that creates certainty about the

³⁵ *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 6 SA 396 (CC).

³⁶ *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 6 SA 396 (CC) para 34.

³⁷ *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 6 SA 396 (CC) para 35.

nature and extent of the powers assigned. This means that the assignment of legislative powers must leave no doubt about the act of assignment and the nature and scope of the powers assigned.³⁸

Fourth, that this approach is consistent with Chapter Three of the *Constitution*, which provides that

...all spheres of government and all organs of state within each sphere must not assume any power or function except those conferred on them in terms of the Constitution.

The public should be left with no doubt about which sphere of government has legislative competence with regard to the matter concerned. This is to preclude disputes.³⁹

Apart from the grounds set out above, the Constitutional Court also pointed out that the use of the qualifier "expressly" in section 104(1)(b)(iii) stands in stark contrast to the absence of such a qualifier in section 156(1), where the *Constitution* refers to matters over which municipalities have executive and administrative and, therefore, legislative authority.

The *Constitution* makes a deliberate choice in the formulation of section 104(1)(b)(iii). Instead of merely requiring that powers be 'assigned', it qualifies the assignment by specifying that it must be 'expressly' made. The deliberate use of the qualifier 'expressly' in section 104(1)(b)(iii), stands in stark contrast to the absence of such qualifier, in section 156(1), where the *Constitution* refers to matters over which municipalities have executive and administrative authority. Section 156(1)(a) provides that municipalities have executive authority in respect of, and the right to administer, 'the local government matters listed in Part B of Schedule 4 and Part B of

³⁸ *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 6 SA 396 (CC) para 36.

³⁹ *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 6 SA 396 (CC) para 37.

Schedule 5'. Section 156(1)(b) further confers an executive authority on municipalities to administer 'any other matter assigned to [them] by national or provincial legislation'.⁴⁰

The implication is that while the power to pass legislation on a matter that falls outside Schedules 4 and 5 cannot be assigned by implication to the provincial legislatures, it can be assigned by implication to the municipal councils.

Finally, it is important to note that when a matter has been assigned to a municipality by national or provincial legislation, the matter will usually become an exclusive municipal competence, at least until the national or provincial legislation is repealed. This is because, unlike the concept of a delegation, the concept of an "assignment" encompasses the full transfer of the authority to exercise power over the matter in question. In *Executive Council, Western Cape Legislature v President of the RSA*,⁴¹ for example, Kriegler J stated that it is important to distinguish between the concept of an assignment and the concept of a delegation. A delegation, he stated further, postulates a less complete transfer of authority than an assignment does.⁴²

5 Incidental municipal powers

Section 156(5) of the *Constitution* provides that a municipality has the right to exercise any power concerning a matter that is reasonably necessary for, or incidental to, the effective performance of its functions. This power is sometimes referred to as the "incidental power". "Incidental power" refers to those matters which, strictly speaking, fall outside the functional areas over which a municipality has authority, but are so closely connected to the "effective performance of its functions" that they are considered to be a part of the functional areas over which a

⁴⁰ *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 6 SA 396 (CC) para 40.

⁴¹ *Executive Council, Western Cape Legislature v President of the RSA* 1995 4 SA 887 (CC).

⁴² *Executive Council, Western Cape Legislature v President of the RSA* 1995 4 SA 887 (CC) para 173.

municipality has authority. As Steytler and De Visser point out, what this means is that while section 156(5) does not confer new functional areas on a municipality, it does confer on a municipality the power to adopt measures that will enhance the effective administration of its existing functional areas. This could, for example, include the power to create offences and impose penalties for transgressing a by-law, or, perhaps, the power to impose an environmental authorisation procedure.⁴³

The incidental power was applied in *Mazibuko v City of Johannesburg*.⁴⁴ The facts of this case were as follows: prior to 2004 the residents of Phiri in Soweto were charged a flat rate of R68,40 per month for using water supplied to them by the City. This amount was based on a deemed monthly consumption of 20 kilolitres of water per household. The actual monthly consumption per household, however, was much higher, although it was not possible to tell how much of the excess was consumed by residents or lost through leakage. Despite the fact that they were charged only R68,40 per month, most of the residents of Phiri did not actually pay this amount.

In order to reduce the amount of water lost through leakage and to increase the rate of payment, the City decided to abandon the system of deemed consumption flat rate charges and replace it with a free basic supply of six kilolitres per household per month and a pre-paid meter system. The applicants, who were residents of Phiri, then applied for an order declaring the City's decision to be unconstitutional and invalid. They based their application on a number of grounds. One of these was that the decision to install pre-paid meters was not authorised by the law.

In response the City argued that the installation of the pre-paid meters was authorised by section 3 of the City's Water Services By-laws, which provided for three different levels of water service, namely Service Level 1, Service Level 2 and

⁴³ For a more detailed discussion of a municipality's incidental powers see Steytler and De Visser *Local Government Law* 5-6 to 5-8.

⁴⁴ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC). See also *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC).

Service Level 3, which was the level of service provided to the residents of Phiri. Insofar as this level was concerned, section 3(2)(c) of the By-law expressly stated that it had to consist of: (a) a metered full pressure water connection to each stand; and (b) a conventional water borne drainage installation connected to the Council's sewer.

Although section 3(2)(c) of the By-law did not expressly refer to pre-paid meters, the City argued further, the phrase "a metered full pressure water connection" had to be interpreted to include both credit meters and prepaid meters, and that the installation of pre-paid meters was therefore authorised by the By-law. The Constitutional Court accepted the City's argument. In addition, it also held that section 95(i) of the *Local Government: Municipal Systems Act* ("Municipal Systems Act"),⁴⁵ which expressly requires local government to provide accessible pay points for settling accounts or for making pre-payments for services,⁴⁶ conferred the authority on the City to install pre-paid meters.

Apart from these two arguments, however, the Constitutional Court also held that the power to install pre-paid meters was reasonably incidental to the effective performance of the functions of a municipality. This was because, the Court held further, the power to install pre-paid meters was one which was reasonably incidental to providing services to citizens in a sustainable manner that permitted cost recovery. Given that the power to install pre-paid meters was reasonably incidental to the effective performance of its functions, the Court held further, section 3(2)(c) of the By-laws should be interpreted in a manner that conferred this power on the City.⁴⁷

Although the issue in this case was not whether the municipal council had the power to pass a law dealing with pre-paid meters, but rather whether the municipal council had in fact passed such a law, the judgment can be interpreted as saying that while

⁴⁵ *Local Government: Municipal Systems Act* 32 of 2000.

⁴⁶ S 95(i) of the *Local Government: Municipal Systems Act* 32 of 2000.

⁴⁷ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 111.

the subject-matter of pre-paid water meters does not fall into any of the functional areas set out in Part B of Schedule 4 and 5, and especially not into the functional area of "water and sanitation services" listed in Part B of Schedule 4, a municipal council can still pass a law on pre-paid water meters because they are so closely connected to "water and sanitation services" that they are considered to be a part of that functional area.

6 *Le Sueur v eThekweni Municipality*

6.1 *The facts*

The facts of this case were as follows. In 2010, the eThekweni Municipal Council adopted a resolution amending its town planning scheme to introduce the Durban Open Space System ("D-MOSS"). This system is aimed at protecting areas that have a high biodiversity value in Durban by creating a system of open spaces that are interconnected. In order to achieve this goal, the system provides that land which falls within a D-MOSS area may not be developed without first obtaining an environmental authorization in terms of the municipality's town planning schemes, and even then it may be developed only subject to strict controls aimed at protecting the ecological goods and services the land provides.

After the municipal council adopted this resolution, the applicant, who owned land located in the eThekweni Municipality and whose land fell into a D-MOSS area, applied for an order declaring the resolution to be unconstitutional and invalid. He based his application, *inter alia*, on the grounds that the subject matter of the resolution was the "protection of the environment"; that the "environment" is listed in Schedule 4A of the *Constitution* as a functional area of national and provincial legislative competence; and, consequently, that the resolution fell outside the legislative authority of the municipal council and was therefore unconstitutional and invalid.

6.2 *The judgment*

The High Court (per Gyanda J) rejected the applicant's argument. In arriving at this decision, the High Court began by observing that the functional area of "municipal planning", which is set out in Schedule 4B, must be interpreted in the light of section 24 of the *Constitution*, which provides that "[e]veryone has a right to an environment that is not harmful to their health or well-being", and section 152(1)(d), which provides that one of the objectives of local government is to "promote a safe and healthy environment". These sections clearly indicate that the functional area of "municipal planning" includes responsibility over environmental affairs.⁴⁸

In addition, the High Court observed, the functional area of the "environment" is not contained in a hermetically sealed compartment. Instead, it is an area over which all three spheres of government enjoy overlapping authority. This is because municipalities are in the best position to know, understand and deal with issues involving the environment at a local level, and also because municipalities have historically always exercised legislative responsibility over environmental affairs as a part of municipal planning. Given that authority over the functional area of the "environment" had to reside in all three spheres, it could not be inserted in Part B of Schedules 4 and 5. Instead, it had to be inserted in Part A of Schedule 4.⁴⁹

Apart from finding that "municipal planning" includes responsibility over environmental affairs, the High Court also held that it is clear that legislative and executive authority over environmental matters as a part of municipal planning has been assigned to municipalities by national and provincial legislation. In this respect the High Court started by pointing out that section 23(1)(c) of the *Municipal Systems Act*, which deals with integrated development planning at a municipal level, recognises that there is an obligation on municipalities together with other organs of state to contribute to the progressive realisation of the fundamental rights contained

⁴⁸ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 para 19.

⁴⁹ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 paras 20-21.

in section 24 of the *Constitution*, and that this was clearly a legislative mandate from the national legislature with regard to environmental matters.⁵⁰

In addition, the High Court pointed out further, sections 25 and 26 of the *Municipal Systems Act* provide that not only must every municipality adopt an integrated development plan ("IDP"),⁵¹ but also that every IDP must include a spatial development framework⁵² and - in terms of the regulations issued under the *Municipal Systems Act*⁵³ - that every spatial development framework must "contain a strategic assessment of the environmental impact of the spatial development framework".⁵⁴

Besides the *Municipal Systems Act*, the High Court went on to point out, section 2 of the *National Environmental Management Act* ("NEMA")⁵⁵ contains a set of national environmental management principles that apply to the actions of all organs of state, including municipalities, that may significantly affect the environment,⁵⁶ and section 33 of the same Act allows a person to institute a private prosecution in those cases in which the accused has infringed a municipal by-law and the by-law is "concerned with the protection of the environment". Section 33 of NEMA thus envisages the enactment of municipal by-laws that deal with the protection of the environment.⁵⁷

In addition, section 48 of the *National Environmental Management: Biodiversity Act*⁵⁸ provides, *inter alia*, that municipalities must not only align their IDPs with the national biodiversity framework and any applicable bioregional plan,⁵⁹ but must also incorporate the provisions of the national biodiversity framework or bioregional plan

⁵⁰ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 para 24.

⁵¹ See s 25(1) of the *Local Government: Municipal Systems Act* 32 of 2000.

⁵² See s 26(e) of the *Local Government: Municipal Systems Act* 32 of 2000.

⁵³ Reg 2(4)(f) of the *Local Government: Municipal Planning and Performance Management Regulations* published in GN R796 in GG 22605 of 24 August 2001.

⁵⁴ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 para 26.

⁵⁵ *National Environmental Management Act* 107 of 1998.

⁵⁶ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 para 34.

⁵⁷ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 para 36.

⁵⁸ *National Environmental Management: Biodiversity Act* 10 of 2004.

⁵⁹ S 48(2)(a) of the *National Environmental Management: Biodiversity Act* 10 of 2004.

that specifically apply to them in their IDPs,⁶⁰ and demonstrate in the IDP how the national biodiversity framework and any applicable bioregional plan may be implemented in their areas of jurisdiction.⁶¹

After setting out these principles, the High Court turned to apply them to the facts. In this respect it found that municipalities are authorised to legislate in respect of environmental matters to protect the environment at the local level and, consequently, that the resolution amending the town planning scheme to introduce the D-MOSS did not fall outside the legislative competence of the eThekweni Municipality:

It is clear from the foregoing and the arguments advanced by the first respondent that contrary to the submissions by and on behalf of the applicants, municipalities have traditionally been involved in regulating environmental matters at the local level and that their functions at this level have been recognised by the drafters of the *Constitution*. Hence, although environmental matters stood as the apparently exclusive area for national and provincial governance at those levels, it is clear that the authority of the municipalities at local government level to manage the environment at that level has always been and is still recognised. It is inconceivable that the drafters of the *Constitution* intended by the manner in which the *Constitution* was framed to exclude municipalities altogether from legislating in respect of environmental matters at the local level. In any event, it is clear that national and provincial legislation in respect of environmental issues recognises the part to be played by municipalities at the local government level in managing and controlling the environment.⁶²

Accordingly, I am satisfied that Municipalities are in fact authorised to legislate in respect of environmental matters to protect the environment at the local level and that the D-MOSS Amendments in no way transgress or intrude upon the exclusive

⁶⁰ S 48(2)(b) of the *National Environmental Management: Biodiversity Act* 10 of 2004.

⁶¹ S 48(2)(c) of the *National Environmental Management: Biodiversity Act* 10 of 2004.

⁶² *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 para 39.

purview of the national and provincial governance in respect of environmental legislation. I am, therefore, satisfied that the D-MOSS Amendments introduced by the first respondent are not unconstitutional and invalid on the basis contended for by the applicants, namely, that the first respondent did not have the authority to legislate in this regard.⁶³

7 Critical comment

Out of the three categories of legislative powers that municipal councils may enjoy, the High Court based its decision on the first two, namely the original legislative powers and the assigned legislative powers. For this reason, it is not necessary to say anything more about the third category of legislative power.⁶⁴

Insofar as the first and second categories are concerned, the High Court relied primarily on the first category when it held that the functional area of "municipal planning" encompasses "environmental matters", and only as an alternative on the second ground, when it held that legislative and executive authority over environmental matters as a part of municipal planning has been assigned by national and provincial legislation to municipalities.

Given that the *Constitution* allows Parliament to assign matters to the municipal councils much more easily than it allows Parliament to assign matters to the provincial legislatures, the judgment appears to be correct in holding that national and provincial legislation has implicitly assigned legislative authority over environment matters as a part of municipal planning to municipalities.

⁶³ *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 para 40.

⁶⁴ Given that the purpose of the incidental power is not to confer new functional areas on municipalities, but rather to confer the power on them to adopt measures that will enhance the effective administration of the functional areas over which they already have authority, it might be possible to argue that those parts of the D-MOSS that make provision for environmental authorisations do fall into the incidental powers of the eThekweni Municipality. It is not clear, however, that those parts of the D-MOSS that deal with the protection of biodiversity do. This is because they appear to deal with matters that fall into the functional area of the "environment".

When it comes to the first category, however, it is not clear whether the functional area of "municipal planning" can simply be interpreted to encompass "environmental matters at the local level" or at least not "environmental matters at the local level" in the broad sense the use of this phrase by the High Court suggests. In this respect the following points can be made:

First, that including "environmental matters at the local level" in the functional area of "municipal planning" potentially upsets the division of subject-matters envisaged by the drafters of the *Constitution*. An examination of Schedules 4 and 5 indicates that while the drafters allocated certain environmental matters to the local sphere of government, such as air pollution, domestic waste water disposal, noise pollution and refuse removal, they reserved all other environmental matters, for example the protection of biodiversity, for the national and provincial spheres.⁶⁵ Given these points, it may be argued that the protection of biodiversity falls outside the original legislative competence of the local sphere of government.

Second, that including "environmental matters at the local level" in the functional area of "municipal planning" means that there will be an overlap between the functional area of "municipal planning" in Part B of Schedule 4 and the functional area of "environment" in Part A of Schedule B. In the *Gauteng Development Tribunal* case, however, the Constitutional Court held that even though they are not contained in hermetically sealed containers, the functional areas are distinct from one another and one functional area should not include another.

Insofar as this point is concerned, it should also be noted that while there may be an overlap between the functional area of "environment" and the functional area of "municipal planning", this does not give a municipal council the power to legislate in

⁶⁵ The environmental matters explicitly allocated to the local sphere of government in Schedules 4B and 5B of the *Constitution* include the following: air pollution; storm water management systems in built-up areas; water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems; beaches and amusement facilities; cemeteries, funeral parlours and crematoria; facilities for the accommodation, care and burial of animals; noise pollution; refuse removal, refuse dumps and solid waste disposal

the overlap. In other words, this does not give a municipal council the power to pass legislation that deals predominantly with the "environment" rather than with "municipal planning". In the case at hand it is difficult to know whether the Resolution introducing the D-MOSS system deals predominantly with the "environment" or with "municipal planning". As pointed out above, this is because the High Court did not clearly identify the subject-matter of the Resolution.

Third, that including "environmental matters at the local level" in the functional area of "municipal planning" could have unintended practical consequences. This is because in the *Gauteng Development Tribunal* case the Constitutional Court also held that while the national and provincial governments have the power to pass legislation with respect to the matters listed in Part B of Schedules 4 and 5, they do not have the power to implement that legislation. The power to implement national and provincial legislation dealing with the matters listed in Part B of Schedules 4 and 5 vests exclusively in local government.

While the functional area of "municipal planning" cannot simply encompass the broad subject-matter of "environment matters at the local level" for the reasons set out above, this does not mean that the functional area of "municipal planning" does not include certain specific environmental matters at the local level. Unfortunately, it is difficult to know which sorts of specific environmental matters at the local level should be included in the functional area of "municipal planning". This is because the High Court found that the substance of the resolution amending the town planning scheme to introduce the D-MOSS was simply the "environment", without first examining the resolution in the light of the factors that have been identified by the Constitutional Court on several occasions.⁶⁶

⁶⁶ See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu Amakhosi and Iziphakanyiswa Amendment Bill of 1995* 1996 4 SA 653 (CC) para 19; *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 36; *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) paras 63-64, 68; and *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 2 SA 99 (CC) para 21.

In the *DVB Behuising* case, for example, the Constitutional Court held that when it comes to determining whether or not legislation falls into a particular legislature's field of competence, a court first has to determine "the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is what the [legislation] is about". In other words, the court has to look beyond the legislation's character or form and identify its true purpose and effect.⁶⁷

The reason a court must look beyond the legislation's character or form and identify its true purpose and effect, the Constitutional Court held further, is because the purpose and effect may show that although the legislation purports to deal with a matter that falls within a legislature's field of competence, its true purpose and effect may be to achieve a different goal, one which falls outside the legislature's field of competence.⁶⁸

In addition, the Constitutional Court also held that, when a court seeks to determine the subject-matter or substance of the legislation in question, it should take the preamble to the legislation and its legislative history into account. This is because they serve to illuminate the legislation's substance. "They place [the legislation] in context, provide an explanation for its provisions and articulate the policy behind them."⁶⁹

In the same judgment, the Constitutional Court went on to warn that it may not be possible to subject a particular piece of legislation to a uniform analysis directed at yielding a single characterisation of what its purpose might be. A single statute might have more than one purpose. Different parts of that statute may thus require different assessments in regard to the disputed question of legislative competence.⁷⁰

⁶⁷ *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 36.

⁶⁸ *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 37-38.

⁶⁹ *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 36.

⁷⁰ *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 39.

If the High Court had followed the procedure set out above more closely, we would undoubtedly have a much better sense of whether or not the specific environmental matters dealt with by the D-MOSS Amendments fell into the functional area of "municipal planning" and, consequently, of the sorts of specific environmental matters at the local level that may or may not be included in "municipal planning".

8 Conclusion

While the judgment in *Le Sueur v eThekweni Municipality* has correctly confirmed that municipal councils have the original authority to pass legislation dealing with environmental matters as a part of their power to pass legislation dealing with municipal planning, it has not set out the scope and ambit of this power as clearly as it could have. Given, however, that similar schemes will in all likelihood be implemented in other municipalities in the future, it seems inevitable that the issues raised in *Le Sueur* will be the subject of further litigation. This will contribute to the development of our nascent jurisprudence in this complex area of the law.

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LIST OF ABBREVIATIONS

D-MOSS	Durban Open Space System
IDP	Integrated development plan
NEMA	National Environmental Management Act