

The obligations on local government with regard to the right to housing/shelter

1 General: obligations on the state with regard to fundamental rights

Section 7(2) of the Constitution imposes four different types of obligations on the state when it comes to the fundamental rights, entrenched in the Bill of Rights: the obligations to *respect*, *protect*, *promote* and *fulfil*. These obligations exist with regard to both rights of civil or political nature as with regard to economic, social and cultural rights.

- (1) The obligation to *respect* these rights means that the state must refrain from interfering with the enjoyment of such a right.¹
- (2) The obligation to *protect* means that the state must prevent violations by third parties.²
- (3) The obligation to *promote* fundamental rights means that the state must encourage and advance the realisation of these rights, which includes ensuring public awareness.
- (4) The obligation to *fulfil* fundamental rights means that the state must take appropriate legislative, administrative, budgetary, judicial and other measures towards realisation.³

The question is whether all three spheres of government, which make up ‘the state’, are jointly responsible for all of these four obligations or whether distinctions can be made. This issue is important, especially with regard to the social, economic and cultural rights, which often require positive state action with substantial budgetary consequences.

1.2 International law

When interpreting the obligations that economic, social and cultural rights place on the South African state, it is both helpful and imperative to have regard to the position in international law.⁴ Principle 6 of the Limburg Principles, which can be seen to reflect a great proportion of existing international law pertaining the economic, social and cultural rights reads that ‘[t]he achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, *in both centralized and decentralised political structures*.’⁵ This underscores the position that international law is not concerned with the question which sphere, organ or structure within the state is responsible for the realisation of economic, social and cultural rights. For example, the trend has been in many countries to rely more and more on market-economy related measures to resolve problems in socio-economic development. Despite that, the state can and should be held accountable for the realisation of socio-economic rights and

¹See Theo C. van Boven, Cees Flinterman and Ingrid Westendorp, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights, Utrecht, 1998, pg 4.

²See Van Boven *et al*, pg 4.

³See Van Boven *et al*, pg 4.

⁴Section 233 of the Constitution.

⁵Own emph.

is obliged to provide basic social services to fulfil these rights.⁶

1.3 Provinces and local government equally liable?

Can a similar, straightforward, approach be followed with regard to the question which of the three spheres is responsible for the realisation of economic, social and cultural rights? To a certain extent, the same applies here: national government can devolve powers and decentralise the effort to realise economic, social and cultural rights, but it remains fully accountable to its citizens for the realisation of these rights.

A follow-up question is whether the same can be said for the other two spheres. Do provincial and local governments bear the same unqualified burden with regard to the realisation of economic, social and cultural rights? It is argued that, in the first place, provincial and local governments are, together with national government, jointly responsible for the realisation of economic, social and cultural rights, but, in the second place, a qualification along the lines of the four types of obligations on the state, referred to above, must be made.

Provincial and local governments derive their power from the decentralised state. The Constitution allocates powers to the three spheres and protects them. The power to amend that constitutional allocation is regulated in section 74 of the Constitution. Provinces have a say in an amendment to the Constitution, as stipulated in subsections (3) and (8), local governments do not. They do not have a vote in an amendment to the constitutional allocation of powers to them.⁷ Thus, when it comes to its constitutionally protected set of competencies, the local sphere of government depends on an allocation of powers, which it does not have decisionmaking or voting powers on. It is therefore reasonable to argue, with regard to the realisation of the fundamental rights entrenched in the Constitution, that a local authority is not charged with an obligation that is the same as the obligation that rests on national government. A qualification must be made along the lines of *respecting, protecting, promoting* and *fulfilling* these rights.

Local government shares with provincial and national government the responsibility to *respect, protect* and *promote* all the fundamental rights of the Bill of Rights, including the economic, social and cultural rights. This is the consequence of the elevation of local government from administrative arm of central and provincial government to “a component of the government proper”;⁸ a new order, the reality of which has been affirmed by the Constitutional Court in the *Fedsure* case.⁹ Local authorities are, just as much as national and provincial governments, obliged to refrain from interfering with these rights, to protect against violation by third parties and to advance the realisation of these rights. However, when it comes to *fulfilling* an economic, social or cultural right in terms of taking legislative, administrative, budgetary, judicial or other

⁶Van Boven *et al*, pg 16.

⁷Except to say that the local sphere has a constitutionally entrenched mouthpiece in Parliament in the form of representation by organised local government in the National Council of Provinces (Ss 67 and 163(b)(ii) of the Constitution).

⁸Rudolf Mastenbroek and Nico Steytler, *Local government and development: The new constitutional enterprise* in: *Law, Development and Democracy*, November 1997, Butterworths, Durban, pg. 245; .

⁹*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC); see also Nico Steytler and Jaap de Visser, *Constitutional Court affirms status of local government*, in: *LGL Bulletin* 1999 (1) 6.

similar measures, local government's hands might be tied by the mandate it has received from the Constitution. Local government's aggregate budget consists mainly of moneys, raised by the municipalities themselves and is supplemented by national government grants and payments for the performance of agency functions.¹⁰ Local authorities raise revenue and receive grants, *based on their powers and functions determined by the Constitution*. As Mastenbroek en Steytler put it, what the Financial and Fiscal Commission, tasked with advising governments on the division of revenue, does is "establishing what it would cost local government to do *what the Constitution instructs it to do*, and then to determine the extent to which the national fiscus is obliged to assist local government."¹¹

There are fundamental rights, such as for example the right to basic education (s 29(1)(a)), where local government simply does not have the power, within the constitutional context, to take legislative, administrative or budgetary measures to achieve the realisation of the right. That, of course, does not mean that local authorities do not have the obligation to *respect, protect and promote* the right to education. When local authorities deal with education related matters, such as the provision of municipal services (eg water, electricity, sewerage) to schools, the making of provisions in town planning schemes for schools or the making available of municipal land for that purpose, the local authorities must be guided by those obligations. For example, the decision to cut off a school from the provision of electricity must be guided by different principles than the severance of electricity supply in the case of a residential dwelling.

1.4 Powers and functions of local government

Section 156(1) of the Constitution deals with the powers and functions of municipalities. It reads:

- (1) 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.

Subsection (2) affords municipalities the power to make and administer by-laws for the administration of those matters that it has the right to administer. Subsection (4) deals with the assignment of matters to a municipality by agreement between the relevant municipality and national or provincial government. In other words, local government derives *statutory* powers from (1) the competencies, listed in Schedule 4B and Schedule 5B and (2) national or provincial legislation that assigns the administration of other matters to municipalities.

1.5 Conclusion

Linking section 7(2), dealing with the four obligations pertaining to fundamental rights, with the constitutional division of powers and functions between the three spheres of government, the conclusion is that a local authority is only responsible for the *fulfilment* of an economic, social or cultural right in terms of taking legislative, administrative or budgetary measures if the subject matter –

¹⁰Mastenbroek en Steytler (n 8), pg 247.

¹¹Ibid.

- C falls within the competencies set out in Schedule 4B and 5B of the Constitution; or
- C has been assigned to local government by national or provincial legislation.

2 Oostenberg Municipality's obligations in the case at hand

In the discussion of the question whether, in this case, Oostenberg Municipality bears the onus of *fulfilling* the right of which violation is claimed, a distinction needs to be made between the two fundamental rights upon which the applicants relied in the court a quo. These are on the one hand the right to shelter as a 'core right' of the right to housing, as laid down in section 26 of the Constitution and on the other hand the children's right to shelter, as laid down in section 28(1)(c).

In dealing with the question which sphere of government carries the primary obligation for taking administrative, legislative and budgetary measures with regard to these rights, this brief will continue to deal with the right to housing (2.1), followed by the children's right to shelter (2.2). It will be argued that in both cases, the primary obligation for the taking of the abovementioned measures does not rest on the local sphere. The question then arises as to what the obligations of local government are, seen in the context of the 'remaining' constitutional obligations to *respect*, *protect* and *promote* the fundamental rights of the Constitution. This will be dealt with in 2.3.

2.1 Is local government obliged to *fulfil* the right to housing?

A determination has to be made whether or not local government has the obligation to *fulfil* the right to housing of section 26. The relevant question here should be *whether any of local government's constitutional obligations make local government the primary responsible sphere for realising the right to housing*. To answer that question, firstly, local government's competencies in terms of Schedule 4B and 5B need to be examined for linkages with the right to housing and secondly, any national or relevant provincial legislation that assigns to local government any matter pertaining the right to housing should be scrutinised.

2.2 Local government's competencies in terms of the Schedules

For the present era, the regulatory competence of metropolitan local councils, which applies to Oostenberg Municipality, is not yet to be found in the Schedules to the Constitution but in the Local Government Transition Act 209 of 1993 (LGTA), which governs the reconstruction of local government until new local authorities have been democratically elected and put in place. The establishment of these new, democratically elected structures will herald the end of the present 'interim phase', as contemplated and governed by the LGTA. "There is therefore no legislative competence (...) until expiry of that "interim phase".¹²

However, in this context, the same two determinations that were discussed in 2.1 need to be made, albeit that instead of looking at the Schedules 4B and 5B of the Constitution for Oostenberg's competencies, the LGTA applies. Section 10C(3) of the LGTA reads as follows:

- (3) A metropolitan local council-
 - (a) shall have the powers and duties listed in Schedule 2A;
 - (b) shall in addition have all such other powers and duties as are normally conferred or

¹²Per Kriegler J in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995(10) BCLR 1289 (CC) at para 162.

- imposed upon primary municipalities;
- (c) shall have such other powers and duties conferred or imposed upon or delegated or assigned to metropolitan local councils by or under any law: Provided that-
 - 1. no power or duty shall be delegated or assigned to a metropolitan local council without providing the sufficient resources for the exercise of such power or the performance of such duty: Provided that such delegation or assignment shall be by agreement; and
 - (ii) such delegation or assignment shall be made on a basis which will ensure the sustainability and practicability of the exercise of such power or performance of such duty;
- (d) may exercise any power or perform any duty concerning a matter which is reasonably necessary for or incidental to the effective exercise of its powers or the performance of its duties.

For ease of reference, the complete list of powers and duties, listed in Schedule 2A follows below:

- 1 Recovery of Costs
The claiming of payments from a metropolitan council to cover the actual costs of any service performed or rendered on behalf of or to such council.

- 2 Integrated Development Plan
A metropolitan local council shall formulate and implement a local integrated development plan, incorporating local land use planning, transport planning, infrastructure planning and the promotion of integrated local economic development, in accordance with the metropolitan integrated development plan.

- 3 Water
Water reticulation.

- 4 Sewerage
Sewage disposal and the provision of a sewerage system.

- 5 Electricity
The retail reticulation of electricity.

- 6 Roads
The construction and maintenance of roads and local stormwater drainage systems.

- 7 Traffic Matters
 - (a) Traffic law enforcement.
 - (b) The testing of vehicles and drivers.
 - (c) Matters pertaining to road safety.

- 8 Waste Disposal
The disposal of waste.

- 9 Cemeteries and Funeral Parlours
The establishment and control of cemeteries and funeral parlours.

- 10 Airports
The establishment and operation of airports, excluding national or international airports and landing strips.

- 11 Libraries
The establishment and operation of libraries.

- 12 Amusement Facilities and Beaches
The establishment, conduct and control of amusement facilities and the control of beaches.
- 13 Public nuisances
The control of public nuisances.
- 14 Environmental Affairs
The management and control of environmental affairs.
- 15 Tourism
The promotion of tourism.
- 16 Municipal Health Services
The provision of municipal health services.
- 17 Billboards and Advertisements
The control of billboards and the display of advertisements in public places.
- 18 Building Control
The control of building activities.
- 19 Cleansing
The provision of cleansing services in streets and public places.
- 20 Business Licensing
The licensing and control of places selling food.
- 21 Animals
The licensing and control of animals as well as the provision and control of facilities for the accommodation, impounding, care and burial of animals.
- 22 Markets
The establishment and control of markets, excluding fresh produce markets.
- 23 Pontoons, Ferries, Jetties, Piers and Harbours
The provision and control of pontoons, ferries, jetties, piers and harbours other than major ports.
- 24 Street Trading
The control of street trading.
- 25 Lighting
The lighting of streets and public places.
- 26 Public Places
The management and control of public places and gatherings in public places.
- 27 Fireworks
The control of fireworks.
- 28 Child Care Facilities
Management of child care facilities.
- 29 Municipal Law Enforcement Agency
The establishment and control of municipal law enforcement agencies, subject to the South African Police Service Act, 1995 (Act 68 of 1995).

The LGTA does not confer on Oostenberg Municipality, any function that can be seen to place the onus on it to be the primary responsible organ for the implementation of the right to housing. Although many of the listed functions and powers relate to housing (the control of building activities, water, sewerage, electricity and waste disposal clearly relate to housing), they do not place the primary obligation to take administrative, legislative, budgetary and other measures for the fulfilment of the right to housing on local government.

The Schedules to the Constitution provide insight into the question on which sphere the primary obligation for the fulfillment of the right to housing rests. Schedule 4A lists 'Housing' as a concurrent competency of the national and provincial sphere.

2.3 Assigned functions of local government

The conclusion that the competencies of Oostenberg Municipality in terms of the Schedules to the LGTA do not render it the primary responsible organ for the fulfillment of the right to housing, leads to the second question; namely whether any national or provincial legislation assigns the subject matter to local government. Firstly, the Housing Act 107 of 1997 will be discussed (2.3.1) and secondly, the relevant provincial legislation, namely the Western Cape Housing Development Act 6 of 1999 will be dealt with (2.3.2).

2.3.1 Local government's competencies in terms of the Housing Act

The Housing Act 107 of 1997 is the primary statute dealing with the national framework with regard to housing. It repeals and replaces most of the previous housing legislation, including the Housing Act 4 of 1966. The preamble contains a specific reference to section 26 of the bill of rights, which deals with the right to adequate housing and the positive obligation it imposes on the state in terms of the realisation of the right. The preamble also lists the six economic and social value imperatives that housing is meant to fulfil and require, namely "housing, *as adequate shelter*, fulfils a basic human need; housing is both a product and a process; housing is a product of human endeavour and enterprise; housing is a vital part of integrated developmental planning; housing is a key sector of the national economy; housing is vital to the socio-economic well-being of the nation".¹³ What follows is an overview of the roles and responsibilities of the three spheres of government in terms of the Housing Act.¹⁴ A discussion of this scheme of responsibilities, as laid down in the Housing Act, is crucial in resolving the issue around the primary responsible sphere of government: firstly, it builds on the constitutional allocation of functions and powers in Schedule 4 and 5 of the Constitution and provides further insight in the scheme of responsibilities and secondly, the Housing Act must be investigated for any assignments in terms of section 156(1)(b).

2.3.1.1 The national government

Powers and duties of the Minister of Housing

¹³Preamble to the Housing Act 107 of 1997 (emph. added).

¹⁴This overview is based on the summary of SBO Gutto in: W A Joubert and J A Faris, *The Law of South Africa Volume 11: Housing (electronic version)*, par. 18 and further, Butterworths 1999.

At the national level, the Minister of Housing has the overall responsibility for establishing and facilitating a sustainable national housing development process, in consultation with all the members of the executive councils responsible for housing and the national organisations representing municipalities.¹⁵

Section 3(2) of the Housing Act lists the statutory responsibilities of the minister as follows:

- (a) determine national policy, including national norms and standards, in respect of housing development;
- (b) set broad national housing delivery goals and facilitate the setting of provincial and, where appropriate, local government housing delivery goals in support thereof;
- (c) monitor the performance of the national government and, in co-operation with every member of the executive council, the performance of their duties in respect of housing development;
- (d) assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their duties in respect of housing development;
- (e) support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their duties in respect of housing development;
- (f) promote consultation on matters regarding housing development between the national government and representatives of:
 - (i) civil society;
 - (ii) the sectors and subsectors supplying or financing housing goods or services;
 - (iii) provincial and local government; and
 - (iv) any other stakeholder in housing development; and
- (g) promote effective communication in respect of housing development.

Section 3(4) also empowers the minister to establish the necessary national institutional and funding frameworks, as well as to negotiate allocations. In this respect the minister may -

- (a) establish a national institutional and funding framework for housing development;
- (b) negotiate for the national apportionment of the state budget for housing development;
- (c) prepare and maintain a multi-year national plan in respect of housing development;
- (d) allocate funds for national housing programmes to provincial governments, including funds for national housing programmes administered by municipalities in terms of section 10 of the Housing Act;
- (e) allocate funds for national facilitative programmes for housing development;
- (f) obtain funds for land acquisition, infrastructure development, housing provision and end-user finance;
- (g) institute and finance national housing programmes;
- (h) establish and finance national institutions for the purposes of housing development, and supervise the execution of their mandate;
- (i) evaluate the performance of the housing sector against set goals and equitableness and effectiveness requirements; and
- (j) take any steps reasonably necessary to:
 - (i) create an environment conducive to enabling provincial and local governments,

¹⁵S 3(1) of the Housing Act 107 of 1997

- the private sector, communities and individuals to achieve their respective goals in respect of housing development; and
- (ii) promote the effective functioning of the housing market.

Provincial and local governments are required to furnish the minister with reports, returns and other information which the minister requires for the purposes of the Act.¹⁶

National Housing Code

The minister is under a statutory duty to develop, adopt and publish a national housing code – a comprehensive housing policy that must be used at the national, provincial and local government levels.¹⁷ Section 4(2)(a) of the Housing Act provides that the code must contain national housing policy. It may, after consultation with every member of the executive council and the national organisation representing municipalities as contemplated in section 163(a) of the Constitution, include administrative or procedural guidelines in respect of the effective implementation and application of national housing policy, as well as any other matter that is reasonably incidental to national housing policy.¹⁸ The minister must furnish a copy of the code to every provincial government and municipality.¹⁹

2.3.1.2 Provincial government

Every provincial government must, after consultation with the provincial organisations representing municipalities, do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy.²⁰

In order to achieve this every provincial government must:

- (a) determine provincial policy in respect of housing development;
- (b) promote the adoption of provincial legislation to ensure effective housing delivery;
- (c) take all reasonable and necessary steps to support and strengthen the capacity of municipalities to exercise their powers and perform their duties in respect of housing development effectively;
- (d) co-ordinate housing development in the province;
- (e) take all reasonable and necessary steps to support municipalities in the exercise of their powers and the performance of their duties in respect of housing development;
- (f) when a municipality cannot or does not perform a duty imposed by the Housing Act, intervene by taking any appropriate steps in accordance with section 139 of the Constitution to ensure the performance of such duty; and
- (g) prepare and maintain a multi-year plan in respect of the execution in the province of every national housing programme and every provincial housing programme, which is consistent with national housing policy in accordance with the guidelines that the minister approves for the financing of such a plan with money from the fund.²¹

16S 3(7)

17S4(1)

18S4(2)(b)

19S4(3)

20S7(1)

21S7(2).

Concurrent and delegated legislative responsibility of provincial governments

The Constitution gives a rather incomplete, picture of the legislative and administrative competence of provincial governments in the area of housing. It simply indicates that “housing” is an area of concurrent national and provincial legislative competence.²² From the descriptive analysis of the Housing Act and other related legislation, it is clear that provinces do not only have concurrent jurisdiction in housing, but also have numerous delegated statutory responsibilities. In order to perform these statutory responsibilities, each province must design and enact legislation that facilitates adherence to the duties delegated to provinces under the Act.²³

2.3.1.3 Local government

Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to:

- (a) ensure that:
 - (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
 - (ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;
 - (iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;
- (b) set housing delivery goals in respect of its area of jurisdiction;
- (c) identify and designate land for housing development;
- (d) create and maintain a public environment conducive to housing development which is financially and socially viable;
- (e) promote the resolution of conflicts arising in the housing development process;
- (f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;
- (g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and
- (h) plan and manage land use and development.²⁴

Furthermore, any municipality may participate in a national housing programme by promoting a housing development project by a developer, by acting as developer in respect of the planning and execution of a housing development project on the basis of full pricing for cost and risk, by entering into a joint venture contract with a developer in respect of a housing development project, by establishing a separate business entity to execute a housing development project, by administering any national housing programme in respect of its area of jurisdiction in accordance with section 10 of the Housing Act or by facilitating and supporting the participation of other role

²²Schedule 4A to the Constitution.

²³Eg., the Western Cape has enacted the Western Cape Housing Law 9 of 1994 (repealed by Western Cape Housing Development Act 6 of 1999), The Residential Landlord and Tenant Act 3 of 1997 applies in Gauteng. The Landlord Tenant Dispute Resolution Board was established under the Act by Provincial Gazette Extraordinary 429 vol 3 Premier’s Notice 54, 17 December 1997. See also the Gauteng Housing Bill, Provincial Gazette Extraordinary 429 Notice 3931, 17 December 1997.

²⁴S 9(1).

players in the housing development process.²⁵

Subject to certain conditions, amongst which approval by the MEC, a municipality may expropriate any land required by it for the purposes of housing development in terms of any national housing programme.²⁶

Administration of national housing programmes by local government

Any municipality may apply in writing to the member of the relevant provincial executive council to be accredited for the purposes of administering one or more national housing programmes.²⁷ If the member of the executive council is satisfied that the municipality complies with the criteria for accreditation, the member of the executive council must accredit the municipality.²⁸ Subject to the directions of the member of the executive council consistent with the national housing policy, any municipality that has been accredited may administer any national housing programme in respect of which accreditation has been granted, and for the purposes of such administration, that municipality may exercise such powers and must perform such duties of the relevant provincial housing development board as are necessary for the administration of such national housing programme.

Review and intervention

Any accredited municipality must be regularly reviewed by the member of the executive council on the basis of adequate performance against the criteria for accreditation.²⁹ If any such municipality fails to so perform, the member of the executive council may intervene and take the steps necessary to ensure adequate performance.³⁰

Funding

The member of the executive council may, after consultation with the relevant provincial housing development board, out of money paid into the relevant provincial housing development fund, allocate to any accredited municipality situated in the province in question such amounts as the member of the executive council considers necessary. A municipality must maintain separate accounts into which money so transferred must be deposited and out of which all disbursements in connection with the administration of the national housing programme in question must be made. The chief executive officer of such municipality must as soon as possible after, but within two months of 31 March in each year, submit detailed statements signed by that officer showing the results of the previous year's transactions and the balance sheets relating to these accounts to the officer designated as the accounting officer within the provincial government.³¹

2.3.2 Western Cape Housing Development Act

On 1 January 2000, Western Cape Housing Development Act 6 of 1999 came into operation. This Act repeals the Western Cape Provincial Housing Law 9 of 1994. In its preamble, the Act

25S9(2).

26S 9(3).

27S 10(1).

28S10(2)(a).

29S10(3).

30S10(3)(c)(ii); see also s10(5) in this regard.

31S10(4) and 12(2)(b).

states that it, *inter alia*, determines general principles applicable to housing in the province of Western Cape, defines the role of the provincial and local spheres of government in housing development, establishes a Provincial Housing Development Board and a Provincial Housing Development Fund and ensures that housing development is integrated with all other facets of development in a holistic way.

Role of local government

The Act envisages a role for local government, in line with the Housing Act. It reiterates most of the provisions of the Housing Act relating to local government's duties. The provisions of the Western Cape Housing Development Act follow the national Housing Act in stating the general powers and duties of local government with regard to housing.³² It also follows the provisions of the Housing Act in regulating the accreditation of local authorities for administering national or provincial housing programmes, the concomitant reporting duties of the municipalities and the powers of review and intervention by the provincial government.³³

It further regulates the transfer of funds out of the Western Cape Housing Development Fund to local authorities for the purpose of administering national or provincial housing programmes. In relation to that, the Act provides that the officer at the head of the department, responsible for housing, remains the accounting officer in respect of any of these moneys transferred to a local authority.³⁴ The accounting procedures, applicable to funds paid to local authorities is also conform the Housing Act.³⁵

2.3.3 Assessment

The Housing Act establishes a division of responsibilities with regard to housing. It states explicitly that the national sphere carries the overall responsibility for the housing development process. Policy is set at national level: the Minister is responsible for the national housing code, which must be used at national, provincial and local level. Provinces and local authorities must furnish the Minister with reports, returns and any other information that the Minister requires. Perhaps most importantly, national government is responsible for the allocation of funds for national housing programmes to provincial governments. These funds include the funds that municipalities use for their administration of national housing programmes.

Critical in the responsibilities of the provinces is their duty to support and strengthen the capacity of municipalities with regard to their housing duties and their duty to intervene by means of section 139 of the Constitution if a municipality fails to perform any of its duties imposed by the Housing Act.

The functions of municipalities in terms of the Housing Act are twofold: (1) The Act, in section 9, imposes certain duties related to housing directly to municipalities and (2) municipalities can administer national and provincial housing programmes. The first set of duties deal mostly with functions that can be called 'ancillary' to housing and concern the duty to deal with water, sanitation, electricity, roads, stormwater drainage, and bulk engineering services and revenue

32S 15(1).

33Ss 15(2) and 16.

34Ss 17, read together with section 1.

35S 18.

generating services where necessary. These functions fall within the metropolitan local council's competencies, listed in the Schedule 2A (in future: local government's competencies listed in Schedule 4B and 5B of the Constitution) and are therefore not 'assignments' in terms of section 156(1)(b) of the Constitution. The other functions that section 9 of the Act has in mind for municipalities evolve around local government's capacity as 'point of delivery' when it comes to housing. Municipalities have the duty to make land available for housing development, to manage land use and development, to ensure the access of their inhabitants to adequate housing on a progressive basis, to create and maintain a public environment that is conducive to housing development, to set housing delivery goals and promote the resolution of conflicts around housing. These functions are matters that are being assigned to local government in terms of section 156(1)(b). That local authorities are entirely dependent on national and provincial governments in their efforts to contribute to the realisation of the goals of the Housing Act is made clear by section 9 which states that these duties can only be exercised 'within the framework of national and provincial housing legislation and policy'. This means that local authorities, in dealing with those assigned matters, must act within the perimeters of national and provincial policies. If there had been a policy, applicable to the facts of the present case and the implementation of which is assigned to local government, local government could have been held responsible for not implementing it. However, since such a policy is absent, local government is not the primary organ responsible for fulfilling this particular aspect of the right to housing.

The second set of local government functions relate to the administration of national housing policies by municipalities. In this regard, municipalities function as 'administrators' of national housing policies, have powers and perform duties that are necessary for that function and are subject to review and intervention by the province. Crucial is that these housing programmes are funded, through the relevant province, by the national government and that (an official within) *the province* (in the case of the Western Cape: the Head of the Department responsible for Housing) is the accounting officer for the funds, used by local authorities for the implementation of those programmes. It is therefore safe to say that the administration of housing programmes by local authorities does not take place in terms of an assignment, contemplated in section 156(1)(b) of the Constitution, but rather on an agency basis.

The Western Cape Housing Development Act is in line with this scheme and does not assign any additional matters to local government.

In conclusion, the scheme of allocating powers and functions that has been laid down in the Housing Act and followed by the Western Cape Housing Development Act does not assign to local government the authority and right to administer any matter which would render local government the primary responsible sphere for the *fulfillment* of the right to housing.³⁶

2.4 Conclusion - Local Government and Housing

In sum, neither the authority of Oostenberg in terms of section 156(1)(a) of the Constitution

³⁶Gutto remarks: "With regard to housing and building control, the responsibilities lie at national and provincial levels, with building control also falling into the sphere of local government." *The Law of South Africa Volume 11: Housing (electronic version)*, at par. 7, Butterworths 1999.

(local government matters, listed in the relevant Schedule) nor the authority of Oostenberg in terms of section 156(1)(b) (matters, assigned to local government) render it the primary responsible sphere for the *fulfillment* of the right to housing.

2.2 Is local government obliged to *fulfil* a child's right to shelter?

A determination has to be made whether or not local government carries the primary obligation for taking administrative, legislative and budgetary measures with regard to the right of every child, in terms of section 28(1)(c), to shelter. The relevant question here should again be *whether any of local government's constitutional obligations in fact deal with the children's right to shelter in terms of section 28(1)(c)*. To answer that question, firstly, local government's competencies in terms of Schedule 4B and 5B need to be examined for linkages with the children's right to shelter and secondly, any national or provincial legislation that assigns to local government any matter pertaining shelter for children should be scrutinised.

2.2.1 Local government's competencies in terms of the Schedules

Item 28 of Schedule 2A to the LGTA mentions 'Child care facilities' as a competency of metropolitan local councils and further describes the competency as 'Management of child care facilities'. Does the inclusion of 'Child care facilities' mean that the 28(1)(c) right to shelter is a matter where metropolitan local councils bear the onus of taking legislative, administrative and / or budgetary measures?

2.2.1.1 Dictionary meaning of 'Child care facility'

The dictionary meaning of the word 'facility' is 'an opportunity, the equipment, or the resources for doing something' which can be 'a plant, installation or establishment'.³⁷ 'Care' is defined in the dictionary as 'protection, charge', whereby 'to charge' means 'to entrust with' and is related to 'responsible possession'. The word 'care' in the competency 'Child care facilities' indicates that this relates to institutions where children are being 'cared for'. This care entails not merely the protection from the natural elements, but an overall and more intense care, which is normally provided for by the parents. 'Child care facilities' relates to 'family - replacing' institutions such as crèches and nursery schools. Here, municipalities are made legislatively competent to establish facilities that provide for alternative care when the children are removed from their parents and to provide for the powers, functions, budgets and general management of those facilities.³⁸ The competency 'Child care facilities' does not relate to the provision of temporary refuge from the weather to any child in need but rather relates to section 28(1)(b) of the Constitution which affords children the right "to family care or parental care, or to *appropriate alternative care when removed from the family environment*."³⁹

2.2.1.2 The Child Care Act

Instructive are also the definitions, used in the Child Care Act 74 of 1983. The Act differentiates between 'places of care' and 'shelters'. The Act defines a 'place of care' as 'any building or premises maintained or used, whether for profit or otherwise, for the reception, protection and temporary or partial care of more than six children apart from their parents, but does not include any boarding school, school hostel or any establishment which is maintained or used mainly for

³⁷The Concise Oxford Dictionary, Clarendon Press, Oxford 1990.

³⁸See Johann Mettler, *The legislative powers of local government*, unpublished, pg. 9.

³⁹Own emph.

the tuition or training of children and which is controlled by or which has been registered or approved by the State, including a provincial administration'. A 'shelter' is defined as 'any building or premises maintained or used for the reception, protection and temporary care of more than six children in especially difficult circumstances'. The Act defines 'children in especially difficult circumstances' to be 'children in circumstances which deny them their basic human needs, such as children living on the streets and children exposed to armed conflict or violence'.

It is clear that also in terms of the definitions used in the Child Care Act, 'shelter' is a *basic* provision of the most essential human needs and not the provision of care, usually provided for by the parents of the child. The definition of a 'place of care' qualifies the 'recipients' of that care by including the phrase 'apart from their parents'.

The conclusion that an onus for local government to fulfil the right to shelter cannot be based on the competencies, listed in the Schedules, is compounded by the circumscription that the legislator gave to the competency. The 'management' of 'Child care facilities' clearly deals with the administration and regulation of these institutions, not with the provision of shelter by the municipality itself.

It can be argued that the fulfilment of the children's right to shelter relates directly with another competency, namely 'Welfare services', a competency listed in Schedule 4A of the Constitution. The dictionary meaning of 'welfare' is the 'maintenance of persons in such a condition (this condition relates to concepts such as well-being, health and prosperity) especially by statutory procedure or social effort' and 'welfare work' is defined as the 'organised effort for the welfare of the poor, disabled, etc.'⁴⁰ The provision of welfare services is an effort that deals with the provision by the state of a fall back mechanism for people, who are not able, for reasons pertaining to unemployment, homelessness etc, to provide for their own basic well-being. Providing basic, temporary shelter to children and their parents in a situation of homelessness falls within this definition of welfare. It is therefore a function that falls under the area of concurrent competencies of national and provincial government.

2.2.2 Assignment

After concluding that none of the competencies in terms of the Schedules relate to the section 28(1)(c) right to shelter, the question arises whether any national or provincial legislation assigns that matter to local government in terms of section 156(1)(b) of the Constitution. National legislation that deals with these matters is the Child Care Act 74 of 1983 which regulates, *inter alia*, the establishment of certain institutions for the reception of children and the treatment of children after such reception. In terms of the Act, the Minister can establish and maintain places of safety (s 28), secure care facilities (s 28A) and children's homes (s 29). Shelters, children's homes and places of care that are not maintained and controlled by the State are subject to registration, classification and inspection under the auspices of the Director-General of the relevant state department that has been assigned by proclamation issued under section 61 of the Act to administer the relevant provision. The Child Care Act does not contain any provision which assigns any of the above matters to local government.

⁴⁰The Concise Oxford Dictionary, Clarendon Press, Oxford 1990.

There is no provincial legislation, applicable in the Western Cape, that assigns any matter relating to a child's right to shelter to local government. The conclusion is therefore that there is no assignment to local government of the authority and right to administer any matter which would render local government the primary responsible sphere for the *fulfillment* of the right to housing.

2.2.3 Conclusion - Local Government and the children's right to shelter

In sum, the authority of Oostenberg in terms of section 156(1)(a) of the Constitution (local government matters, listed in the relevant Schedule) does not render it the primary responsible sphere for the *fulfillment* of the children's right to shelter and no assignment of any matter in terms of section 156(1)(b) of the Constitution pertaining the children's right to shelter has been assigned to Oostenberg that would render it the primary responsible sphere.

2.3 Local government's obligation to *respect, protect and promote*

What are the obligations of local government with regard to these two fundamental rights, given the fact that it does not bear the primary obligation to *fulfil* these rights, but does bear the obligation to *respect, protect and promote* them? It is clear from the Constitution that local authorities cannot simply 'shrug off' any responsibility for the right to housing or the children's right to shelter. The obligations to *respect, protect and promote* these rights are there for local authorities to uphold.

2.3.1 Content

Instructive with regard to the *content* of the obligations with regard to housing is section 9 of the Housing Act. It makes clear that local government has distinct duties with regard to housing. These duties exist notwithstanding the fact that local government is not the primary responsible sphere for housing and apart from the fact that it can participate in national housing programmes. They flow directly from the obligation to *promote* the right to housing. Section 9 of the Housing Act instructs local authorities to contribute to the realisation of the right to housing, *within their constitutional mandate*, by making land available, by ensuring provision of services such as water, sanitation, electricity, roads, stormwater drainage and transport, by ensuring access to housing for its inhabitants etc. Without local government performing these tasks, the right to housing is meaningless. The inclusion of these functions in the Housing Act are meant to combine the effort of national and provincial governments with the efforts of local government to realise a meaningful right to housing. These duties are also relevant in the context of the realisation of the children's right to shelter, because many of these, more or less ancillary aspects relate to both a meaningful core right to housing as a meaningful children's right to shelter.

The *minimum* obligations of local government in the process of realising the right to shelter, as a core right to housing, in the present case therefore include matters such as -

- making land available; a 'site' on which the provision of shelter can take place - in many cases, municipalities have greater access (through ownership) than provinces to land in their jurisdiction that is appropriate for causes like these;
- providing basic water services;
- providing basic sanitation;
- facilitating the realisation of the right to shelter, by -
 - facilitating communication between the residents and the provincial housing department, including the resolution of conflicts
 - assisting the provincial housing department on any relevant matter - this may include playing a co-ordinating role in the implementation of the realisation of the right to shelter.

These *minimum* obligations flow directly from local government's obligation to *promote* the right to housing and shelter. The local authority is therefore not only responsible for ensuring the provision of these services, but must also carry the cost for these services, within its available resources.

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