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ROLE OF LOCAL GOVERNMENT IN PROVIDING CHILD CARE

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The Local Government Working Paper Series disseminates policy and legal analyses to improve local governance in South Africa. The papers are short, preliminary studies intending to provide a brief look at relevant and timely topics. For additional information, please contact Dr Jaap de Visser at jdevisser@uwc.ac.za or visit the Local Government Project website at <http://www.communitylawcentre.org.za/Projects/Local-Government>

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The Commission suggests that local authorities need to play a much greater role in the provision of prevention services, early intervention services and promotion of the welfare of children in South Africa.

What follows is a set of comments on the proposal made by the commission. Where possible, recommendations have been made.

Firstly, this paper deals with the difference between regulating Schedule 4B/Schedule 5B matters on the one hand and assigning additional duties to local government on the other hand. It is submitted that the proposal fails to make this distinction, which renders it difficult to implement.

Secondly, the submission provides a brief overview of the legal framework for regulating Schedule 4B matters. In other words: to what extent can national and provincial governments make rules on matters listed in Schedule 4B?

Thirdly, the submission provides an overview of the legal framework for assignment.

Fourthly, the submission makes a global assessment of the proposals made by the Commission.

I REGULATING OR ASSIGNING?

Section 156(1) of the Constitution makes a distinction between two types of local government authority:

1. authority over matters listed in Schedules 4B and 5B of the Constitution. These are local government's 'original' competencies, over which it has legislative power that is constitutionally protected. Section 84 of the Municipal Structures Act subsequently divides these competencies between district and local municipalities; and
2. authority over matters assigned to it by national or provincial legislation.

A distinction needs to be made between regulating 'Child Care Facilities' as a Schedule 4B matter and assigning additional matters to local government

The proposal criticises the Local Government Transition Act, the Development Facilitation Act and, implicitly, the Constitution for failing to define 'child care facilities'.¹ The lack of accepted definitions of the competencies in the Schedules is indeed very problematic since it seriously impedes a clear allocation of responsibilities. At the same time, however, the proposal could contribute significantly to the unfolding process of defining local government powers by providing guidelines for defining 'Child care facilities' in Schedule 4B.

¹ The Commission's outline of the legal framework on local government is dated in that refers to the Local Government Transition Act 209 of 1999. Since 5 December 2000, local governments no longer derive their powers from this Act but from the Constitution itself.

Some of the proposals made by the commission in paragraph 9.7.4 amount to regulation of a Schedule 4B competency and others amount to the assignment of functions to local government. The distinction is important.

For example, the proposal obliges local government to determine the needs of children in their area of jurisdiction on a three-yearly basis. This does not appear to be an issue that falls within the parameters of ‘child care facilities’ but under ‘welfare services’. It is therefore a case of assignment rather than regulating child care facilities. The same would apply to the obligation to keep a register of the number of lost or abandoned children.

In sum, the proposal should distinguish between regulating the local government competency ‘child care facilities’ on the one hand and assigning additional matters on the other hand.

II THE LEGAL FRAMEWORK FOR REGULATING 4B MATTERS

The Constitution does not allocate the matters in Schedule 4B and 5B *exclusively* to local government. National and provincial government can also regulate on those matters.² In fact, they have the authority to ensure that municipalities perform these matters adequately.³

National government’s powers on Schedule 4B matters

National government has two sources of legislative competence in respect of Schedule 4B matters: section 155(7) and section 44(1)(a)(ii).

National laws in terms of section 155(7)

National government can legislate on Schedule 4B matters on the basis of section 155(7), which affords national government the power to ‘regulate’ the exercise by municipalities of their executive authority. This legislative power is limited, since it is circumscribed by the context of seeing to the “effective performance by municipalities of their functions in terms of Schedule 4” and the term “regulating”. The term ‘regulating’ in the context of section 155(7) was held by the Constitutional Court to connote “a broad managing or controlling rather than direct authorisation function”.⁴ Textually, the word ‘regulate’ is used in the context of the exercise of a legislative and executive power of both national and provincial governments in respect of municipal executive authority. It is submitted that the powers in terms of section 155(7) do not extend to the ‘core’ of Schedule 4B matter, but rather deal with the framework within which local government is to exercise these powers.⁵ In other words, the regulatory power enables national government (and also provincial government, see below) to set essential national standards, minimum requirements, monitoring procedures etc.

² *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development* at para. 23.

³ White Paper on Local Government p 30.

⁴ *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para. 377.

⁵ Mettler J *The legislative powers of local government* unpublished research paper at page 9.

National laws in terms of section 44(1)

National government can also legislate on Schedule 4B matters on the basis of section 44(1)(a)(ii) of the Constitution.⁶ There is no limitation contained in this provision. Does this amount to a broad legislative power, encompassing every aspect of the Schedule's matters? The introduction to Schedule 4B stipulates that the schedule contains local government matters that are of national and provincial competency "to the extent set out in section 155(6)(a) and (7)". The question, therefore, is whether this qualification also applies to Parliament's legislative power in terms of section 44(1).

The principle of developmental local government informs an interpretation that recognises the need for sufficient municipal discretion in regulating these matters whilst maintaining the need for national oversight and regulation.⁷ Therefore, the answer to the question whether or not section 155(7) qualifies section 44(1)(a)(ii) must be that it does. National government's legislative power on Schedule 4B matters does not extend to the 'core' of Schedule 4B matters but is limited to the setting of a legal framework, including minimum standards and monitoring requirements. This means that Parliament is prohibited from legislating on the 'core' of 4B matters, such as child care facilities. Parliament must limit its legislative efforts to framework legislation, national standards, minimum requirements, monitoring procedures etc.

Provincial government's powers on Schedule 4B matters

The sources of provincial power to legislate in Schedule 4B matters can be found in section 155(6)(a) and section 155(7).

Provincial laws in terms of section 155(7)

Provincial government has a regulatory power in terms of section 155(7). The same considerations that apply to national government's powers under section 155(7) apply here.

Provincial laws in terms of section 155(6)(a)

Section 155(6)(a) echoes the duty to support and strengthen LG imposed on national and provincial government in section 154(1) for provincial government in particular. It instructs provinces to monitor and support LG and promote the development of LG capacity. The

⁶ 44. (1)The national legislative authority as vested in Parliament -

(a) confers on the National Assembly the power -

(i)

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; ..."

⁷ This issue was dealt with by the Constitutional Court in *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development et al* **BCLR 1999 XXX**. National government argued that Parliament has concurrent powers with the other spheres of government in respect of all powers vested in such spheres by Chapter 7, except for matters falling within Schedule 5B. This submission was based on section 44(1)(a)(ii) of the Constitution. The Constitutional Court disagreed: "The legislative power vested in Parliament by section 44(1)(a)(ii) "to pass legislation with regard to any matter...excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5" must be exercised, in terms of subsection (4), "in accordance with, and within the limits of, the Constitution". Thus, where on a proper construction of the Constitution such limits exist, they constrain the residual power of Parliament..." (paragraph 25 and 28).

duty on the province to monitor and support in terms of section 155(6)(a) can entail legislative measures that are aimed at either establishing a monitoring framework or impacting on the manner in which local government administers such matters. The Constitutional Court held that the

“legislative and executive powers to support local government (LG) are...not insubstantial. Such powers can be employed by provincial governments to strengthen existing LG structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions.”⁸

The Court further held that this power is to be read in conjunction with the legislative and executive role granted provincial government in sections 155(6)(b) and 155(7). In terms thereof, the provinces must assert legislative and executive power to promote the development of LG capacity to perform its functions and manage its affairs and may assert such powers, by regulating municipal executive authority, to see to the effective performance by municipalities of their functions in respect of listed LG matters. Taken together these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer Schedule 4B matters. This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administration of LG matters.

The word “monitor” in section 155(6) was not interpreted by the Court as bestowing additional or residual powers of provincial intrusion on the domain of local government, beyond perhaps the power to measure or test at intervals its compliance with national and provincial legislative directives or with the Constitution itself.⁹

Assessment

This short discussion of the legislative powers of national and provincial powers with regard to Schedule 4B matters presents the following picture:

- Local government has legislative authority over Schedule 4B matters.
- National government has regulatory powers over Schedule 4B matters - these cannot be prescriptive with regard to the ‘core’ of Schedule 4B matters but are limited to the setting of a legal framework, which includes minimum standards and monitoring.
- Provincial government has regulatory powers over Schedule 4B matters - these cannot be prescriptive with regard to the ‘core’ of Schedule 4B matters but are limited to the setting of a legal framework, which includes minimum standards and monitoring.

III LEGAL FRAMEWORK FOR ASSIGNMENT

The constitutional provisions in connection with the assignments to individual municipalities can be found in sections 44(1)(a)(iii) and 104(1)(c) and in sections 99, 16 and 156(4).

⁸ *In Re: Certification of the Constitutional of the Republic of South Africa* 1996 (1) BCLR 1253 (CC) at para 371.

⁹See also Pimstone G (1998) *The Constitutional basis of local government in South Africa* Johannesburg: Konrad Adenauer Stiftung (Occasional papers) at pg. 7.

- Sections 44(1)(a)(iii) and 104(1)(c) confer on Parliament and the provincial legislatures the power to assign any of their legislative powers to a *municipal council*.¹⁰ Importantly, this refers to an assignment of a legislative *power*. A legislative power is discretionary: there is no compulsion to legislate.
- Section 99 provides that a member of the national Cabinet can assign a matter *that is to be exercised* in terms of national legislation to a municipal council. In this instance, there is a compulsory element because the Constitution refers to a matter that *is to be exercised*. However, the assignment must take place *in terms of an agreement* and must be consistent with the relevant Act of Parliament in terms of which the power exists. In other words, an Act of Parliament that tasks the relevant Minister with the obligation must provide for (or at least not prohibit) the assignment to municipalities and an agreement with the municipal council is a prerequisite.
- Section 126 provides the same for a member of the provincial Cabinet who can assign a matter that is to be exercised in terms of national or provincial legislation to a council. The same conditions as in section 99 apply.
- Further, section 156(4) of the Constitution makes assignment by agreement of a Schedule 4A or 5A matter to a municipality by national and provincial government compulsory if –
 - the matter would be most effectively administered locally; and
 - the municipality has the capacity to administer it.

The legal regime for assignment of matters to local government is complemented by Chapter 3 of the Municipal Systems Act.

In section 9 and 10, the Act distinguishes between assignments to municipalities generally and assignments to specific municipalities. These two sections render the assignments subject to requirements.

General assignments by legislation

The Systems Act provides for a number of requirements to general assignments by legislation. Prior to the introduction of the Bill in Parliament, the relevant member of Cabinet (or Deputy Minister) must -

1. consult with the Minister, responsible for local government, the Minister of Finance and organised local government (national); and
2. request an assessment from the Financial and Fiscal Commission of the financial implications of the legislation and consider that assessment.¹¹

The Bill must be published in the manner that is prescribed in section 154(2) of the Constitution. This means that the Bill must be published for public comment in a manner that allows organised local government, municipalities and other interested parties to make representations. In effect, this would usually mean that national or provincial Parliament would conduct a public hearing on the Bill and invite submissions.

¹⁰ For Parliament, this excludes the power to amend the Constitution.

¹¹ S 9(1).

Further, the (Deputy) Minister, initiating the assignment must assess:

1. whether or not the assignment imposes a duty of the municipalities concerned;
2. whether the duty falls outside Schedule 4B and 5B (and is not incidental to any of those areas); and
3. whether the performance of the duty has financial implications for the municipalities concerned.¹²

If all three conditions are met, the (Deputy) Minister must ‘take appropriate steps to ensure sufficient funding, and capacity building initiatives as may needed, for the performance of the assigned function or power by the municipalities concerned’.¹³

All of the above also applies to the general assignment by an MEC to the municipalities in the relevant province, subject to the proviso that the consultation must take place with the provincial ministers for local government and finance and with organised local government in the province.¹⁴

Specific assignments

The assignment of a function or power in terms of section 99 or 126 of the Constitution to a specific municipality is also subject to certain consultation requirements. A national Minister initiating the assignment by way of national legislation or by way of an agreement must consult the Minister, responsible for local government before introducing the Bill in Parliament or concluding the agreement.¹⁵ An MEC initiating the assignment by way of provincial legislation must consult the MEC for local government in the province, before introducing the Bill. An MEC initiating the assignment by way of an agreement must consult the national Minister, responsible for local government before concluding the agreement.¹⁶ At first sight, the requirement in section 10(2)(b) seems strange compared to the logic of sections 9 and 10: why would the MEC have to consult with the *national* Minister before assigning by *agreement* when he or she has to consult with the *provincial* MEC for local government before assigning by *legislation*. The rationale must lie in the absence of the checks and balances associated with the legislative process. This necessitates consultation with a ‘higher’ organ in the instance of assignment by agreement, which is an executive act.

Sections 10(1)(a) and 10(2)(a) of the Systems Act need to be interpreted in a particular way to avoid unconstitutionality. The problem that arises is a possible disjuncture with the Constitution when it comes to assignment by legislation. Can an individual assignment be done by way of legislation as is provided for in sections 10(1)(a) and 10(2)(a) of the Systems Act? As was alluded to above, sections 99 and 126 of the Constitution authorise the assignment *in terms of* an agreement and 156(4) provides for assignment *by* agreement. It is only sections 44(1)(a)(iii) and 104(1)(c) that refer to assignment to a particular municipal council by *legislation*. This means that 10(1)(a) and 10(2)(a) of the Systems Act can only refer to the assignment of legislative power in terms of those sections.

¹² S 9(3); In answering the question about the financial implications, the assessment of the Fiscal and Financial Commission must be considered.

¹³ S 9(3).

¹⁴ S 9(2),(3) and (4).

¹⁵ S 10(1).

¹⁶ S 10(2).

The Minister or MEC, initiating the individual assignment must conduct the same assessment as under section 9(3) (see above) and take appropriate steps to ensure sufficient funding and capacity building initiatives if those conditions are met.¹⁷

IV ASSESSING THE PROPOSALS

(b) “Ensure integrated development planning in respect of child care facilities within its area”

This proposal falls within the ambit of regulating ‘Child care facilities’ and does not appear to go beyond what is constitutionally permitted. However, the assessment of the planning framework for local government omits the recently enacted Local Government: Municipal Systems Act 32 of 2000. The Systems Act has forever changed the way in which municipalities conduct their planning. Integrated development planning existed prior to the Systems Act and was implemented by municipalities in terms of the Local Government Transition Act 209 of 1993, read with the Development Facilitation Act 67 of 1995. The Systems Act, however, determined a new and far-reaching legal framework for the IDP process. The principles of chapter 1 of the DFA still apply and must be read together with the Systems Act (s 23(2)).

The legal framework for IDP makes specific provision for local government to incorporate national and provincial planning requirements:

- the so-called ‘Process plan’ (the document that spells out the IDP process for a particular municipality) must identify national and provincial planning requirements, to ensure that they feed into the IDP (s 29(1)(c) Systems Act);
- the so-called ‘District Framework’ (the document, adopted by the district municipality that co-ordinates IDPs in the district) (s 27(2)(a) Systems Act) must also identify national and provincial planning requirements for them to inform the IDPs in the district.

Therefore, the proposed obligation on local government to ‘[e]nsure integrated development planning in respect of child care facilities within its area’, could be articulated more effectively if it were linked to IDP. To prevent this planning requirement from getting lost in the ever-increasing plethora of planning requirements it should be clearly linked to the IDP process.

(b) keep a register of the total number of children and record their ages, in its area of jurisdiction.

The obligation on local government to keep this kind of register appears to fall outside of ‘child care facilities’. An assignment would be necessary. The mere formulation in national legislation of such a duty on local government is unconstitutional and not in keeping with the system of intergovernmental relations.

¹⁷ S 10(3).

Since it would concern an assignment of a specific function and not the assignment of legislative power, it would have to be done in terms of section 99 or 126 of the Constitution. This means that it would have to be preceded by an obligation on the relevant ministry to perform that task. Subsequently, the Minister would have to assign in terms of sections 99 or 126 *to specific municipalities*, subject to an agreement and the requirements of section 10 of the Systems Act.

- (d) undertake a needs analysis of children in order to determine the existing needs of children in the area of jurisdiction. Each local government should appoint a task team to determine what it needs to do in respect of the children in its area and to budget for such services. The analysis must be conducted at least once every three years. A format for the needs analysis should be included in the regulations to the new children's statute.**

The same considerations as above apply. It does not appear to fall within the ambit of regulating child care facilities and can only be effected by means of assignment.

Moreover, the obligation on each municipality to appoint a task team would be tantamount to interfering with a municipality's institutional integrity. The appointment, budgeting and determining of job descriptions of personnel falls within the competency of the municipality. The municipality should be afforded the necessary scope to determine in what manner the needs analysis be conducted. To instruct a municipality to appoint a task team would be a feature of the previous local government dispensation and no longer suits a constitutional dispensation in which local government is expected to pursue a developmental agenda. It can be argued that even an assignment of an obligation with such a degree of prescriptiveness would fall foul of section 151(4) of the Constitution, which protects local government against undue interference by other spheres of government.

- (e) keep records in the register of the number of lost or abandoned children, children living on the street, and disabled children within its area of jurisdiction and give assistance to them in order to enable them to grow up with dignity among other children and to develop their potential and self-reliance. These children within the area of its jurisdiction are the special responsibility of the local authority. The local authority must see that such children have access to basic nutrition, shelter, basic health care services and social services. The latter must include, where appropriate, family tracing and family reunification.**

Again, none of these obligations appear to fall within the ambit of regulating child care facilities and can only be effected by means of assignment.

These kind of obligations would impose enormous challenges for local authorities to implement. For example, the keeping of a register of lost, abandoned or streetchildren poses an enormous task, especially in big cities. The Constitution and the Systems Act have been designed to prevent so-called 'unfunded mandates' to local government by making assignment of executive duties subject to agreement and the requirements of section 9/10 of the Systems Act.

(f) maintain a database of all available child care facilities in their area of jurisdiction

This obligation falls clearly within the ambit of regulating ‘child care facilities’. It does not appear to go beyond ‘regulation’ and can be legislated.

(g) provide and maintain sufficient and appropriate recreational facilities for the children in its area of jurisdiction

This would most probably be a case of regulating the Schedule 4B competency of ‘Beaches and amusement facilities’ or ‘Municipal parks and recreation’

It would have to be articulated as a ‘minimum standard’ for the exercise by local authorities of those competencies.

(h) ensure the environmental safety of the children in the area of jurisdiction

Local government is already, in terms of the Systems Act and the Constitution obliged in various ways to ensure environmental safety. As such the obligation does not add significantly to existing obligations.

(i) Conduct inspections of child care facilities to ensure maintenance of standards. This must occur in terms of a singly, national standard set in the regulations of the new children’s statute

This could be a case of regulating ‘child care facilities’ that exceeds the limits of what is constitutionally permitted. Local governments must regulate child care facilities in their by-laws. The legal framework, established in each by-law would include inspection. National legislation can set minimum standards for child care facilities but cannot prescribe the content of local government by-laws on child care facilities. A general obligation to conduct inspections would still pass muster but the content of the single, national standard would determine whether it is too prescriptive or not.

(j) provide for home visiting services to all new-born babies

This is an obligation that falls outside of the ambit of child care facilities and would have to follow the procedures of assignment in terms of section 99 and 126 of the Constitution as well as the Systems Act. The mere enactment of such an obligation would be unconstitutional and contrary to the Systems Act and the general framework of intergovernmental relations.

ROLE OF DISTRICT MUNICIPALITIES

The remark in the proposal that the omission of ‘Child care facilities’ from the list of district functions in section 84(1) of the Municipal Structures Act has as a consequence that resources are not shared at district level is incorrect. In fact, the primary function or *raison d’être* of a district municipality is to effect redistribution and co-ordinate the activities of the local municipalities in the district. As such, the sharing of resources (even pertaining to

functions that are not in 84(1)) is critical in the district municipalities' activities. For example through funding, joint planning and co-ordination by the district, the local municipalities' efforts and resources on child care facilities can be shared equitably amongst the local municipalities.