

1. Introduction

The objective of this chapter is to provide the reader with the legal framework and background to the division of powers and functions. Our task in this chapter is essentially one of setting out the concepts behind powers and functions, the legal framework within which powers and functions are allocated thereby indicating the primary responsibility for the various powers and functions. For obvious reasons the focus is on the allocation of powers and functions to municipalities.

The chapter is not intended to address:

- Powers and functions allocated to national or provincial government.
- The mechanics of the division of powers and functions, nor is it intended to delve in detail into the division of powers and functions themselves.
- The allocation of powers and functions in respect of the provision of essential services such as electricity (REDS) and water as these are of a highly specialised nature.

These exclusions are predominately for the following reasons:

- The complexities of the relationships between the parties involved is beyond the scope of this text;
- Unique features that exist in respect of each province and/or municipality involved in the division of powers and functions; and
- The issues surrounding the allocation of powers and functions are too numerous to include in a text of this nature.

After addressing the Constitutional aspects of powers and functions it is essential that we consider some of the current topical issues arising out of the allocation of powers and functions.

2. The Constitution

Municipalities are empowered by the Constitution of the Republic of South Africa, 1996 to provide a broad range of services in a sustainable manner. This authority



emanates from 152(1) of the Constitution which stipulates the objects of local government, namely to:

- a) Provide democratic and accountable government for local communities;
- b) Ensure the provision of services to communities in a sustainable manner;
- c) Promote social and economic development;
- d) Promote a safe and healthy environment; and
- e) Encourage the involvement of community organisations in the matters of local government.

Of utmost importance is section 152(2) of the Constitution which stipulates the manner in which a municipality must strive to achieve the aforementioned objectives.

A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

The developmental duties of a municipality are specified in section 153(a) of the Constitution which indicates that a municipality must “structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.”

Section 154 of the Constitution lays the foundation for co-operative government by requiring both national and provincial government to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Furthermore, subsection (2) entrenches the need for both national and provincial government to follow a consultative process with respect to the drafting of legislation affecting the status, institution or powers and functions of local government prior to such legislation being introduced in Parliament or a provincial legislature.

In order to facilitate the allocation of powers and functions to local government the Constitution has in section 155 provided for the establishment of different categories of municipality.

All legislation applicable to municipal functions are open for interpretation and can either be defined as functions, activities, and/or tasks. It is not the purpose of this chapter to interpret the legalities and the meanings of the respective acts, but rather



to identify and categorize the different functions for future municipal services to be rendered by Municipalities

3. *Establishment of municipalities*

It is not the intention of this text to deal with the reasons for the categorisation of municipalities or the rationale behind such categorisation; we wish to merely provide some background to the categorisation of municipalities in so far as it impacts upon powers and functions.

There are the following categories of municipality:

- **Category A:** A municipality that has exclusive municipal executive and legislative authority in its area (Metropolitan municipality).
- **Category B:** A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls (Local Municipality).
- **Category C:** A municipality that has municipal executive and legislative authority in an area that includes more than one municipality (District Municipality).

National legislation is required to define the different types of municipality within each category and must establish various criteria with respect to numbers of municipalities, municipal boundaries and make provision for the division of powers and functions between municipalities. This legislation is the Municipal Structures Act, 1998.

4. *Powers and functions of municipalities*

The Constitution contains two main sections for dealing with the powers and functions of municipalities, namely section 156 and 229. Section 156 reflects the powers and functions of municipalities whilst section 229 contains Municipal fiscal powers and functions. It must be borne in mind that the Constitution sits at the top of the legislative hierarchy; consequently no national or provincial legislation may contain provisions which conflict with those contained within the Constitution.



Section 156 of the Constitution states the following:

- (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 (*refer table below*); and
 - (b) any other matter assigned to it by national or provincial legislation.
- (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
- (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.
- (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if
 - (a) that matter would most effectively be administered locally; and
 - (b) the municipality has the capacity to administer it.
- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

The powers and functions allocated to local government in terms of the Constitution section 156(1)(a) are as follows:



Schedule 4 Part B	Schedule 5 Part B
<p>Air pollution</p> <p>Building regulations</p> <p>Child care facilities</p> <p>Electricity and gas reticulation</p> <p>Fire fighting services</p> <p>Local tourism</p> <p>Municipal airports</p> <p>Municipal planning</p> <p>Municipal health services</p> <p>Municipal public transport</p> <p>Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution.</p> <p>Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto.</p> <p>Storm water management systems in built-up areas</p> <p>Trading regulations</p> <p>Water and sanitation services limited to potable water supply systems and domestic waste-water and sewerage disposal systems</p>	<p>Beaches and amusement facilities</p> <p>Billboards and the display of advertisements in public places</p> <p>Cemeteries, funeral parlours and crematoria</p> <p>Cleansing</p> <p>Control of public nuisances</p> <p>Control of undertakings that sell liquor to the public.</p> <p>Facilities for the accommodation, care and burial of animals</p> <p>Fencing and fences</p> <p>Licensing of dogs</p> <p>Licensing and control of undertakings that sell food to the public</p> <p>Local amenities</p> <p>Local sport facilities</p> <p>Markets</p> <p>Municipal abattoirs</p> <p>Municipal parks and recreation</p> <p>Municipal roads</p> <p>Noise pollution</p> <p>Pounds</p> <p>Public places</p> <p>Refuse removal, refuse dumps and solid waste disposal</p> <p>Street trading</p> <p>Street lighting</p> <p>Traffic and parking</p>



Section 229 of the Constitution states the following regarding municipal fiscal powers and functions:

- (1) Subject to subsections (2), (3) and (4), a municipality may impose
 - (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
 - (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
- (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties
 - (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
 - (b) may be regulated by national legislation.
- (3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:
 - (a) The need to comply with sound principles of taxation.
 - (b) The powers and functions performed by each municipality.
 - (c) The fiscal capacity of each municipality.
 - (d) The effectiveness and efficiency of raising taxes, levies and duties.
 - (e) Equity.
- (4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.
- (5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.



The second legislative layer that deals with the powers and functions of municipalities is the Municipal Structures Act, Act 117 of 1998 (Structures Act). Chapter 5 (sections 83 to 89) of the Structures Act covers the functions and powers of municipalities. A summary of these sections is presented below.

Section	Comment
83	<p>This section makes reference to sections 156 and 229 of the Constitution and requires that the powers and functions assigned to municipalities in terms of the Constitution to be split between those assigned to district municipalities and those assigned to local municipalities.</p> <p>Subsection 3 places the responsibility on district municipalities to seek to achieve integrated, sustainable and equitable social and economic development of its area as a whole by:</p> <ul style="list-style-type: none"> (a) ensuring integrated development planning for the district as a whole; (b) promoting bulk infrastructural development and services for the district as a whole; (c) building the capacity of local municipalities in its area to perform their functions and exercise their powers where such capacity is lacking; and (d) promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area.
84	<p>Subsection 1 specifies which powers and functions assigned to municipalities are allocated to district municipalities. These are listed in paragraph 4 below.</p> <p>Subsection 2 indicates that local municipalities have the powers and functions assigned to municipalities in terms of the Constitution that are not fulfilled by a district municipality.</p> <p>Subsections 3 specifies the process for authorising a local municipality to carry out district municipality powers and functions with respect to water, electricity, waste water and sewerage disposal and municipal health services.</p>



Section	Comment
85	Sets out the process by which the MEC for Local Government in a province may adjust the division of certain powers and functions between district and local municipalities. The following district powers and functions may not be allocated to a local municipality in terms of this section: District integrated development planning, water, electricity, waste water and sewerage disposal, municipal health services, receipt, allocation and distribution of grants made to the district municipality and the imposition and collection of any fees in respect of these services.
86	Caters for the resolution of disputes concerning the performance of functions or the exercise of powers by the MEC for Local Government.
87	Provides for the temporary allocation of powers and functions in the event of collapse, or likely collapse, of the provision of a basic service.
88	This section provides for co-operation between district and local municipalities by providing assistance (financial, technical, or administrative support) and supporting one another to the extent either has available capacity.
89	In a district management area, the district municipality has ALL the municipal powers and functions.

The third legislative layer that deals with the powers and functions of municipalities is the Municipal Systems Act, Act 32 of 2000 (MSA). Chapter 3 (sections 8 to 15) of the MSA deals with municipal powers and functions. A summary of which is presented below.

Section	Comment
8	General empowerment – makes reference to the Constitution and the Structures Act. It gives the municipality the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.



Section	Comment
9	This section specifies the process to be followed for the assignment of functions or powers to municipalities generally by Acts of Parliament or provincial Acts. The key components of this process include consultation, the assessment of fiscal capacity and the financial impact of such an assignment and sustainability.
10	This section specifies the requirements for the assignment of functions or powers to specific municipalities by acts of executive or by agreement.
10A	Section 10A requires the institution assigning a function or power to a municipality to take appropriate steps to ensure that the municipality concerned has sufficient funding and such capacity building initiative as may be needed for the performance of the assigned function or power.
11	<p>The exercise of executive and legislative authority is dealt with this section. Executive and legislative authority is exercised by Council within the area of a municipality's jurisdiction (subject to chapter 5 of the Structures Act).</p> <p>Subsection 3 details how a municipality exercises its executive or legislative authority. Refer paragraph 5 below.</p> <p>Subsection 4 indicates that "A decision taken by a municipal council or any other political structure of the municipality must be recorded in writing."</p>
12	Section 12 specifies the legislative procedures to be followed with respect to by-laws.
13	<p>A by-law passed by a municipal council:</p> <p>(a) must be published promptly in the <i>Provincial Gazette</i>. and, when feasible, also in a local newspaper or in any other practical way to bring the contents of the by-law to the attention of the local community: and</p> <p>(b) takes effect when published or on a future date determined in or in terms of the by-law.</p>



5. Functions and powers of district and local municipalities:

Section 84(1) of the Structures Act requires a district municipality to fulfil the following functions and powers:

- to plan for development for the district municipality as a whole (district integrated development plan)
- bulk supply of water that affects a large proportion of the municipalities in the district
- bulk supply of electricity that affects a large proportion of the municipalities in the district
- bulk sewage purification works and main sewage disposal
- solid waste disposal sites for the whole district council area - determination of a waste disposal strategy, regulation of waste disposal and the establishment, operation and control of waster disposal sites, bulk waste transfer facilities and waster disposal facilities for more than one local municipality in the district
- municipal roads which form an integral part of a road transport system for the whole district area
- regulating passenger transport services
- Municipal airports serving the area of the district as a whole
- municipal health services for the whole area
- fire-fighting services serving the area of the district as a whole including the planning, co-ordination and regulation of fire services; specialised fire fighting services (mountain, veld and chemical fire services); co-ordination of the standardisation of infrastructure, vehicles, equipment and procedures; and training of fire officers
- establishment, conduct and control of fresh produce markets and abattoirs serving the area of a major proportion of the municipalities in the district
- establishment, conduct and control of cemeteries and crematoria serving the area of a major proportion of the municipalities in the district
- promoting local tourism for the area of the district
- municipal public works relating to any of the above functions or any other functions assigned to the district municipality



- establish and implement a framework for disaster management in the municipality aimed at ensuring an integrated and uniform approach to disaster management in its area after consultation with the local municipalities in its area.
- must establish a disaster management centre after consultation with the local municipalities within its area and may operate such centre in partnership with those local municipalities.

The table on the below lists functions and powers that might be undertaken by a local municipality in addition to those specified in the Constitution.

Local municipality functions
Disaster management (*)
Gas reticulation
Housing (**)
Integrated development planning (at local municipal level only)
Libraries and museums (other than national libraries and museums)
Nature conservation
Tourism promotion (at local level only)

- * Certain powers and functions have been assigned to both district and local municipalities in accordance with section 44 of the Disaster Management Act, Act 57 of 2002.
- ** Certain powers and functions have been assigned to local municipalities in accordance with section 9 of the Housing Act, Act 107 of 1997

6. Executive and legislative authority

A municipality exercises its executive and legislative authority by:

- developing and adopting policies, plans, strategies and programmed, including setting targets for delivery;
- promoting and undertaking development;
- establishing and maintaining an administration;



- (d) administering and regulating its internal affairs and the local government affairs of the local community;
- (e) implementing applicable national and provincial legislation and its by-laws;
- (f) providing municipal services to the local community. *or* appointing appropriate service providers in accordance with the criteria and process set out in section 78 of the MSA;
- (g) monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;
- (h) preparing, approving and implementing its budgets;
- (i) imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariffs, rates and tax and debt collection policies;
- (j) monitoring the impact and effectiveness of any services, policies, programmed *or* plans;
- (k) establishing and implementing performance management systems;
- (l) promoting a safe and healthy environment;
- (m) passing by-laws and taking decisions on any of the above-mentioned matters; and
- (n) doing anything else within its legislative and executive competence.

7. *Unfunded mandates*

Unfunded mandates are where one level of government, usually a local municipality, undertakes the function of another level government but does not receive funding to carry out the mandate. This places an additional burden on the already limited resources of the municipality. Unfunded mandates often arise between district and local municipalities, where one party carries out the functions of the other, frequently as a result of a lack of capacity. Similarly, unfunded mandates arise where local government carries out the functions of provincial government without receiving compensation in the form of grant funding. Examples of these are: pauper burials (district function frequently carried out by local municipalities) and the administration and operation of museums (provincial functions frequently carried out by municipalities).



In order to address the issue of unfunded mandates it is essential that the affected party enter into negotiations with the relevant authority to resolve the issue without compromising service delivery to the public.

8. *Previous Provincial Ordinances*

Despite the introduction of the Municipal Structures Act, Act 117 of 1998; the Municipal Systems Act, Act 32 of 2000; the Municipal Finance Management Act, Act 56 of 2003; the Municipal Property Rates Act, Act 4 of 2004; and various other pieces of legislation that impact upon municipal government there remains certain sections of the “old” Provincial Ordinances applicable to municipalities. One must remain aware of these as they differ from province to province and should always be considered when addressing powers and functions issues as these ordinances frequently provide a municipality with either the power to carry out a particular functions or the duty to provide a service to the community.

9. *Authorities and service providers*

There is a significant difference between the role of an authority and that of a service provider. Firstly, an authority is responsible for the regulation of the service provider. In other words, it determines the types and level of service to be provided to the community by the service provider, it determines the charges that may be levied the community in respect of those services, and it regulates the manner in which services are provided to the community by the service provider.

The service provider on the other hand, is solely responsible for providing the services in question to the community. The authority may, however, grant the service provider the authority to carry out other powers and functions assigned to the authority, yet the authority remains responsible to the community for the provision of the service. The service provider is granted the authority to provide the service to community in terms of a municipal by-law supported by an appropriate service level agreement. Service providers may not be limited to providing services on behalf of a single municipality, they may be multi-jurisdictional, i.e. provide services on behalf of more than one municipality in more than one municipal jurisdiction.



10. *Inter-Government Relations*

Intergovernmental Relations in the South African context concern the interaction of the different spheres of government. The Constitution declares that government is comprised of National, Provincial and Local spheres of government which are distinctive, inter-dependent, and interrelated. According to the Constitution, Section 41 (2), an Act of Parliament must establish or provide structures and institutions to promote and facilitate Inter-governmental Relations and provide for appropriate mechanisms and procedures to facilitate settlement of Inter-governmental disputes. The primary location of Inter-governmental Relation system is within the Department of Provincial and Local Government (DPLG) in conjunction with the Cabinet Governance and Administration Cluster. DPLG is responsible for various programmes and policy interventions geared towards predictability, stability and institutionalisation of the Intergovernmental Relations system and it has so far put in place the Inter-governmental Relations Framework Act, Act 13 of 2005 (IGR).

The IGR Act is structured as follows

- Intergovernmental structures.
 - Part 1 - President's Co-ordinating Council*
 - Part 2 - National intergovernmental forums*
 - Part 3 - Provincial intergovernmental forums*
 - Part 4 - Municipal intergovernmental forums*

The section 24 of the IGR Act requires the establishment of district inter-governmental forums to promote and facilitate inter-governmental relations between the district municipality and the local municipalities in the district. Section 25 defines the composition of the forum whilst section 26 establishes the role of the forum. Section 28 allows for the establishment of inter-municipality forums. Section 29 deals with the role of the inter-municipality forums.

Part 5 - General

- Conduct of intergovernmental relations.
- Settlement of intergovernmental disputes.



- Miscellaneous.

DPLG has issued guidelines in terms of the IGR in addition to a number of guides and tools to assist with the implementation of the IGR. These available from the DPLG's website, www.dplg.gov.za.

