

The Legal Status of Local Government in South Africa under the New Constitutional Dispensation

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Abstract

The history of local government in South Africa dates back to a time during the formation of the Union of South Africa in 1910. With regard to the status of local government, the Union of South Africa Act placed local government under the jurisdiction of the provinces. The status of local government was not changed by the formation of the Republic of South Africa in 1961 because local government was placed under the further jurisdiction of the provinces. Local government was enshrined in the Constitution of the Republic of South Africa arguably for the first time in 1993. Under the interim Constitution local government was rendered autonomous and empowered to regulate its affairs. Local government was further enshrined in the final Constitution of 1996, which commenced on 4 February 1997. The Constitution refers to local government together with the national and provincial governments as spheres of government which are distinctive, interdependent and interrelated. This article discusses the autonomy of local government under the 1996 Constitution. This it does by analysing case law on the evolution of the status of local government. The discussion on the powers and functions of local government explains the scheme by which government powers are allocated, where the 1996 Constitution distributes powers to the different spheres of government. Finally, a conclusion is drawn on the legal status of local government within the new constitutional dispensation.

Keywords: local government; provincial government; jurisdiction of provinces; constitution; autonomy; subsidiarity

Introduction

The legal status of local government within the structure of government in the Republic of South Africa has attracted much public interest. This is evident from the number of cases that have come before the courts in order to determine the jurisdiction of local government over issues where it operates in a functional area concurrently with the other spheres of government (that is, provincial and national).¹ The reason for the large measure of public interest is that the evolution of the status of local government—from having been under the full control of the national and provincial governments to becoming a fully-fledged sphere of government—constitutes a substantial change from the position under the pre-1994 constitutional dispensation. This study explains the evolution of the status of local government from what it was prior to 1994 up to the current constitutional dispensation. This it does by describing the historical background to the change in the status of local government, the challenges involved in determining the competence of this functional area of government and the role of the principle of subsidiarity as it affects local government.

Historical Background

The history of local government in South Africa dates back to at least 200 years before the two former British colonies (Cape Colony, Natal Colony) and the two former Boer Republics (Orange Free State and Transvaal) were united to form the Union of South Africa in 1910.² By that time the four territories had already developed their own distinctive systems of local government,³ but the South Africa Act of 1909, which created the Union, not a federation, placed local government under the jurisdiction of the four provinces.⁴ When South Africa became an independent republic in 1961,⁵ local

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¹ See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council*; *Minister of Local Government, Environmental Affairs v City of Cape Town* 2014 (4) SA 437 (CC).

² See DL Craythorne, *Municipal Administration: The Handbook* (Juta 2006) 1, where he states that South Africa became a state in 1910; Jacobus Cloete, *South African Municipal Government and Administration* (Van Schaik Academic 1997) 11, states that the four colonies were united on 31 May 1910 to form the Union of South Africa.

³ See Cloete (n 2) 11.

⁴ Section 85(vi) of the Union of South Africa Act of 1909 (hereinafter the South Africa Act) empowered the provincial councils to make ordinances in relation to municipal institutions, divisional councils and other local institutions of a similar nature.

⁵ See s 1 of the Republic of South Africa Constitution Act 32 of 1961 (hereinafter the Republic of South Africa Constitution Act, 1961), which provided that the Union of South Africa, comprising the provinces of the Cape of Good Hope, Natal, Transvaal and Orange Free State, would, as from 31 May 1961, be a republic under the name of the Republic of South Africa.

government was placed even more firmly within the jurisdiction of the provinces.⁶ The democratic dispensation based on a Constitution that was negotiated in the 1990s represented a significant break with the past, not least in the way South Africans would be governed. One important distinction between the pre- and post-1994 regimes was that, whereas during the period dating from the formation of the Union local governments had been created by statute, local government became enshrined in the Constitution of the Republic of South Africa for the first time:⁷ under the 1993 interim Constitution local government became autonomous and was empowered to regulate its own affairs.⁸

Local Government under the 1996 Constitution

With the coming into force of the final Constitution of the Republic of South Africa on 4 February 1997, local government was further enshrined in the Constitution, its status being bolstered in the Constitution by reference being made to local, national and provincial government as being *spheres* of government that are distinctive, interdependent and interrelated,⁹ and also by the Constitution assigning powers and functions to local government directly.

The effect of the reference to local government as a ‘sphere of government’ is well covered in the literature. In the interim Constitution, the national, provincial and local areas of government were referred to as ‘levels’.¹⁰ This reference to ‘levels of government’ normally reflects a hierarchical government structure where a higher level or structure confers authority on a lower level or structure and such authority can be unilaterally withdrawn by the higher level or structure.¹¹ The reference to local government in the 1996 Constitution as ‘a sphere of government’, however, indicates a significant shift in emphasis which means that, unlike the situation in the past where local governments were established and abolished by provincial governments,¹² the

⁶ See s 84(1)(f)(i) of the Republic of South Africa Constitution Act, 1961.

⁷ See s 174(1) of the Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter the interim Constitution).

⁸ Section 174(3) of the interim Constitution.

⁹ See s 40(1) of the Constitution of the Republic of South Africa 108 of 1996 (hereinafter the Constitution).

¹⁰ See Constitutional Principle XXVI of the interim Constitution.

¹¹ See Ignatius Rautenbach and Erasmus Malherbe, *Constitutional Law* (LexisNexis Butterworths 2009) 93–94.

¹² Section 85(iv) of the Union of South Africa Act 1909 placed local government under the jurisdiction of the provincial councils; section 84(1)(f)(i) of the Republic of South Africa Constitution Act 1961 placed local government under the jurisdiction of provincial government, and Schedule 1(6) of the Republic of South Africa Constitution Act 1983 classified local government as the own affairs of a particular population group. It should be recognised that this Act made provision for matters of own affairs which were matters that affected a population group in relation to its own identity and the upholding and furtherance of its way of life, culture, traditions and customs. Section 14(2) provided

independent status of local government is now entrenched in the Constitution. Meyer points out that the reference to local government as a sphere of government implies that the 1996 Constitution places local government in the position of a partner in government together with the national and provincial spheres.¹³ One effect of this partnership relationship between the structures of government is to enforce a culture of co-operation and partnership between them. In contrast, though, their distinctiveness accounts for the autonomy that the spheres have in respect of their powers and functions, whereas their interrelatedness explains the close relationship between the three spheres and their interdependence explains the dependence of the spheres on one another.¹⁴ The provisions of the Constitution that relate to the status of local government are explained next.

Status of Local Government

In recognising local government as one of the spheres of government, the 1996 Constitution makes provision for its status where it states, in section 151, that:

- 1) The local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic.
- 2) The executive and legislative authority of a municipality is vested in its Municipal Council.
- 3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
- 4) The national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Under the 1996 Constitution, there is no geographical area in the Republic of South Africa that is without local-government institutions regulating its affairs. This system of local government is described as 'wall-to-wall' municipalities.¹⁵ The right afforded a municipality to govern at its own initiative the affairs of its community enables the municipality to exercise its powers independently of the control of the national and

that the matters which were not own affairs of a population group were general affairs. Thus, while local government was no longer under the jurisdiction of provincial government, it was still not a matter of general affairs. Also see Rautenbach and Malherbe (n 11) 302, where the authors argue that, under the 1996 Constitution, local government enjoys constitutional recognition as a fully-fledged sphere of government, and this means at least that the other spheres of government may not abolish local government or otherwise disregard the provisions of the Constitution on local government.

¹³ See J Meyer, *Local Government Law* (Butterworths Publishers 1997) 6.

¹⁴ See Nico Steytler and Jaap de Visser, *Local Government Law of South Africa* (Butterworths 2007) ch 16, 3.

¹⁵ Id chs 2 and 3. They describe this system as being critically different from the situation that pertained before 2000, but fundamental to the new local government dispensation.

provincial governments. The prohibition against the national and provincial governments' compromising or impeding the ability of a municipality to exercise its powers protects the institutional status of a municipality from being eroded by the other spheres of government. This constitutional provision advancing and protecting the status of municipalities implies that, under the 1996 Constitution, local government is a creature of the Constitution in contrast to the dispensation that pertained before 1994, when local governments were established by ordinary statute.

The status of local government is further enhanced by the Constitution, which sets out its powers and functions.

Powers and Functions of Local Government

The Constitution assigns powers and functions to local government,¹⁶ which enhances their status. This change in the status of local government has been confirmed by the Constitutional Court judgment in *Fedsure Life Assurance (Ltd) v Greater Johannesburg Transitional Metropolitan Council*. In that matter, it was held that under the interim Constitution and the 1996 Constitution, local government was no longer a public body exercising delegated powers but that a municipal council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.¹⁷

The *Fedsure Life Assurance* judgment explains the break with the past that the current local-government dispensation represents: local government exercises original legislative powers, and the source of such powers is the Constitution itself. In *In re Certification of the Constitution of the Republic of South Africa, 1996*,¹⁸ the Constitutional Court explained further that, whereas local government acquired constitutional status in the interim Constitution, local-government structures are given more autonomy in the 1996 Constitution than they had enjoyed under the interim Constitution.¹⁹ The Court further reaffirmed the solid status of local government under the new Constitution in the case of *City of Cape Town v Robertson*.²⁰ In this case, the applicant, a ratepayer, launched a court application for relief by interdicting the City of Cape Town from levying and recovering property rates based on property valuations

¹⁶ Section 156 read with Part B of Schedules 4 and 5 of the Constitution allocates powers to local government, although local government has legislative authority over these matters only to the extent that is set out for provincial and national governments in terms of s 155(6)(a) and (7) of the Constitution.

¹⁷ *Fedsure Life Assurance (Ltd) v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at para 26 ('*Fedsure Life Assurance*').

¹⁸ *In re: Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (10) BCLR 1253 (CC).

¹⁹ See *Certification of the Constitution, 1996* para 364.

²⁰ *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) ('*Robertson*').

contained in the valuation roll. In restating the power of local government to levy rates on property, the Court held that:²¹

The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, inviolable and possesses the constitutional latitude within which to define and express its unique character subject to the constraints permissible under our Constitution.

It was held that section 229(1)(a) of the Constitution authorises a municipality to impose rates on property.²² In ruling in favour of local government, the Court reinforced its solid status in cases involving disputes over jurisdiction between the spheres of government.

In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,²³ the Constitutional Court further confirmed the autonomy of local government by affirming that the City of Johannesburg was exercising original powers distinct from those of the other spheres of government. This case arose from competing legislation, namely the Development Facilitation Act (DFA),²⁴ which authorised provincial development tribunals to determine applications for rezoning land and establishing townships in areas falling within the jurisdiction of municipalities, on the one hand, and, on the other, the Town-Planning and Townships Ordinance,²⁵ which authorised the City of Cape Town to consider applications for rezoning land and the establishment of new townships within the city's area of control. The city launched a court application seeking a declaratory order relating to its authority to exercise rezoning and planning powers within the area of jurisdiction of a municipality.²⁶ The Court found that rezoning land and establishing townships form part of municipal planning.²⁷ It was held that the provisions of the DFA encroach on the functional area of municipal planning and were, therefore, inconsistent with the Constitution.²⁸

This judgment reinforces the directive of the Constitution on the principles of co-operative governance that requires the spheres of government not to assume any power

²¹ Id para 60.

²² Id para 61. Section 229(1)(a) of the Constitution provides that a municipality may impose rates on property and surcharges on fees for services provided by or on behalf of the municipality.

²³ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) ('*Gauteng Development Tribunal*').

²⁴ Development Facilitation Act 67 of 1995.

²⁵ Town-Planning and Townships Ordinance 15 of 1986.

²⁶ *Gauteng Development Tribunal* (n 23) para 11.

²⁷ Id para 57.

²⁸ Id para 70.

or function except those conferred on them in terms of the Constitution²⁹ and to respect the constitutional status, institutions, powers and functions of government in the other spheres.³⁰ In this regard, the Court held that the national and provincial spheres cannot appropriate for themselves the power to exercise municipal powers or administer municipal affairs.³¹

In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council*; *Minister of Local Government, Environmental Affairs v City of Cape Town*,³² the issue arose from the interpretation of section 44 of the Land Use Planning Ordinance (LUPO).³³ This granted the MEC for local government the authority to appeal the decision of municipalities regarding a planning application. The City of Cape Town and the Habitat Council launched a court application seeking an order declaring section 44 of LUPO unconstitutional not only on the grounds that it permits appeals to the MEC against decisions made by a municipality, but also because it allows the MEC to replace the decision with one of his own.³⁴ The Court held that, since the Constitution ascribes planning competence to municipalities, which includes the rezoning of land and the establishment of townships, the general appellate power afforded to the MEC was unconstitutional.³⁵

In *Minister of Local Government Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd*,³⁶ the Minister of Local Government in the Western Cape refused the application by Lagoonbay Lifestyle Estate (Pty) Ltd (applicant) for the rezoning and subdivision of certain properties, after such an application had been approved by the municipality and referred to the MEC for further attention. The MEC interpreted section 25(1) of LUPO, which provides that either the province or a duly authorised municipality may refuse the subdivision applications, as meaning that the MEC was the competent authority for administering LUPO.³⁷ The Court found, however, that the provincial authorities were authorised to make decisions regarding the subdivision of property only if a municipality has elected not to decide on the subdivision application itself.³⁸ It was therefore found that the decision of the MEC to refuse the applicant's application was unlawful, and it was accordingly set aside.³⁹

²⁹ See s 41(1)(f) of the Constitution, 1996.

³⁰ *ibid.*

³¹ See *Gauteng Development Tribunal* (n 23) para 59.

³² 2014 (4) SA 437 (CC) ('*Habitat Council*').

³³ 15 of 1985.

³⁴ *Habitat Council* (n 32) para 5.

³⁵ *Id* para 13.

³⁶ 2014 (1) SA 521 (CC) ('*Lagoonbay*').

³⁷ *Id* para 6.

³⁸ *Id* para 54.

³⁹ *Id* para 56.

Protection of Status of Local Government

In protecting the status of local government, the Constitution protects municipal institutions from being compromised or impeded in their ability or right to exercise their powers or perform their functions.⁴⁰ This provision serves as a limitation on the exercise of powers over municipalities by national and provincial governments. In this regard, while the national and provincial governments have the right to regulate the use of local government powers, a local government is protected from the decisions of the other spheres of government if such actions affect its status, constitutional institutions, powers or functions.

The protection of local government autonomy was further affirmed by the Constitutional Court in *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development; Executive Council of KwaZulu-Natal v President of the Republic of South Africa*.⁴¹ Here it was held that, whereas the national and provincial spheres of government have the powers to supervise local government, these two spheres of government should exercise their supervisory powers in a manner that respects the autonomy of municipalities.⁴² In explaining the protection afforded to the powers of local government, the Court held:⁴³

The Constitution therefore protects the role of local government, and places certain constraints upon the powers of Parliament to interfere with local government decisions. It is neither necessary nor desirable to attempt to define these constraints in any detail. It is sufficient to say that the constraints exist and if any Act of Parliament is inconsistent with such constraints it would to that extent be invalid.

The judgment explains that, while parliament has the power to regulate the institution of local government, it can do so only within the boundaries prescribed by the Constitution. This further demonstrates that the status of local government as enshrined in the Constitution is that of an autonomous institution that is not under the strict control of the other spheres of government.

Limitation of Powers of Local Government

The Constitution not only protects the powers of local government, but also places limitations on those powers. In this regard, the Constitution empowers local government institutions to exercise their constitutional powers as regulated by national and

⁴⁰ Section 151(4) of the Constitution, 1996.

⁴¹ 2000 (1) SA 661 (CC) (*'Executive Council Western Cape'*).

⁴² Id para 29. The power of national and provincial governments to supervise municipalities emanates directly from the Constitution: s 155(7) empowers the national and provincial governments to ensure the effective performance by municipalities of their functions by regulating the municipalities' exercise of their executive authority.

⁴³ See *Executive Council Western Cape* (n 41) para 29.

provincial legislation.⁴⁴ In the exercise of its powers, a local government authority, like the other spheres of government, is bound by the Constitution.⁴⁵ When exercising its powers, therefore, the actions of a local-government authority should conform to the spirit of the Constitution and these powers should be exercised within the prescribed parameters and procedures.

The authority of parliament to limit the powers of local-government institutions arose in the *Executive Council Western Cape* case,⁴⁶ in which the provisions of the Local Government: Municipal Structures Act 117 of 1998 were considered. That Act conferred on a municipal council the power, inter alia, to appoint a municipal manager, who is the head of the administration of a municipality.⁴⁷ This provision of the Act was challenged for encroaching on the powers of local-government to employ its personnel, but the Court found that, based on the powers of the national government to regulate the exercise of municipal powers, it is permissible for it to make provision for the appointment of a municipal manager.⁴⁸ Consequently, whereas the power to employ a municipal manager is vested in a municipal council, the national government has the authority to regulate the use of such power.

The Constitution further limits the powers of local government by affording both the national and the provincial spheres of government the power to supervise local government.⁴⁹ A system of government where original powers are bestowed on local government and it is also subjected to the supervisory powers of the national and provincial governments has the potential to lead to challenges to the actual status of local government.

Challenges to Status of Local Government

One of the major challenges to the status of local government lies in a dispensation in which the Constitution allocates both concurrent powers to all the spheres of government and exclusive powers to the national and the provincial spheres of

⁴⁴ See s 151(3).

⁴⁵ See s 2 of the Constitution, 1996, which clearly states that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid; s 8(1) provides that the Bill of Rights binds all organs of state. In this regard local government, like all other organs of state, is bound by the Constitution and can perform only those powers afforded to it within the confines of the Constitution.

⁴⁶ *Executive Council Western Cape* (n 41).

⁴⁷ Section 82(a) of the Local Government: Municipal Structures Act 117 of 1998, prior to its repeal by s 15 of the Local Government: Municipal Systems Amendment Act 7 of 2011, made provision for the appointment of a municipal manager.

⁴⁸ *Executive Council Western Cape* (n 41) para 108.

⁴⁹ Section 155(6) of the Constitution requires the provincial government to provide for the monitoring and support of local government; s 155(7) empowers both national and provincial government to oversee the performance by municipalities of their functions and s 139 empowers national and provincial governments to intervene in the municipal councils under specified circumstances.

government respectively, but it does not allocate exclusive powers to local government—this sphere shares powers with the other two. This presents challenges in determining the jurisdiction of local government, more particularly because the Constitution does not define the powers of local government.

This view is supported by the Constitutional Court judgment in *Maccsand (Pty) Ltd v City of Cape Town*, where it was held that sometimes the exercise of powers by two spheres of government may result in an overlap because these powers are not contained in hermetically sealed compartments.⁵⁰ Accordingly, the question arises as to how the Court should determine the functional area of local government in instances where there is an overlap in the exercise of powers by the spheres of government in concurrent functional areas. The Court should be guided by the nature of the power when deciding whether it is more appropriate for local government to exercise it rather than one of the other spheres. This is the case because the Constitution allocates particular powers to a sphere of government in accordance with the vision of what is appropriate to that sphere.⁵¹

Although the courts have, in some instances, reaffirmed the authority of local government within a concurrent functional area of competence where local government shares the exercise of power with the other spheres of government, such determinations lack precision. For example, in planning matters the Court has found in favour of municipalities because the power in issue concerns municipal planning. But the Constitution allocates regional planning and development competence concurrently to provincial and national governments,⁵² and municipal planning concurrently to national, provincial and local governments.⁵³ The *status quo* prior to the coming into force of the Spatial Planning and Land Use Management Act on 1 July 2015,⁵⁴ however, was that neither the Constitution nor the legislation defined the nature and scope of regional planning or the development of municipal planning. But given the fact that every area in South Africa falls within the jurisdiction of a municipal council, it was consequently not always easy to ascertain whether a planning matter was regional or municipal, since even planning undertaken by the national and provincial governments takes place at the local level within the jurisdiction of a municipality.

In instances where the planning took place across the jurisdictions of more than one municipality, it was easy to define it as regional, but in instances where the planning took place within the jurisdiction of one municipality it was not. However, the Spatial

⁵⁰ 2012 (4) SA 181 (CC) 47 (*Maccsand*).

⁵¹ *Id* para 47, where the Court held that the Constitution allocates powers to three spheres of government in accordance with a functional vision of what is appropriate to each sphere.

⁵² Part A of Schedule 4 of the Constitution, 1996.

⁵³ Part B of Schedule 4 of the Constitution, 1996.

⁵⁴ Spatial Planning and Land Use Management Act 16 of 2013.

Planning and Land Use Management Act cleared up this uncertainty in that the Act now defines the categories national, provincial and local planning.⁵⁵

Another grey—and challenging—area in determining the competence of local government is when a municipality exercises a power that is not listed as a functional area of its competency but which is incidental to the performance of its functions.⁵⁶ It would seem that applying the principle of subsidiarity might be a solution when determining the functional competence of municipalities with any precision. This is the subject of the next section.

Principle of Subsidiarity

In states where powers are exercised concurrently by different levels of government, determining the functional competence of the different spheres may be informed by the principle of subsidiarity. The distribution of powers between the different spheres can also be measured against this principle. Carpenter defines subsidiarity as the principle of allocating powers to smaller entities.⁵⁷ In dealing with the allocation of powers within the spheres of government, Du Plessis' definition of institutional subsidiarity is relevant: he states that the principle of subsidiarity constrains an upper level from taking upon itself those matters that a lower level can appropriately dispose of.⁵⁸ According to Føllesdal, the principle entails allocating powers to the lowest level unless allocating them to a higher level would ensure higher comparative efficiency or effectiveness.⁵⁹ The principle requires the allocation of government powers to be based on efficiency in that the level of government to which the power is allocated should exercise the power efficiently, otherwise the power should be allocated to the level of government that has the capacity to perform the function in question.

Carpenter points out that the essential features of the principle of subsidiarity are to be found in the allocation of powers under the 1996 Constitution.⁶⁰ She further explains that section 151 of the Constitution is capable of being applied in accordance with

⁵⁵ See s 5 of the Spatial Planning and Land Use Management Act, 2013.

⁵⁶ Section 156(5) of the Constitution provides that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

⁵⁷ Gretchen Carpenter, 'Cooperative Governance, Devolution of Powers and Subsidiarity: The South African Perspective', Paper presented at the Subnational Constitutional Governance Conference, St George's Hotel, Pretoria, 16–18 March 1999, 45.

⁵⁸ Lourens du Plessis, 'Subsidiarity: What Is in the Name for Constitutional Interpretation and Adjudication?' (2006) 17 Stellenbosch LR 209.

⁵⁹ Andreas Føllesdal, 'Survey article: Subsidiarity' (1998) (6)2 Journal of Political Philosophy 194-195.

⁶⁰ See Carpenter (n 57) 49.

subsidiarity.⁶¹ Accordingly, if the principle of subsidiarity is fully realised in terms of the Constitution, it may be a vital tool in determining the competence of local government.

Conclusion

The evolution of the status of local government from being the creature of statute to becoming an equal partner with the other spheres of government is seen in the distinct and independent status of local government in the new constitutional dispensation in South Africa. This evolution has seen local government being enshrined in the Constitution for the first time in the history of the country's system of government. Although, in the new constitutional dispensation, local government is afforded original powers and value equal to the other spheres of government, the concurrent allocation of powers between the spheres of government poses challenges that relate to determining the functional areas of local government. In instances where powers are not clearly demarcated, it is suggested that the courts should apply the constitutional principle of subsidiarity as a key tool in determining the area of functional competence of local government.

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⁶¹ See Carpenter (n 57) 49. Section 151 deals with establishing municipalities throughout the republic, vesting executive and legislative authority in municipal councils, and prohibiting the upper spheres of government from limiting the right of municipalities to exercise their powers.

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