The *Le Sueur* case and a local government's constitutional right to govern

Abstract

The KwaZulu-Natal, Pietermaritzburg High Court case of *Le Sueur v eThekweni Municipality* was decided on the basis that a municipality, in the local government sphere, was permitted to legislate within the functional area of the environment. The Constitution of the Republic of South Africa, 1996 sets out functional areas of governmental powers in Schedules 4 and 5 and allocates these powers to National, Provincial and/or Local Government. Established jurisprudence in the Constitutional Court has entrenched the sanctity of the functional areas and interpreted these areas in such a way as to prohibit intrusion by one sphere into a functional area allocated to another. Both the 'environment' and 'municipal planning' are allocated functional areas, the first to the National and Provincial spheres concurrently and the second to local government. The judgment in the *Le Sueur* case is seemingly at odds with the accepted jurisprudence. Although the decision in *Le Sueur* seems to be intuitively correct the reasoning employed seems to be somewhat strained. This paper proposes an alternative rationale which could be used to permit the same decision to be reached in a less strained manner. The local government 'right to govern' is postulated as a plenary power granted to local government and this, in turn, requires that Schedules 4 and 5 be interpreted in a slightly different manner. If this approach is followed then local government would be entitled to legislate in the functional area of the environment (and indeed generally) subject to the limitations discussed.

1 Introduction

The somewhat controversial case of *Le Sueur v eThekwini Municipality*[1] has prompted the publication of at least three articles discussing the judgment.

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[1] *Le Sueur v eThekwini Municipality* [2013] ZAKZPHC 6; 2013 JDR 0178 (KZP).

Freedman[2] and Humby[3] have both discussed the *Le Sueur* case in an attempt to reconcile its outcomes with existing constitutional jurisprudence. Du Plessis and van der Berg discuss the case in a detailed note which highlights local government's perceived role in environmental management.[4] This article will revisit the *Le Sueur* judgment and will suggest an alternative rationale to support the decision reached and to address some of the concerns raised by the authors mentioned. In doing so some of the prominent judgements dealing with the Constitutional separation of powers and functions will be discussed in brief to provide context to the hypothesis presented.

Very briefly, the *Le Sueur* case decided that the local government sphere, in this case the Metropolitan (category 'A')[5] *eThekwini Municipality* (eThekwini) was held to have legislated[6] in what is regarded as being the functional area of the 'environment' and to have done so lawfully. The legislative action in question was the municipality's amendment of its D-MOSS policy to include it as part of the townplanning scheme. The D-MOSS or Durban Metropolitan Open Space System was a planning policy intended to conserve nature through preservation of natural open spaces. In order to enhance effectiveness, the D-MOSS was, by legislative action, integrated 'into the respective planning schemes as a control area or overlay'[7] which applied to properties in addition to their formal zonings. Development of properties falling within the D-MOSS required additional approvals as, 'despite the underlying zoning, development may not occur without having first obtained the necessary environmental authorisation or support from the Environmental Planning and Climate Protection Department of the eThekwini Municipality'.[8] [9] The applicants had challenged the validity of eThekwini's

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[2]Freedman 'The legislative authority of the local sphere of government to conserve and protect the environment: A critical analysis of *Le Sueur v eThekwini Municipality* [2013] ZAKZPHC 6 (30 January 2013)' (2014) 17(1) *PER/PELJ* 567-594.

[3]Humby 'Localising environmental governance: The *Le Sueur* case' (2014) 17(4) *PER/PELJ* 1660 -1689.

[4]Du Plessis and Van der Berg '*RA LeSueur v eThekwini Municipality* 2013 JDR 0178 (KZP): An environmental law reading' (2014) 3 *Stell LR* 580-594.

[5]In terms of s 155(1) of the Constitution.

[6]The exact nature of the action, whether legislative, judicial or administrative was not canvassed and the judgment proceeded on what might be regarded as the assumption that the D-MOSS amounted to legislative action. Du Plessis and Van der Berg question whether the action was in terms of 'legislative, executive or "executive legislative" authority?' (n 4) 590.

[7]http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx (2016-01-26).

[8]*Ibid.*

[9]A 'D-MOSS controlled area' is defined in the scheme as 'any area demarcated upon the map by the overprinting of a green hatched pattern (or by a green layer on the GIS), where, by reasons of the natural biodiversity, flora and fauna, topography, or the environmental goods and services provided or other like reasons, development or building may be prohibited, restricted, or permitted upon such conditions as may be specified having regard to the nature of the said area' and: 'No

legislative actions arguing, in part, that the functional area of the 'environment' was the exclusive preserve of the National and Provincial spheres of government and therefore the actions of the local sphere were not legally permitted. Instead of revisiting the *Le Sueur* judgment in detail this paper will propose an alternative, and somewhat radical, argument which would have allowed the court to arrive at very much the same decision.

Humby noted that in the *Le Sueur* case Gyanda J had concluded that eThekwini was legally permitted to legislate in the 'environmental' functional area.

> This conclusion was based on an elaborate argument that can be dissected in terms of five distinct, yet interlocking and mutually supporting themes, namely: (1) state obligations imposed by the [environmental right] in section 24 of the Constitution; (2) the scope of municipal executive and legislative power in terms of section 156 of the Constitution; (3) the constitutional model of co-operative governance; (4) the meaning of 'municipal planning'; and (5) national and provincial support for local environmental governance.[10]

The reason why the *Le Sueur* judgment is noteworthy is that it focusses quite closely on the ambit of municipal executive and legislative powers (functions) in terms of section 156 of the Constitution[11] and, in doing so, argues that environmental considerations have always played a part in municipal planning.[12] The noteworthiness of this is that, prior to the *Le Sueur* judgment, a number of cases decided in the Constitutional Court had increasingly entrenched the sanctity of the authority of the respective sphere to which a functional area had been assigned in Schedules 4 and 5 to the Constitution[13] and, that in terms of these Schedules, 'environment' and 'municipal planning' are distinct. Schedule 4 lists 'Functional Areas of Concurrent National and Provincial Legislative Competence' and Schedule 5 lists 'Functional Areas of Exclusive Provincial Legislative Competence'. Both are divided into Parts 'A' and 'B' where Parts 'B' grant to the national and provincial or to just the provincial spheres (as the case may be) authority in respect of what are otherwise local government competencies but this authority is limited '… to the extent set out …in section 155(6)(a) and (7)'. Section

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person shall, within a D-MOSS controlled area … develop any land, or excavate or level any site, or remove any natural vegetation from, or erect any structure of any nature whatsoever, dump on or in or carry out any work upon such site without having first obtained the prior approval of the Council in terms of this sub-clause'. (N 7) above.

[10] Humby (n 3) 1664.

[11] Constitution of the Republic of South Africa, 1996.

[12] '"Municipal Planning" involved the power to regulate land use whilst taking into account, amongst other things, the need to protect the natural environment'. Gyanda J in *Le Sueur* para 33.

[13] Schedules 4 and 5 to the Constitution set out functional areas and allocated these to different spheres of government.

155(6)(a) prescribes that 'provincial government ..., by legislative or other measures, must provide for the monitoring and support of local government in the province'; and section 155(7) prescribes that:

> The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

Thus national and provincial authority in Parts B is limited to legislative and executive authority in respect of monitoring, oversight and support. As such Parts B are regarded as permitting framework legislation. However, it is local government which has the legislative and executive authority in respect of the core substance of the Part B functional areas.

'Environment' is a functional area recorded in Schedule 4A meaning that it is a functional area shared concurrently by national and provincial government. In turn, 'municipal planning' is a functional area of a local government as prescribed in Schedule 4B.

A number of cases (the Municipal Planning Cases) have been decided in which provincial government and local government disputed each other's exercise of powers within a scheduled functional area. These cases are the following: the *Gauteng DFA* case,[14] the *Maccsand* case,[15] the *Lagoonbay* case[16] and the *Habitat* case.[17] The bearing of each of these judgments to the present discussion is discussed in brief below.

2 Municipal planning cases

In the *Gauteng DFA* case the Johannesburg Metropolitan Municipality (a category 'A' sphere of local government) challenged the constitutionality of chapters V and VI of the Development Facilitation Act 67 of 1995 (the DFA). These chapters of the DFA (which was national legislation) granted executive authority to provincial government (the Development Tribunal) to perform, what the Constitutional Court held to be, municipal planning functions. The Johannesburg Metropolitan

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[14] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11.

[15] *Maccsand (Pty) Ltd Applicant v City of Cape Town* [2012] ZACC 7.

[16] *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39.

[17] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* [2014] ZACC 9.

Municipality successfully argued that these municipal planning functions fell into functional areas reserved to local government and therefore the impugned chapters of the DFA were unconstitutional.

In arriving at the conclusion the Constitutional Court recognised that section 40 of the Constitution 'defines the model of government contemplated in the Constitution';[18] and that this model consists of three distinct yet interdependent and interrelated spheres of government.[19] It is important to note that each 'sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space'.[20] Despite this autonomy one sphere may in 'highly circumscribed' situations or 'well-defined circumstances' intervene in the defined space of another sphere.[21] Critically it seemed that the Constitutional Court approached its analysis and decision from the perspective 'that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances' and then only 'in compliance with strict procedures'.[22] In determining whether or not municipal functions had been unlawfully usurped the Constitutional Court stated that '[t]he starting point in assessing the powers of the local government sphere is section 156(1) [of the Constitution] which affords municipalities original constitutional powers'.[23]

Section 156(1) grants to a municipality 'executive authority in respect of, and … the right to administer' matters listed in Schedule 4B and Schedule 5B and 'any other matter assigned to it by national or provincial legislation'. With regard to Schedules 4 and 5 the Constitutional Court stated that '[t]he purpose of these schedules is to itemise the powers and functions allocated to each sphere of government'.[24] This reasoning appears to have been integral to the decision reached by the Constitutional Court. The Constitutional Court did however recognise that the distinct 'functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments'.[25]

The *Gauteng DFA* case was ultimately determined by analysis of 'municipal planning' which occurs in Schedule 4B and the '[ineluctable] conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise'.[26] Importantly the Constitutional Court held that 'the national and provincial spheres

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[18] *Gauteng DFA* case para 43.
[19] *Ibid.*
[20] *Ibid*.
[21] *Id* para 44.
[22] *Ibid.*
[23] *Id* para 45.
[24] *Id* para 50.
[25] *Id* para 55.
[26] *Id* para 56.

cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs'.[27]

In the subsequent *Maccsand* case the applicant (Maccsand (Pty) Ltd) had been granted a mining right by national government, in terms of national legislation (the MPRDA),[28] to mine three properties owned by the City of Cape Town (a category 'A' municipality). Two of the three properties were zoned as 'public open space' and the third zoned 'rural' in terms of the applicable town planning schemes. These zonings did not permit mining to take place without rezoning. The City of Cape Town exercised executive or administrative authority in terms of provincial legislation (the LUPO).[29] The City of Cape Town had interdicted Maccsand from mining pending rezoning of the properties. The Constitutional Court, in reference to section 41(1) of the Constitution, stated that '[t]he administration of these laws [MPRDA and LUPO] falls under different spheres of government, which are under a constitutional obligation to exercise their powers in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere'.[30]

The Constitutional Court reiterated its reasoning in the *Gauteng DFA* case and added to the reasoning where it stated:

> The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.[31]

And, on this basis, held that the powers exercised by national government under the MPRDA and the local government under the LUPO were separate but that their subject matter overlapped. In these circumstances both spheres had to authorise the mining and, absent the City's authorisation, mining could not commence. Somewhat surprisingly, given the earlier *Gauteng DFA* judgment, the Constitutional Court appeared to suggest that Maccsand could approach the 'Provincial Government to intervene [in the City's possible refusal to rezone the

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[27] *Id* para 59.
[28] Mineral and Petroleum Resources Development Act 28 of 2002.
[29] Land Use Planning Ordinance (Cape) 15 of 1985.
[30] *Maccsand* case para 37.
[31] *Id* para 47 (footnotes omitted).

properties] and have the rezoning effected'.[32] The Constitutional Court however did not determine that the provincial government could actually do so.

The Constitutional Court did not expressly deal with the interpretation or application of Schedules 4 or 5 but it is implicit to the judgment that the MPRDA dealt with a subject which was not listed in either Schedule thus rendering it a national government function whilst the LUPO correctly granted executive authority for municipal planning to the City.

In the *Lagoonbay* case a private company had sought approval to develop approximately 655 hectares into a mixed use estate. The provincial government, acting in terms of LUPO, had refused to approve the applications for subdivision and rezoning despite the local municipality having approved them. Despite the approvals clearly falling within the scope of municipal planning as previously determined in *Gauteng DFA* the provincial government regarded itself as a competent authority based, in part, on the sheer size of the proposed development. Lagoonbay had argued that the LUPO, insofar as it granted the province powers to consider and decide subdivision and rezoning applications was, on the basis of the *Gauteng DFA* case, unconstitutional. However, this argument had not been properly pleaded and, accordingly the argument was not considered by the Constitutional Court which, in the absence of a properly conceived legal challenge, assumed that LUPO was entirely valid. The Constitutional Court did however suggest that '[a]t the very least there is therefore a strong case for concluding that, under the Constitution, the Provincial Minister was not competent to refuse the rezoning and subdivision applications'.[33] In reaching this *obiter* conclusion the Constitutional Court reiterated its reasoning in the *Gauteng DFA* case where it held that 'except in exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government' and that the 'constitutional vision of autonomous spheres of government must be preserved'.[34]

The question of, 'whether direct provincial intervention in particular municipal land-use decisions is compatible with the Constitution's allocation of functions between local and provincial government', left undecided in *Lagoonbay* was finally decided in the *Habitat* case.[35]

Unsurprisingly the Constitutional Court held that the province's powers to intervene in the execution of functions conferred upon local government in terms of Schedule 4B were unconstitutional. In arriving at this conclusion the Constitutional Court quoted with approval the following: 'A municipality enjoys

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[32] *Id* para 49.
[33] *Lagoonbay* case para 46.
[34] *Id* para 46.
[35] *Habitat* case para 1.

"original" and constitutionally entrenched powers, functions and duties that may be qualified or constrained by law and only to the extent the Constitution permits'.[36] The Constitutional Court went on to hold that '[t]he provincial appellate capability impermissibly usurps the power of local authorities … [and] … intrudes on the autonomous sphere of authority the Constitution accords to municipalities'[37] and therefore the appellate powers were unconstitutional.

Of great relevance was the reasoning of the Constitutional Court regarding the nature of the functional areas. This reasoning was to the effect that certain functions eg, rezoning of land would always form part of 'municipal planning' irrespective of the size or scale of the project. In other words a functional area retained its character irrespective of the complexity or scale of the decision.[38] Only where a particular process could not be ascribed to a particular functional area could such process be ascribed to a different functional area.

All of the cases discussed above deal with the constitutional separation of powers but they are all linked by a common underlying theme and that is municipal planning. The cases represent the development of a particular jurisprudence in matters of municipal planning and build on the foundations laid in the *Gauteng DFA* case. All of the cases looked at the usurpation of local government powers by provinces either in terms of national (the DFA) or provincial legislation (the LUPO). Although it would not be relevant to these cases it must be borne in mind that the central underlying theme of municipal planning is a functional area explicitly dealt with in Schedule 4B and interpreted as such. *Gauteng DFA* was considered and decided on the basis that 'section 156(1) … affords municipalities original constitutional powers'.[39]

The contemplation by the Constitutional Court of the usurpation of the local government powers by province is important. By implication the court has held that local government had originally held these powers and that they had been usurped by province. The reason for the Constitutional Court holding so can be inferred from both section 156(1) and the express reference to municipal planning in Schedule 4B.

The discussion of these planning cases indicates that the Constitutional Court has determined the competency of local government to exercise powers in respect of a particular functional area and that, in doing so, provincial government has been divested of certain powers which it previously held. This conclusion however seems to be premised on the basis that the powers granted to local

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[36] Dictum from *City of Cape Town v Robertson* [2004] ZACC 21 para 60 as quoted in *Habitat* case para 11.
[37] *Habitat* case para 13.
[38] 'All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities' para 19.
[39] *Gauteng DFA* case para 45.

government were originally held by the provincial government. The LUPO is an example of such a situation. As an old order ordinance it predates South Africa's transition to a new and democratic constitutional dispensation. It is clear from a reading of the cases dealing with LUPO discussed above that LUPO granted final municipal planning authority to the province. The Constitution has now granted this final authority to local government and the Constitutional Court has determined as much.[40] In these cases provincial government sought to exercise executive authority within an area which the Constitutional Court held to be reserved for local government. Thus it can be inferred that power was shifted from provincial government to local government. It is argued though that that inference would be an incorrect. Instead of being regarded as shifting power from province to local government the judgments should be properly regarded as confirming that the powers in question were original powers of local government and the province was prevented from usurping them.

This reasoning echoes that of the Constitutional Court in the *Fedsure* case.[41] The *Fedsure* case turned, in part, on whether or not powers exercised by local government amounted to administrative action as contemplated in the Interim Constitution.[42] In order to qualify as administrative action there would need to be a delegation of the power to local government. Despite holding that the 'detailed powers and functions of local governments have to be determined by laws of [provincial or national] authority' the court held that the powers were not delegated.[43] Seemingly the determination of the powers was an entitlement[44] or right of local government and, presumably, the determination of these powers by national or provincial government served to crystallise a power that otherwise existed. In the same way the determination of powers and functions in Part B should not be regarded as a delegation of power to local government rather it is a manifestation of the local government's powers subject to a conferring of certain oversight provisions (intrusions) on national and provincial government. If the powers have not been delegated then they have not passed from province to local, instead province has the power to specify details of an otherwise inherent local power. If a province does not have a power then it cannot delegate the

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[40] A similar reasoning lead to the demise of the provincial planning appeal body created in terms of the KwaZulu-Natal Planning and Development Act 6 of 2008. See *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* (9645/14) [2015] ZAKZPHC 42.

[41] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17.

[42] The Constitution of the Republic of South Africa 200 of 1993 which was subsequently replaced by the Constitution.

[43] *Id* para 39.

[44] 'Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates' – *Fedsure* case para 38.

power to local. As such the powers have actually been retained by local government to the general exclusion of provincial government with strict limitations on any possible intrusion. Thus there has been no shifting of powers. It will be argued that the Constitution has narrowly construed the powers of provinces and has, in contrast, granted wide powers to the point of plenary autonomy to the national and local spheres of government.

3 A comparison of national and provincial powers and functions

Before exploring the ambit of local government powers it is useful to look at how the Constitution assigns powers to the National and Provincial spheres of government.

As a starting point, section 40(1) requires that 'all spheres must observe and adhere to the principles in this chapter [3] and must conduct their activities within the parameters' prescribed. Three of the underlying principles of chapter 3 are that each sphere must: 'respect the constitutional status, institutions, powers and functions of government in the other spheres;' and 'not assume any power or function except those conferred on them in terms of the Constitution;' and 'exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere'.[45] These sections, by implication, indicate that it is the Constitution which confers all of a sphere's powers and functions to such sphere.

The legislative authority of the national sphere is vested in Parliament (made up of the National Assembly and the National Council of Provinces) and is as set out in section 44.[46] Parliament has 'the power to amend the Constitution' and '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'.[47] (Subsection (2) provides for intervention in exceptional circumstances). In exercising this power Parliament is bound only by the Constitution. The executive powers and functions of the national sphere vest in the President who may, in addition to certain listed functions, perform 'any other executive function provided for in the Constitution or in national legislation'.[48] Apart from specific provisions of the Constitution the national sphere has plenary legislative competence limited only by Schedules 4 (to the extent that competences are shared) and 5 and the national sphere's executive authority is similarly plenary.

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[45]Section 41(1)(e), (f) and (g) of the Constitution.
[46]*Id* s 43(a) read with s 42(1).
[47]*Id* s 44(1).
[48]*Id* s 85(1) and (2)(e).

In direct contrast to the plenary nature of the national sphere's powers and functions the provincial sphere has narrowly defined powers and functions. Legislative authority is strictly set out in section 104(1)(b) which permits a provincial sphere:

> to pass legislation for its province with regard to –
> (i) any matter within a functional area listed in Schedule 4;
> (ii) any matter within a functional area listed in Schedule 5;
> (iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and
> (iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation;

A province has similarly constrained executive powers and functions which are limited to:

> (a) implementing provincial legislation in the province;
> (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
> (c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
> (d) developing and implementing provincial policy;
> (e) co-ordinating the functions of the provincial administration and its departments;
> (f) preparing and initiating provincial legislation; and
> (g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

In essence therefore a province's powers and functions are largely limited to what is expressly stated in Schedules 4 and 5.[49] In this regard it must be borne in mind that Parts B of these Schedules describe functional areas of legislative competence for the provinces but areas of substantive executive competence of local government. Provincial powers and functions are severely constrained. The division of powers and functions between national and provincial government is dealt with in a number of what Bronstein refers to as federalism judgments.[50] Two of these federalism judgments are notable and have been commented on by

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[49]There are other express and implied powers and functions contained in the Constitution, for instance monitoring of police conduct is a function which may be exercised by a province in terms of s 206(3). See *Minister of Police v Premier of the Western Cape* [2013] ZACC 33.

[50]See generally Bronstein 'Envisaging provincial powers: A curious journey with the Constitutional Court' (2014) *SAJHR* 24-40.

Bronstein. In the *DVB Behuising* case the Constitutional Court indicated that, rather than a narrow and strict interpretation of the functional areas:

> In the interpretation of those schedules there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.[51]

In the second case the Constitutional Court considered the powers of a province to pass legislation in terms of section 104.[52] The Constitutional Court noted that '[u]nlike Parliament, which enjoys plenary legislative power within the bounds of the Constitution, the legislative authority of provinces is circumscribed'.[53] And that 'any matter that falls outside those functional areas [Schedules 4 and 5] with regard to which the provinces have legislative competence falls within the exclusive legislative competence of Parliament, unless Parliament has expressly assigned legislative power over such matter to provincial legislatures or the Constitution envisages provincial legislation with respect to such matter'.[54] In the result:

> The defining feature of our constitutional scheme for the allocation of legislative powers between Parliament and the provinces is that the legislative powers of the provinces are enumerated and clearly defined, while those of Parliament are not. The plenary power that resides in Parliament is therefore contrasted with the limited powers that have been given to provincial legislatures.[55]

The Constitutional Court went on to hold that assignment of legislative powers and the envisaging of legislative powers 'must be conveyed in clear terms' and be 'clearly identifiable' and therefore implied or inherent powers are not permitted.[56] In this regard 'express' is given significant weighting[57] and 'does not permit legislative powers of the provincial legislatures to be implied'.[58]

The legislative powers and functions of a province are therefore highly constrained and a province has very little, if any, inherent or implied legislative

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[51] *Western Cape Provincial Government in re: DVB Behuising (Pty) Limited v North West Provincial Government* [2000] ZACC 2par 17.
[52] *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature* [2011] ZACC 25.
[53] *Id* para 21.
[54] *Id* para 22.
[55] *Id* para 24.
[56] *Id* para 35.
[57] *Id* para 41.
[58] *Id* para 52.

authority. Its original legislative authority is limited to what is set out in section 104 and, principally, to those areas listed in Schedules 4 and 5. However the legislative authority conferred on provinces by Schedule 4 is shared with national government and, in respect of Parts B of both Schedules, with local government. The powers in respect of Parts B are further limited as the provinces can only pass framework legislation and not legislation which goes to the substantive core of the functional area.[59]

Executive and administrative authority is even more constrained. Essentially this authority is limited to implementing provincial legislation (which is inherently limited) and to national legislation in respect of the listed functional areas or which has been expressly assigned to it. However functional areas listed in parts B are implemented by local government and not by the province (the province only retains oversight functions) thus limiting a province's functions still further.

4 Local government powers and functions

The powers and functions of the national and provincial spheres were dealt with in detail during the constitutional negotiating process, most probably due, in part, to the tensions between the negotiating parties.[60] In contrast the powers and functions of local government were not delineated as clearly. The Interim Constitution provided that 'local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs'.[61] The Interim Constitution also prohibited encroachment on the powers, functions and structure of local government by Parliament or a provincial legislature.[62] Unlike the detailed and limited list of provincial powers in section 104, the Constitution presents a less definitive set of powers for local government.

In discussing the Constitution in the *Second Certification* case the Constitutional Court stated that: 'A municipality will have legislative and executive powers in respect of the local government matters listed in Part B of [Schedule] 4 and Part B of [Schedule] 5, and any other matter assigned to it by national or

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[59]As discussed by Freedman (n 2) 570-571.

[60]'Federalism had emerged as a contentious issue at the time of the drafting of the Constitution. The African National Congress (ANC) favoured strong central government at the expense of provincial powers. The National Party (NP) and the Inkatha Freedom Party (IFP), each with strong regional support bases in the Western Cape and KwaZulu-Natal respectively, demanded substantial powers for the provinces. This issue assumed such importance that the IFP only agreed to take part in the first democratic elections on the basis that a Constitutional Principle was incorporated into the interim Constitution that guaranteed that the powers and functions of the provinces would not be substantially reduced by the final Constitution'. Bronstein (n 50) 26 (footnote omitted).

[61]Section 174(3) of the Interim Constitution.

[62]*Id* s 174(4).

provincial legislation'.[63] However this is not an exhaustive list of the powers of a municipality as, in the same paragraph, the court also acknowledged the powers of the municipality in respect of fiscal matters in terms of chapter 13 of the Constitution. The Constitutional Court regarded Schedules 4 and 5 as a 'restricted list-based provincial competence' and that this 'must mean that the [Constitution] attenuates the manner in which the [provincial] legislative power is exercised'.[64] The result is that 'provincial powers [with respect to local government] have been diminished in the [Constitution]'.[65]

The determination of the local sphere's powers being as set out (itemised) in Schedules 4 and 5 or which are assigned to it ie, in terms of section 156(1), has persisted and was repeated in the *Gauteng DFA* case (as discussed above) and in the *Le Sueur* case.[66] In his paper Freedman identifies[67] three sources of local government powers, namely original powers,[68] assigned powers[69] and incidental powers.[70]

The original powers contemplated by Freedman are those listed in Parts B to the Schedules. However these powers are limited in that provinces retain legislative authority in respect of framework legislation leaving the substantive core to local government. Freedman argues that the power of a local authority is naturally limited to its jurisdiction and legislation which has inter-municipal impact would not be lawful.[71] The Municipal Planning Cases provide clear direction on the interpretation and application of section 156 insofar as it applies to original powers. Regarding assigned powers Freedman suggests that, unlike assignment to a province, an assignment of a power to local government could be implied rather than express.[72] Furthermore, once a power has been assigned, it becomes exclusive to the local government to which it was assigned.[73]

Incidental municipal powers are powers falling outside of Parts B and which have not been assigned to local government. These are powers 'so closely connected to the "effective performance of its functions" that they are considered to be a part of the functional areas over which a municipality has authority'.[74]

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[63] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, In re: Ep Chairperson of the Constitutional Assembly* 1997 1 BCLR 1; 1997 2 SA 97 (CC) para 78.
[64] *Id* par 375.
[65] *Ibid*.
[66] (N 1) para 16.
[67] Freedman (n 2) 569.
[68] Constitution s 156(1)(a) and (b).
[69] *Id* s 156(1)(b) and (2).
[70] *Id* s 156(5).
[71] Freedman (n 2) 574-575.
[72] *Id* 580-581.
[73] *Id* 581.
[74] *Ibid* (footnote omitted).

The contrast in how the Constitution allocates powers and functions to the provinces and to local government is important. This contrast will be used to argue that the Schedules (and s 156) are more concerned with defining and limiting provincial powers than circumscribing local government powers.

5 *Le Sueur*: An alternative approach

The debate surrounding the *Le Sueur* judgment can be attributed to the fact that Gyanda J held that:

> Municipalities are in fact authorized to legislate in respect of environmental matters to protect the environment at the local level and that the D-MOSS Amendments in no way transgress or intrude upon the exclusive purview of the National and Provincial governance in respect of environmental legislation.[75]

This conclusion was seemingly based on a determination that 'environment' although listed in Schedule 4A also comprised an integral part of 'municipal planning' in Schedule 4B thus empowering local government to legislate over it although the exact rationale is not clear from the judgment. The crux of the *Le Sueur* case seems to have been firstly the determination that a municipality's authority was confined to section 156 and therefore, as an original power, limited to the interpretations of Parts B of the Schedules; and then, despite this limitation and the Constitutional Court jurisprudence, to decide that what would probably correctly be regarded as an environmental process, falling squarely within the functional area of 'environment' could be validly legislated on by a municipality. In *Le Sueur* it appears that the functional area of 'environment' was shoe-horned into 'municipal planning' rather than determining that the authority stemmed from an assigned or an incidental power.[76] This approach seems at once to be both at odds with the jurisprudence of the Constitutional Court but also to be intuitively correct. Logically a municipality has to be able to produce an instrument such as the D-MOSS as part of its inherent functions. Possibly the *Le Sueur* judgment is legally tenuous but it seems to be logically, intuitively and practically correct.

Freedman regards the lack of information regarding the decision to implement the D-MOSS as preventing a comprehensive discussion of the legal merits of ascribing original 'environmental' legislative powers to the municipality.[77] If the source of the municipality's authority was confined to Parts B then it would

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[75](N 1) para 40.
[76]This is not always explicit – see for instance (n 93) below. This has also been described as a 'permeability of the division of powers and functions in the Constitution' by Olivier 'Cooperative government and the intergovernmental division of environmental powers and functions' in Du Plessis (ed) *Environmental law and local government in South Africa* (2015) 352.
[77]Freedman (n 2) 593.

be necessary to determine whether or not the action amounted to an irregular disguising of environment as municipal planning. If the process was irregular then, based on the Constitutional Court's approach to the separation of the functional areas, it would be unlawful. If however the process was not irregular then it would, presumably, be lawful.

There is another approach which could be considered: firstly, if the municipality could claim original powers other than those listed in Parts B then its legislating in the environmental functional area could be lawful; and secondly, the approach to defining the functional areas as granting authority to local government might be better regarded as defining a province's powers and thus limiting usurpation of local government's 'additional' powers by either provincial or national government.

5.1 Does local government have additional original powers?

Section 156 is, as discussed above, widely regarded as the source of local government's powers. Section 156 permits the classification of three sources of local government powers, namely original powers,[78] assigned powers[79] and incidental powers.[80] But is section 156 the only source of these powers?

Section 151(3) states that: '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'. The *Oxford English Dictionary* defines 'govern' to be to 'conduct the policy, actions, and affairs of (a state, organization, or people) with authority'. It appears that this section grants to local government a *right* to govern its own affairs (ie, within the limits of its territory) and on its own initiative.[81] Implicit in this right must be the power to do so. This right is protected against intrusion or usurpation by provincial or national government through section 151(4). In this sense 'govern' would include both legislative and executive functions and any hybridisation of the two. It would also include other powers and functions, for example the determination of disputes outside of the judicial process, taxation, etcetera, and should be interpreted purposively.

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[78]Section 156(1)(a) and (b) of the Constitution.
[79]*Id* s 156(1)(b) and (2).
[80]*Id* s 156(5).
[81]The right to govern has been described as being 'remarkably empowering to the extent that it invites every municipality to innovate and to govern within its area of jurisdiction in the way and through the means it deems best. It is believed that this provision is often overlooked and that municipalities tend to underestimate how porous the limits of their governing powers are'. Du Plessis 'An introduction' in Du Plessis (ed) *Environmental law and local government in South Africa* (2015) 33. This work was published after this article was submitted and provides interesting material for the elaboration of the arguments made in this article, time and space do not permit this elaboration now.

This right to govern could be construed as a plenary right limited only by territorial and subject matter constraints: ie, the 'local government affairs of its community'. This local government right to govern seems to be similar to the legislative[82] and executive[83] powers of national government except that these do not carry the territorial and subject matter constraints. Both the local government right to govern and the plenary powers of national government are in marked contrast to the clearly delimited powers of provinces which have been circumscribed and, in turn, restrictively interpreted. If this is the case then reference to the exercise of the right to govern being 'subject to national and provincial legislation, as provided for in the Constitution' would be regarded as a reference to the powers of national and provincial government to intrude or usurp the plenary powers of the local government despite section 151(4).[84] In this interpretation Schedules 4 and 5 would be some examples of what would constitute lawful intrusion or usurping of the plenary power. The Constitution provides for other intrusions in this right to govern but for the most part these intrusions are limited to oversight, support and monitoring framework functions. Direct limitations include provisions dealing with the judiciary and security services.[85] It is conceivable that it is these intrusions into the right which is what is meant by the reference in section 151(3) to 'as provided for in the Constitution'.

The alternative view would be that this right is given substance by section 156. Decisions in the Municipal Planning cases have seemingly all been based on interpretations of the functional areas listed in Schedules 4 and 5 and in terms of Section 156. They have not contemplated an inherent power for local government but they have not been required to do so as the underlying dispute was clearly a Scheduled functional area dispute and the dispute was found in favour of local government so there was no need to look for alternative sources of the power.

Therefore, do Schedules 4B and 5B define the municipal 'right to govern' and itemise original local government powers? If they do then it might well be that section 156 is the only source of municipal powers. If not, then Schedules 4B and 5B should be viewed, not so much as granting powers to local government, but rather as permitting intrusion (usurping) of local government's right to govern in

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[82]Section 44(1) of the Constitution.

[83]*Id* s 85(1) and (2)(e).

[84]An example of this would be s 206(7) of the Constitution which permits municipal (ie, local government) police services subject to national framework legislation. 'National legislation must provide a framework for the establishment, powers, functions and control of municipal police services'. Thus municipalities have the right to form their own police services, in accordance with an inherent right to govern, but this right is subject to intrusion by national government. This right of local government to form its own police service is in direct contrast to the very limited policing functions of provincial government – in this regard see *Minister of Police v Premier of the Western Cape* [2013] ZACC 33.

[85]Chapters 8 and 11 of the Constitution.

certain specified instances. (Parts A permits an intrusion by the provinces into national government's otherwise plenary powers). If this view is preferred then the functional areas permit the national and provincial governments' legislative and executive powers over the country or a province and therefore over their constituent municipalities. These legislative and executive powers are limited in the case of Parts B to oversight, support and monitoring frameworks. With reference to the *Le Sueur* matter; the municipality would have inherent power to legislate in the environmental functional area but this power would be limited in that the laws passed cannot extend beyond the municipal territory and must be of a local government nature and they would be further limited by the national and provincial governments' superior powers to legislate in the same functional area. A municipality's laws which conflict with national or provincial legislation are automatically invalid but this is subject to the national or provincial government not having unlawfully intruded upon or usurped local government powers.[86]

Is there any indication that Parts B are not the sole source of original local government power and therefore that they do not define the right to govern? In order to answer this question one would need to identify a governance right normally ascribed to local government and then to determine whether or not such right is catered for in Parts B or elsewhere. Whilst it is difficult to answer the question in the abstract there appear to be real practical scenarios which indicate that Schedules 4 and 5 are insufficient as the sole source of original municipal power.[87] In attempting to answer the question it must be borne in mind that the powers might also be assigned or incidental powers. Parts B are by definition limited from the perspective of the right to govern in that the initiative of the municipality is absent.

If however it is determined that Parts B are insufficient or inadequate sources of original municipal powers then where else but from the local government right to govern can such powers be sourced? Turning to *Le Sueur* the court held that the section 24 environmental right contained in the Constitution imposed a positive duty upon the municipality to legislate in the functional area of the

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[86]Section 156(3) of the Constitution – 'Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid'.

[87]Dog licencing is a municipal function listed in Schedule 5B. What would the situation be if a South African municipality wanted to levy a licence fee in respect of cats?* Presumably the municipality would have to either overly stretch the bounds of constitutional interpretation to include cats within the ambit of dog licencing, or else would have to rely on their Constitutional powers to levy rates and taxes, or else would have to argue that such a power was incidental to a specified power or that it had been assigned to it. Alternatively the municipality could simply claim that this formed an inherent power in terms of its right to govern. The most plausible solution would seem to be the last. See for instance City of Toronto http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=66437729050f0410VgnVCM10000071d60f89RCRD (accessed 2015-04-10).

* The city of Toronto in Canada, Municipal Code chapter 349, requires that all dogs and cats owned in Toronto be licenced. A number of other Canadian and American towns appear to have similar provisions.

environment.[88] That such a positive duty exists is not disputed but this duty does not amount to an assignment nor, seemingly, can it be properly regarded as an incidental power. If the power to legislate in environmental matters is inherent, forming part of the local government right to govern, then what would the implications of listing 'environment' in Schedule 4A be? Firstly and most importantly would be the extension of the functional area to the province which would otherwise not have the power. National government is not affected as it has plenary and inherent powers and therefore the granting of concurrent functional areas is purely an extension of the province's powers. Secondly, either national (by virtue of plenary powers limited only by Schedule 5) or province (by virtue of its Schedule 4 power) could legitimately intrude into the municipality's powers by legislative means, such law would however have to apply to the country or province as a whole and must 'not compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.[89] Provided that the municipality acted in accordance with the environmental right and within the applicable national and provincial environmental laws it would be free to exercise its right to govern the environment within its boundaries and to the benefit of its community. Furthermore a municipality would be unable to resist intrusion by national or provincial government where such intrusion was in terms of a Scheduled power or function which, presumably, would be superior to the undefined and unspecified right to govern.

The true purpose of the Schedules would then seemingly be to, firstly, limit intrusion into the local government right to govern to the areas listed in Parts B and, to secondly, circumscribe and constrain provincial powers and thereby to circumscribe intrusion by province into the realm of the plenary national government to those areas listed in Parts A. Provincial powers are strictly interpreted and are largely limited to the functional areas listed in Schedules 4 and 5 only. That the functional areas listed in Schedules 4 and 5 may be regarded as intrusions into the otherwise plenary power of local government may be inferred from the provisions of section 156(4) which requires that national and provincial government *must* assign to a municipality the administration (though not direct legislative power)[90] of a matter listed in either of Parts A provided that the matter relates to local government and would most effectively be dealt with at a municipal level and, further provided that, the municipality has capacity. Whilst in *Le Sueur* no such assignment was proved it would seem that eThekwini could have possibly

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[88](N 1) para 19.
[89]Section 151(4) of the Constitution.
[90]Section 156(2) of the Constitution permits local government to 'make and administer by-laws for the effective administration of the matters which it has the right to administer'. Presumably assigning administration to local government automatically confers a degree of legislative authority too.

compelled assignment to it of the power to conduct environmental impact assessments as required by the D-MOSS. Such assignment would however deprive the assignor of the power.

In conferring legislative authority of any matter in a functional area listed in Schedules 4 and 5, the Constitution does not require that the national or provincial government does pass legislation.[91] The power is apparently discretionary[92] and its exercise is optional, the Constitution does not compel the passing of legislation nor does it empower a local government to compel the other two spheres to do so. A failure by both national and provincial government to legislate will leave a lacuna which the local government would be unable to fill without its own plenary right to govern. It does however permit local government to compel assignment of administrative functions and such an assignment would carry with it limited legislative capacity.[93] But this would be of limited value; if no original legislation existed, what function could be assigned in such circumstance?

The state (ie, government consisting of all three spheres) must fulfil the rights in the Bill of Rights as well as fulfil their other, constitutionally allocated, powers and functions.[94] Are the expressly allocated powers and functions contained in the Constitution, and especially in Schedules 4B and 5B, sufficient for these purposes? If not then the local government right to govern should be interpreted as granting plenary power to local government where the only limits to such powers are capacity and geographical constraints as well as the permitted intrusions into this right. Given the inherent difficulty in attempting to conceive of all eventualities and the Constitutional Court's approach to interpreting Schedules 4 and 5 as clearly differentiating between functional areas and not permitting overlaps it is likely that Parts B (even including incidental powers) will be insufficient to provide for the necessary capabilities of local government. If this is the case then local government will only be able to obtain additional capabilities from assigned powers and/or from the right to govern. The right to govern is probably a more practicable model to use and would seem to be in keeping with the intended autonomy of local government.

5.2 Le Sueur *revisited*

It is critical to note that the *Le Sueur* matter was confined to a challenge of a legislative process (the promulgation of the D-MOSS) and a challenge of the executive authority the D-MOSS granted to local government to require environmental assessments when developing properties affected by the D-

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[91] See s 44(3) and s 104(1)(b) of the Constitution.
[92] In contrast to the peremptory language used in s 206(7) discussed in (n 77) above.
[93] See (n 82) above.
[94] Section 7(2) read with s 40 of the Constitution.

MOSS.[95] The D-MOSS does not preclude development or rezoning of properties, rather it applies an additional layer of controls and decision-making.[96] *Le Sueur* was not a challenge of a particular decision but was a challenge of the legislative powers of local government.

One of the 'five distinct, yet interlocking and mutually supporting themes', on which the judgment in *Le Sueur* is based and as identified by Humby, amounted to 'national and provincial support for local environmental governance'.[97] This theme may be construed as being tacit recognition of the local government right to govern.

Gyanda J stated that he was

> fully in agreement with the submission by [eThekweni] that the environment is an ideal example of an area of legislative and executive authority or power which had to reside in all three levels of Government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4.[98]

Unfortunately this reasoning seemed to be used to support some kind of tacit assignment of the Schedule 4A function to eThekwini, a conclusion which is strained. Intuitively, though, the judge recognises that environmental power had to reside in all three spheres. The right to govern permits this without unduly straining the assignment to include a tacit or implied assignment.

It seems that the intuitive recognition of local government's power to exercise environmental authority extended to the national and provincial government. In this regard the judge notes that:

> In fact, none of the respondents cited support of the stand point of the applicants *vis-a-vis* the contention that [eThekweni]'s transgression in the field of environmental legislation in enacting the D-MOSS Amendments is unconstitutional and therefore unlawful. Most importantly, the Minister of Environmental Affairs; the MEC; Agriculture and Environmental Affairs, KwaZulu-Natal and the MEC for Co-Operative Governance, KwaZulu-Natal have not contradicted the view or stand point of [eThekweni] in this regard at all. If indeed, [eThekweni/] was transgressing into the exclusive realm of the National and Provincial Governance in legislating

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[95] *Le Sueur* case (n 1) para 1.

[96] 'D-MOSS is a layer that overlies the underlying town planning scheme zoning. It is a controlled area wherein, despite the underlying zoning, development may not occur without having first obtained the necessary environmental authorisation or support from the Environmental Planning and Climate Protection Department of the eThekwini Municipality, which may or may not be given'. eThekwini Municipality http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx (accessed 2015-03-15).

[97] Humby (n 3) 1664. Similarly Du Plessis and Van der Berg 'welcome' confirmation of local government's role in environmental governance (n 4) 588.

[98] *Le Sueur* case (n 1) para 20.

> on Environmental matters, I would be extremely surprised, to say the least, if they did not express their objection thereto in the present application.[99]

This apparent acceptance by the national and provincial spheres of a local sphere's 'intrusion' into what would otherwise have been regarded as their exclusive domain was used to justify the judge's conclusion 'that it is impossible to separate environmental and conservation concerns in town planning practice from a "Municipal Planning" perspective'.[100] This is a conclusion which is seemingly at odds with the Constitutional Court's approach to interpreting functional areas. Both Freedman and Humby have questioned the validity of including environment as part of municipal planning in order for it to be considered an original power.[101] Instead of having to regard national and provincial legislation which 'recognises the role of Municipalities and Municipal duties with regard to the environment in its Municipal planning function'[102] as being the source of an assigned or somehow otherwise delegated environmental power such legislation could more comfortably be regarded as providing a framework or oversight function directing the exercise of a municipality's inherent environmental power.

Rather than shoe-horning 'environment' into 'municipal planning', the issue could have been approached from the perspective that eThekwini had, in terms of its right to govern, inherent, albeit limited, environmental powers and that D-MOSS was its own tool but one required or contemplated in the 'recognising legislation'[103] as referred to in *Le Sueur*. Doing so might have achieved the same result in a less strained manner.

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[99] *Id* para 29.

[100] *Id* para 33.

[101] See Freedman (n 2) 588-592 and Humby (n 3) 1671-1681. Humby seems to prefer to regard the power which was exercised as being compatible with the incidental power doctrine and s 156(5), therefore the exercise of an environmental power was acceptable as this is incidental to municipal planning (1679-1680). Freedman however focussed on original and assigned powers on the basis that the court had limited itself to these considerations and, further, 'that the purpose of the incidental power is not to confer new functional areas on municipalities' and that the D-MOSS is focused on protecting biodiversity and therefore is an environmental power in a functional area of national and provincial governments, seemingly this is less an incidental than original power (588 n 64).

[102] *Le Sueur* (n 1) para 37.

[103] For instance, in *Le Sueur*, reference is made to environmental considerations imposed by the Municipal Systems Act (para 24), the Municipal Structures Act (para 25), Local Government: Municipal Planning and Performance Management Regulations (para 26), the NEMA (Act 107 of 1998) Chapter One Principles (para 34), the KwaZulu-Natal Environmental Implementation Plan pursuant to s 11 of NEMA (para 35), the requirement in terms of the 2010 NEMA Environmental Management Framework Regulations that an SDF must guide a municipality in certain environmental areas (para 36) and the NEM: Biodiversity Act (para 38). This legislation prompts the judge to conclude that 'it is clear that national and provincial legislation in respect of environmental issues recognizes the part to be played by Municipalities at the Local Government level in managing and controlling the environment' (para 39). See Humby (n 3) 1669-1671.

As an aside (as it was not considered in the case): The KwaZulu-Natal Planning and Development Act 6 of 2008 (the PDA) requires that 'a municipality in determining the merits of a proposal to subdivide or consolidate land must take into account the potential impact of the proposal on the environment'.[104] The PDA does not specify how the municipality is to make the required assessment and this provision seems to lack sufficient detail to be considered an assignment. Instead this requirement could be regarded as a framework directive requiring exercise of a municipality's inherent powers implicit in a right to govern.

It is one of Gyanda J's closing remarks, that 'it is clear that the authority of the Municipalities at Local Government level to manage the environment at that level has always been and is still recognized',[105] which seems to agree with the argument made here that local government has an inherent plenary right to govern in a local sphere. This right is limited only by capacity, geography and by the permitted national and provincial intrusions set out in the Constitution. Finally, by regarding the right to govern in this light there is no intrusion into the functional areas of national and provincial government. In addition to the inherent limitations, any legislative act by a local government which contradicts national or provincial law is invalid. The Schedules would be there to define and limit intrusions into plenary powers, by the province into national and local government powers and by the national government into local government powers. Similarly then section 156 provides substance for the interpretation and application of the Schedules to local government but would not be the sole source of local government power.

Basing a municipality's powers on a right to govern will address the concerns regarding the source of the municipality's powers. It would also provide a more robust justification of these powers than would be achieved by straining the interpretation of the Schedules or broadening the ambit of incidental powers.

The interpretation proposed will not necessarily intrude into national or provincial competencies. Firstly the right to govern is always, in terms of section 151(3), subject to national and provincial legislation and the Constitution (and thereby it is subject to s 156) and is limited to matters which constitute the 'affairs of its community'. The right is further limited by the fact that national and provincial legislation takes precedence over municipal legislation and will invalidate conflicting municipal legislation. Furthermore the exercise of this right must not encroach on the national or provincial spheres' functional integrity. Thus regarding the right to govern as a limited plenary right will not usurp powers or functions from the national government. Provincial powers are circumscribed and narrowly construed but are otherwise similarly protected from local government intrusion.

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[104] Section 25(d) of the PDA.
[105] *Le Sueur* case (n 1) para 39.

6 Conclusion

The *Le Sueur* judgment has prompted a rethinking of the powers and functions of the three spheres of government and, in particular, those of local government. The *Le Sueur* judgment does not seem to have been criticised for its outcome but its reasoning has been questioned. Instead of trying to align the reasoning with the three local government powers created in section 156, which seems to strain the provisions of section 156, it has been suggested that the true source of this power is the right to govern. The right to govern is created by section 151(3) and grants to local government plenary powers which are limited by its distinctive local government character.[106] The right to govern would allow a local government to use any means at its disposal and upon its own initiative to fulfil its government mandate within the specified local government constraints. Section 156 is therefore one of the mechanisms whereby the right to govern may be limited and does not define the extent of the right to govern.

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[106] This conclusion may be contrasted with the suggestion by Du Plessis that the limits of the local government's powers are 'porous' (n 81), instead they are, in the local sphere, relatively unlimited.

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