

A council's legislative powers

In 1999 (1) *LGL Bulletin 6*, the impact of the recent case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) in confirming the new constitutional status of local government structures, was highlighted. In this case the Constitutional Court held that 'a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.' A critical consequence of this enhanced status, the Court pointed out, is that 'the enactment of legislation by an elected local council acting in accordance with the Constitution is, in the ordinary sense of the words, a legislative and not an administrative act'.

This signifies an important change to the constitutional and legal framework in which local government structures exercise their lawmaking powers. Their legislative acts cannot be reviewed in terms of the common-law principles of administrative law and everyone's right to just administrative action in terms of section 33 of the Constitution. *Fedsure* also makes clear, however, that local government legislatures will be subject to important constitutional 'controls'. As organs of state they have an obligation to protect and promote and, in some cases, to progressively realise the fundamental rights in Chapter 2 of the Constitution. They are also subject to the principle of legality and the provisions of Chapter 7 of the Constitution, which deals specifically with the powers and functions of local government.

The principle of legality

A local authority exercising lawmaking functions must act within the powers lawfully conferred upon it by the Constitution, or by laws of a competent authority. In *Fedsure*, the Court emphasised that a local authority that acts in contravention of its empowering statutes will be acting unconstitutionally.

Current powers to legislate

Pending the next local government elections, which must be held before 30

January 2001, municipalities' powers are as set out in the LGTA. In terms of the Act, a council must act within the powers conferred upon it by -

- (a) the proclamation issued in terms of section 10D of the LGTA, establishing the council; and
- (b) any law (s 10D (1) (a) and (b)) of the LGTA.

The Council may, furthermore, exercise any power 'concerning a matter which is reasonably necessary or which is incidental to the effective exercise of its powers and performance of its duties' (s 10D (1) (c) of the LGTA).

Powers to legislate after 2000 elections

After the elections, a municipality's powers will be determined by the Constitution, which allows it to -

- (a) make by-laws 'for the effective administration of the matters which it has the right to administer' (s 156 (2) of the Constitution); and
- (b) 'exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions' (s 156 (5)).

The matters which a municipality will have the 'right to administer' are the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution and any other matter assigned to it by national or provincial legislation (s 156 (1) (a) and (b)).

Chapter 7 of the Constitution

A municipal council making legislation must comply with the provisions of Chapter 7 which set out the objects (s 152) and the developmental duties of local government (s 153).

Municipalities must, in terms of section 152, 'strive to achieve' the following objectives:

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic

development;

- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

In terms of section 153, key 'developmental duties' of a municipality are to:

- (a) structure and manage its administration, and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community, and
- (b) participate in national and provincial development programmes (s 153).

Chapter 7 also mandates a democratic lawmaking process. Council's decisions in passing by-laws require 'a supporting vote of a majority of its members' (s 160 (3) (b) read with s 160 (2) (a)). A municipal council cannot pass a by-law unless 'all the members of the Council have been given reasonable notice' (s 160 (4)(a)). Participation in a council's proceedings must take place 'in a manner that allows parties and interests reflected within the Council to be fairly represented', and is 'consistent with democracy' (s 160 (8)).

Community participation is an important element of the lawmaking process. A municipal council 'must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted' (s 160 (7)). A by-law cannot be passed unless previously published for public comment' (s 160 (4) (b)). Municipal by-laws 'must be accessible to the public' (s 162 (3)) and cannot be enforced until they have been published in the official gazette of the relevant province (s 162 (1)).

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