

THE Constitutionalisation

OF LOCAL GOVERNMENT

In the last decade we have seen a shift in the way local government is conceived –socially, politically and in the legal context. The changed status of local government has been evident in the courts and the increased judicial scrutiny of the activities by the institutions of local government.

But the academic commentary on the restructured local government has paled in comparison to the activities taking place in the courts. This book is a welcomed addition to the scarce material on local government and its complexities. We commend Nico and Jaap for their comprehensive and lucid analysis of local government in South Africa. As a loose-leaf publication it is a work in progress and we eagerly anticipate further updates and additional explanations to the multitude of new rules and legislative enactments around the regulation of local government.

I would like to deal with two brief points. The first is that the status of local government was unsustainable under the new democratic dispensation and the constitutionalisation of local government was therefore necessary; and second, that there is a link between a constitutionalised local government and the realisation of service delivery and infrastructural development in previously disadvantaged communities.

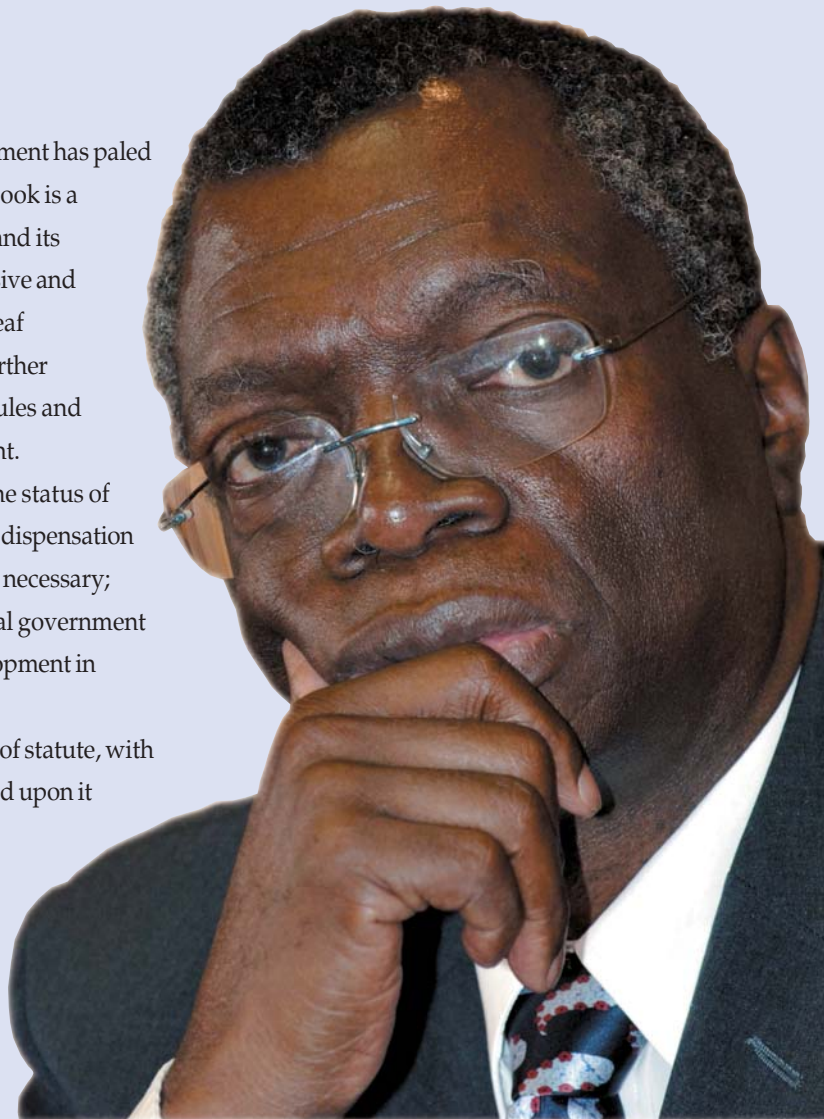
Pre-1994, local government was characterized as a creature of statute, with no rights or powers except those expressly or impliedly conferred upon it by an empowering legislative authority. Although local municipalities had the power to enact by-laws, such by-laws were subordinate delegated legislation, fully reviewable by the courts.

Local government was the lowest tier of government, with national and provincial government placed at the apex. The picture was bleak – local municipalities were divided along racial lines with gross inconsistencies in the

Keynote Address

Justice Pius Langa
Chief Justice of South Africa

at the launch of
Local Government Law of South Africa,
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provision of services and infrastructural development across the various communities.

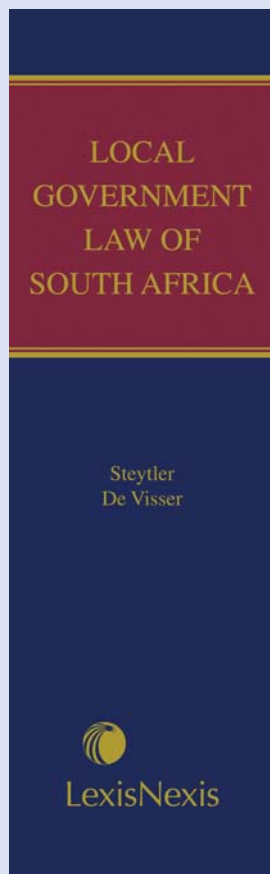
In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC), Kriegler J aptly recognised the impact of the apartheid system on local government:

“[t]he results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stonethrow reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities ... we find white suburbia.”

The transformation of local government was aimed at removing the unequal distribution of resources based on race, to create a sphere of government responsive to the needs of the communities, able to provide basic services to address the glaring disparities. With the advent of a new constitutional dispensation, South Africa moved towards a non-racial system of government. The reconstruction of local government was necessary – as it was best placed to effect changes to the living conditions of the people at grass roots level, but it needed more flexibility and autonomy to regulate its own affairs.

In 1994, local government, for the first time, received constitutional recognition in Chapter 10 of the Interim Constitution. The constitutional status of local government was materially different to what it was when Parliament was supreme and the powers and the very existence of local government depended on superior legislatures. That is no longer the position. Local government has a place in our constitutional order. Our Constitution recognises local government as a separate sphere of government, alongside national and provincial government.

The autonomy of local government has been strengthened in our Constitution and the boundaries of its autonomy have been more clearly delineated. In addition, local government’s powers and functions are listed and protected in Chapter 7 of the Constitution. Local government operates in a collaborative and co-operative relationship with national and provincial government to ensure that it achieves its objectives, including



inter alia, the provision of services to communities in a sustainable manner; the promotion of social and economic development and the promotion of a safe and healthy environment.

The transition to a constitutional democracy marked a restructuring of local government. The provisions in the Constitution envisage local government working with their communities to find effective and sustainable ways of addressing their needs. There is a link between the constitutionalisation of local government and development – the legislative framework facilitates local government to achieve its mandate of service delivery and the development of previously disadvantaged communities.

Through the constitutionalisation of local government, we have made progress towards equipping local municipalities with the necessary tools to address the disparities in their communities to ensure that basic services reach

the poorest in our communities. The new constitutional order conferred a welcomed and dramatically enhanced status on local government. Local government must be allowed to “govern on its own initiative” and use its powers creatively to respond to the needs of its communities, without the risk of its powers being trampled by empowering legislation.

The communities in the historically “black”, “indian” or “coloured” areas are plagued by underdevelopment and poor infrastructure. The impact of apartheid is especially apparent at the level of local government. In working towards the reconstruction and development of communities, local government will play a crucial role in transforming our society and contributing towards the progressive realisation of the basic amenities to all communities, especially the poor and vulnerable.

Local government must be in a constant dialogue with its communities to address the disparities and imbalances inherent in our society which we inherited from our past. New laws and a new constitutional order do not necessarily translate into change and the disparities inherited from the past are not magically removed through a change of government. Local government must address these inequalities in a manner that advances and protects the values enshrined in our Constitution.