

Assignment to local government: Protection with a hollow ring?

When the new Premier of the Western Cape took office in January 2002, he vowed to 'devolve as many provincial functions as possible onto local authorities which have the capacity to perform them'. Assignment is the most important way of bringing functions down to local government. This article discusses the legal framework for assigning powers and responsibilities to local government.

Why is assignment important?

Internationally, one of the biggest problems that local authorities experience is the dreaded 'unfunded mandate'. They cannot function properly if they are given responsibilities but are not given adequate resources to carry them out. It is also important that the responsibilities of national, provincial and local governments are *clear*: uncertainty over who does what leads to inadequate service delivery. Clarity over assignments, the procedures, their content and impact is therefore important. This article examines the legal framework for assignment of powers to local government.

Sources of local powers

Local government has two sources of power, namely 'original' powers and 'assigned' powers.

Original powers

Section 156(1)(a) of the Constitution says a municipality has authority over the local government matters listed in Schedule 4B and 5B of the Constitution. The *Constitution* is thus the primary source of power for local government.

Municipalities get these powers from the Constitution itself. They cannot be removed or amended by ordinary statutes or provincial acts. They can only be changed by an amendment to the Constitution. Also, national and provincial governments' legislative powers over Schedule 4B and 5B matters are limited.

Assigned powers

The secondary source of power for local government is *assignment*. Section 156(1)(b) says that a municipality has authority over any other matter assigned to it by national or provincial legislation. There are:

- general assignments (i.e. to local government in general); and
- assignments to individual municipalities.

Two more sources of power, which this article does not deal with, are *delegation* in terms of section 238 of the Constitution and *contractual agreements* (agencies).

Assignment: The legal provisions

The laws governing assignment are found in the Constitution and in sections 9 and 10 of the Municipal Systems Act. There are three categories of assignment. Distinctions between them are important because they determine the applicable legal framework.

General assignment of legislative and executive powers

Section 156(1)(b) of the Constitution, the general provision on assignment, is the basis for national or provincial legislatures to assign matters to local government by legislation. This means that a national Act of Parliament would assign a matter that falls outside Schedule 4B or Schedule 5B to the entire sphere of local government. An example could be an Act stipulating that low cost housing (part of the 4A competency 'Housing') is assigned to local government. Municipalities would thus be given the power to administer and regulate low cost housing. A provincial legislature can do the same and assign a matter to the local government sphere in the province. All municipalities in that province would then have the power to administer and regulate that particular issue.

Assigning legislative power does not mean every municipality is obliged to adopt bylaws on the topic. Nor does it have to be a blanket transfer: national or provincial government can limit the legislative power in the assignment act.

The Systems Act includes a number of requirements for general assignments by legislation. Before introducing the Bill in Parliament, the relevant (Deputy) Minister must:

- publish the Bill for public comment;
- consult with the Minister for Provincial and Local government, the Minister of Finance and SALGA; and
- request that the Financial and Fiscal Commission assesses the financial implications.

Further, the initiator must assess whether:

- the assignment imposes a duty on the municipalities concerned;
- the duty falls outside Schedules 4B and 5B; and
- performing the duty has financial implications.

If the answer is 'yes', he or she must 'take appropriate steps to ensure sufficient funding, and capacity building initiatives as may be needed, for the performance of the assigned function or power by the municipalities concerned'.

This also applies to general assignment by a province to the municipalities in that province. The initiating MEC must do the same, although he or she must consult provincial MEC for local government and finance, and provincial organised local government.

Individual assignments of legislative power

In terms of sections 44(1)(a)(iii) and 104(1)(c) of the Constitution, national or provincial legislatures can assign legislative powers to *specific* municipal councils. Thus, for example, a national Act of Parliament could assign legislative power over regulating animal control, a Schedule 4A matter, to an individual municipal council. Provincial legislatures could do the same.

Importantly, this refers to an assignment of a *legislative* power, which is discretionary – i.e. the municipality can choose whether or not it does legislate. Also, the scope of the municipality's legislative power can be limited in the Act.

The national minister (or MEC) who initiates the assignment must consult the Minister for Provincial and Local Government (or the MEC for local government in the province) before introducing the Bill. The initiator must assess whether or not it imposes a duty, whether or not the duty falls outside Schedule 4B and 5B and whether there are financial implications. If it does, the initiator must take appropriate steps to ensure sufficient funding and capacity building initiatives.

Individual assignments of executive power

Sections 99 and 126 of the Constitution allow national and provincial Ministers to assign *executive* powers to specific municipal councils. This differs from the previous assignments in a number of ways:

- It only concerns executive powers and not legislative powers.
- The relevant sections speak of the assigning a matter 'that is to be exercised'. Assigning executive power thus gives a *duty* to do something.
- This is why it must be concluded by means of an agreement with the municipality.

The national minister or provincial MEC who initiates an assignment by way of an agreement must consult the Minister for Provincial and Local Government before concluding it. In either case, if the assignment imposes a duty with financial obligations that falls outside of Schedule 4B and Schedule 5B, the initiator must ensure funding and capacity building.

Why must the initiator do so if the municipality must, in any event, agree to the assignment? It is unlikely to do so unless it is convinced that these measures have been taken. However, in light of the commitment to a strong developmental local government with municipalities that are mature partners of provincial and local government, the obligation appears necessary. A specific statutory obligation will strengthen municipalities in their negotiations with other spheres of government around the assignment of duties.

Subsidiarity

Section 156(4) of the Constitution entrenches the principle of *subsidiarity*. This means that a government function should be performed as close to the people as possible. Importantly, Section 156(4) makes assignment by national and provincial government compulsory if:

- the matter would be most effectively administered locally; and
- the municipality has the capacity to administer it.

This does not mean the municipality can make bylaws on matters that were assigned in terms of section 156(4). The text and context of the provision suggest otherwise. The assignment must be effected by agreement. A legislative power cannot be transferred by agreement.

Assessment: Preventing unfunded mandates

These procedures and requirements are aimed at 'protecting' local government against being given responsibilities without resources. It is too soon to say whether they will be effective. The value of the provisions will depend on the stakeholders' commitment to effective local government.

The requirements are both procedural and substantial. *Procedural* requirements relate to various consultation mechanisms. They are not absolute guarantees of adequate protection. Their effectiveness will depend on whether the consultation is genuine. For example, does the relevant line department consult with the department of local government? At what stage of the preparation process is, for example, organised local

government involved? For example, the process around the Immigration Bill is not an example of genuine consultation (see p 10).

The *substantial* requirements relate to the 'appropriate steps' that must be taken to ensure funding and capacity building. This is a stronger protection against unfunded mandates. It is an implementation of the provisions in the Constitution that instruct provincial and local government to support the capacity of local government. The courts have already said that the duty to support is enforceable in court (see *LGL Bulletin* 2002(1) p 13). In an extreme case, when all other avenues are exhausted, a municipality can challenge an assignment in court on the basis that 'appropriate steps' were not taken.

However, the requirement does not relate to 'outcome' (namely, the presence of sufficient funds or capacity) but to 'input' (appropriate steps to ensure funding and capacity). It is likely that a court would only test whether or not the measures taken to support the municipalities were 'reasonable' or not.

Explicit assignment

A critical problem that makes this intricate scheme difficult to implement and monitor is that assignments are not explicitly formulated as assignments. Legislation that is tabled in national or provincial Parliaments does not always state upfront that a function is being assigned. Whether or not functions are in fact being assigned is thus a matter of interpretation.

This makes the division of responsibilities between spheres of government unpredictable and unclear. It also compromises the implementation of safeguards against unfunded mandates. This can probably be explained by a lack of knowledge about the new local government dispensation in departments other than those responsible for it. There is also a lack of co-ordination between departments on matters affecting local government. National and provincial departments of local government play a crucial role in ensuring these safeguards do not ring hollow.